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CONSUMER CLASS ACTIONS UNDER FEDERAL RULE 23: CONSUMER PROTECTION CAUSES OF ACTION AVAILABLE UNDER FEDERAL STATUTES

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CONSUMER CLASS ACTIONS UNDER FEDERAL RULE 23: CONSUMER PROTECTION CAUSES OF ACTION AVAILABLE UNDER FEDERAL STATUTES

INTRODUCTION

The Rule 23 class action is not a "cause of action" but rather a procedural device through which multiple parties may join in pursuing a single cause of action or multiple defendants may join in defending against a single cause of action. While traditionally the plaintiff class action has been primarily utilized in shareholder and antitrust suits, recent legislation and decisions reflecting public concern about consumer abuse have resulted in increasing utilization of the class action by consumer-plaintiffs. The consumer, for purposes of this note, is defined as the average lower to middle class citizen who must purchase goods and services for personal, family or household purposes. This consumer is subject to the practices of the consumer trade industry and to local laws protecting creditors. These practices and creditor laws are the target of consumer class actions when there is a possible violation of statutory or constitutional requirements.

Because the class action is a procedural question, the substantive requirements of the law suit must exist prior to any determination of whether the class action may be maintained. Consequently, the attorney attempting to pursue a consumer class action must first determine whether an actionable claim under federal law exists before attempting to meet the requirements of the Rule 23 class action procedure. For purposes of this note, the analysis will be inverted to enable the reader to fully appreciate the difficulties of adapting the Rule 23 class action to


2. This general definition of "consumer" has been adopted for use in recently proposed federal legislation designed to specifically provide for consumer class actions. See Keegan, Consumer Class Suits-Righting Wrongs to Consumers, 26 Food Drug Cosm. L.J. 130 (1971).
the causes of action available to consumers under federal law. First, there will be an orientation to the technical requirements consumer class representatives must meet under Rule 23. The second part of the note will survey some of the problems confronted by consumer class representatives attempting to apply the class action form to federal causes of action currently available for consumer protection. Cases and articles cited for authority will be consumer oriented except where analogy to other types of authority is appropriate or helpful. ³

I. CLASS ACTIONS—RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Before treatment of specific consumer class actions may be pursued, it is necessary to understand the background of the current federal rule allowing class actions and how this rule is designed to work. The following outline of Rule 23 is intended to give the reader a basic understanding of the vital subsections of Rule 23 and to show the general application of these subsections to consumer class actions.

A. Purpose of the 1966 Revision of Rule 23

Prior to the 1966 revision of the Federal Rules of Civil Procedure, Rule 23 was the subject of much confusion and controversy. ⁴ The pre-1966 Rule 23 categorized classes into abstract class concepts: “joint,” “several” affecting specific property and “several” with a common question of law or fact. In an attempt to simplify, these categories were labeled as “true,” “hybrid” and “spurious” class actions. ⁵ Judicial efforts at clarification were far from effective—the tests being largely subjective with little in the opinions

³. There are two particularly helpful sources available which give an excellent introduction to the consumer class action under Rule 23 of the Federal Rules of Civil Procedure: an untitled collection of articles and notes in 10 B.C. IND. & COM. L. REV. 497-632 (1969) and the new ten volume federal practice treatise entitled, WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE (1972) [hereinafter cited WRIGHT & MILLER].

⁴. Advisory Committee’s Note, 39 F.R.D. 98-99 (1969). This is not to imply that the new version of Rule 23 has been without confusion and controversy. The controversy over the old rule was due to the difficulty in interpreting the rule, whereas the controversy over the new rule concerns its application. Note, Revised Federal Rule 23, Class Action: Surviving Difficulties and New Problems Require Further Amendment, 52 MINN. L. REV. 509 (1968).

⁵. 7 WRIGHT AND MILLER § 1752 (1972).
giving any real guidance. The problems associated with the old rule and the difficulties the courts encountered in formulating clear guidelines demanded a major revision of Rule 23.

In 1966, Rule 23 was drastically overhauled. The basic purpose of the overhaul was to draft the rule "in more practical terms" than the prior rule to avoid problems of interpretation. Beyond this basic purpose, however, there are divergent theories concerning a possible deeper, further reaching purpose in the revision of Rule 23. One theory—the narrow view—is that the new rule is designed to tighten guidelines for class actions so that fewer class actions may be brought under the new rule. This narrow view draws support from (1) the original purpose of the class action to eliminate multiple litigation and (2) the Advisory Committee Notes concerning the 1966 Federal Rules revisions, which indicate an overall policy of limiting the access to the federal courts.

On the other hand, most commentators believe that the new rule was designed to depart from the narrower purpose of the old rule and set forth a new form of relief for "small claimants," otherwise unable to have their day in court. This theory—the broad purpose view—while still being debated in the courts, appears to be the majority view. There is yet another theory—the cautious view—which embraces a broader utilization of the class action than the old rule, but only when the class action procedure is clearly preferential and provided that the class action is effectively manageable. Otherwise, so the proponents of the cautious

9. "The amended rule is in jeopardy from those who embrace it too enthusiastically just as it is from those who approach it with distaste or undue restrictiveness . . . . [P]atience is essential. . . ." 7 WRIGHT & MILLER § 1753 (1972). See also Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39 (1967) and Frankel, Amended Rule 23 From a Judge's Point of View, 32 ANTITRUST L.J. 295, 299 (1966), expressing the "cautious views" of District Judge Marvin E. Frankel; Kaplan, A Prefatory Note, 10 B.C. IND. & COM. L. REV. 497 (1969), expressing the guarded optimism of Professor Benjamin Kaplan, Reporter for the Advisory Committee on the 1966 revision of the Federal Rules of Civil Procedure:

[Some] are repelled by these massive, complex, unconventional lawsuits because they call for so much judicial initiative and management. We hear talk that it all belongs not to the courts but to administrative agencies. But . . . I do not myself see only subversion of the judicial process here but rather a fine
view have warned, the class action will be abused and consequently "fall into disrepute." The wisdom of the cautious view is clear. Unfortunately, however, this view has not been widely accepted and the warnings have gone unheeded.

B. Requirements for Class Actions under the 1966 Rule 23

There are two phases of requirements that must be met by the representative parties under Rule 23. The first phase is found in the list of prerequisites under Rule 23(a) which must exist in all three forms of class actions. The second phase depends on the category of class action sought to be maintained. When the prerequisites of Rule 23(a) and the requirements for the particular category of class action are met, the representative party or parties may proceed with the class action. Other subsections of Rule 23 are designed for the court to utilize in maintaining an orderly, proper course after the class action is begun. It is important in considering any of the Rule 23 requirements to bear in mind the broad discretion allowed the court in determining whether a class action is maintainable and if so, the extent to which the component parts of the class action will be binding.

1. Rule 23(a): Prerequisites for All Categories of Class Actions

Rule 23(a) outlines the basic prerequisites to be met before any of the Rule 23(b) categories of class action may be maintained.\(^{10}\) Although not specifically mentioned under Rule 23(a), there must first exist a class defined in such terms that it will not be difficult to determine who the class members are.\(^{11}\) Here the court has broad discretion in redefining the class if necessary or appropriate. After the existence of the class is established, the representative party bringing the action in the name of the class must establish his own membership in the alleged class.\(^{12}\)

After the establishment of the existence of the class and the class membership of the representative, the representative party

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opportunities for its accommodation to new challenges of the times. I am exhilarated, not depressed, by experimentation which spurs out carefully the fullest possibilities of the new Rule.


11. 7 Wright & Miller § 1760 (1972).

12. Id. at § 1761. Usually, a plea "on behalf of [the plaintiff-class representative] and others similarly situated" is sufficient.
must meet four requirements specifically enumerated in Rule 23(a). Of these four requirements, the first and the fourth are the most important. Rule 23(a)(1) states the class must be too numerous for joinder of all class members to be practicable. This requirement necessarily implies that where joinder is practicable under Rule 20,\textsuperscript{13} the class action should not be maintained. It is well established, however, that a test of “ numerosity” alone is not sufficient, there being other factors that may affect the practicability of joinder.\textsuperscript{14} Rule 23(a)(2) requires the existence of questions of law and fact common to all the class members. The rule provides no direction in determining how many “questions of law and fact” must be “common.” Yet, the courts have had little difficulty in finding sufficient “commonality” of questions and only a few cases treat this requirement in any detail.\textsuperscript{15} Rule 23(a)(3) requires that the claims or defenses of the representatives must be typical of those of the whole class. The difficulty in this requirement is apparent in its subjectivity. Cases attempting to articulate the meaning of the “typicality” requirement have, for the most part, related it to the other requirements under Rule 23, thereby evading an independent definition.\textsuperscript{16} The fourth and final enumerated requirement of Rule 23(a) requires that the representative be able to fairly and adequately protect the interests of the entire class he represents. This condition is particularly important in the Rule 23(b)(3) class action which has a binding effect on all class members unless they opt out. If the class is not fairly and adequately represented from the outset, however, the class members under Rule 23(b)(3) may not be bound by the outcome because of denial of due process.\textsuperscript{17}

It is apparent that judicial discretion plays a vital role in determining whether the requirements of Rule 23(a) have been met. Determining the representative capacity of the party bringing the action, the “ numerosity” of the class with respect to the impracticability of joinder, the “commonality” of the questions of fact and law, the “typicality” of the claims or defenses and the

\textsuperscript{13} Fed. R. Civ. P. 20 allows “ permissive joinder” of all parties claiming relief “jointly, severally or in the alternative . . . arising out of the same transaction . . . and if any question of law or fact common to all these persons will arise in the action.”

\textsuperscript{14} 7 Wright & Miller § 1762 (1972).

\textsuperscript{15} Id. at § 1763.

\textsuperscript{16} Id. at § 1764.

\textsuperscript{17} Id. at § 1765.
ability of the representative fairly and adequately to represent the class necessarily require broad judicial discretion since these tests are largely subjective. To preclude an inordinantly strict application of these requirements, Rule 23 contains special "safety valves" in subsections (c), (d) and (e) which aid the court in controlling the maintenance of the class action. These "safety valves" add the needed flexibility for the proper utilization and function of the class action. Although a detailed discussion of these subsections is beyond the scope of this note, the attorney pursuing a class action under Rule 23 should familiarize himself with them to ease the administration of Rule 23.

The prerequisites required by Rule 23(a) apply to all class actions. Therefore, there are no unique considerations necessary for the application of Rule 23(a) to the consumer class action. The class is usually quite large in a consumer class action and while determination of impracticality of joinder is relatively simple, determination of commonality of questions and fair and adequate representation are often difficult. Indeed, the class size is implicitly becoming a dispositive factor in dismissal of consumer class actions. Nevertheless, the practical considerations by the court in determining whether the Rule 23(a) prerequisites exist should be no more difficult in the consumer class action than in other class actions.

2. Rule 23(b): Specific Requirements for the Three Separate Categories of Class Actions

In addition to the requirements of Rule 23(a) there are additional conditions to be met dependent on the category of class action brought. There are three categories, each having requirements exclusive of those related to the other two categories. These three categories are: (1) actions which might adversely affect other parties; (2) actions for equitable relief; and (3) actions with predominant common questions and in which the class action procedure is superior to other procedures. Of the three, the last

18. See Appendix infra for Fed. R. Civ. P. 23(c), (d) and (e).
20. See Appendix infra for Fed. R. Civ. P. 23(b)(1), (2) and (3).
is most commonly used for consumer class actions. Each category, will be briefly discussed for background, clarification and contrast.

a. Rule 23(b)(1) Class Actions: Adverse Effect Caused by Separate Actions

The basic rationale behind the Rule 23(b)(1) class action is that the class action procedure is deemed appropriate because of the possible adverse effect of separate actions. Rule 23(b)(1) protects both the opponents of the alleged class and the class members by allowing the class action: (1) when separate actions would create incompatible standards for the parties opposing the class; and (2) when separate action would act adversely or dispositively upon the rights of class members not joined in the separate actions. The drafters of Rule 23(b)(1) class actions were anticipating situations in which numerous lawsuits concerning a single controversy would be impending or imminent. Therefore, the rule is designed to limit the caseload of the federal courts by consolidation of duplicate actions.21

The situations anticipated by the drafters of Rule 23(b)(1) class actions are distinguishable from the situations from which consumer class actions arise. Rarely are numerous separate suits by consumers brought in federal courts. On the contrary, it is only through the class action suit that the most effective action may be brought in behalf of the members of this class.22 Rule 23(b)(1) is a shield for the courts, whereas the consumer class action is a sword for the "small claimant." Accordingly, most courts and commentators have distinguished Rule 23(b)(1) actions from consumer class actions stating that the latter should be sought under Rule 23(b)(3).23 Nevertheless, some courts have allowed consumer oriented class actions under Rule 23(b)(1) and Rule 23(b)(3).24 In such situations, the courts have applied the more lenient notice rules for Rule 23(b)(1) class actions instead of the more complex

22. 7A WRIGHT & MILLER § 1779 (1972).
24. 7A WRIGHT & MILLER § 1772 (1972).
Rule 23(b)(3) class action notice requirements. The courts allowing the Rule 23(b)(1) consumer class action, however, are in the minority and clearly the better procedure for the consumer class representative is the Rule 23(b)(3) form. Therefore, the class representative in the consumer class suit should prepare to meet the requirements of Rule 23(b)(3).

b. Rule 23(b)(2) Class Actions: Equitable Relief

Class actions under Rule 23(b)(2) are limited to actions wherein final injunctive or declaratory relief is sought by the class representative. Specific requirements, in addition to the standard prerequisites of Rule 23(a), are that the party opposing the class bringing the action has consistently "acted or refused to act in a manner generally applicable to the class" and that equitable remedy is sought. The typical example of this class action is the civil rights action seeking equitable relief. This category of class action is not usually desirable for a consumer class action because of a very practical reason: the remedy available is purely equitable, and therefore monetary awards are rarely achieved. Few parties will pursue a class action for only equitable remedies unless grave civil rights are in jeopardy. The most important consideration for the prospective consumer class representative is whether the class action procedure is necessary when all the claimant seeks is equitable relief for himself and the class he represents. A favorable judgment in a civil rights action may protect the rights of all class members having a similar complaint. In such event, the class action problems and expense may not be necessary to achieve the desired result. As previously stated, money damages will normally be an important goal of the

28. Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), rev'd on other grounds sub nom., Fuentes v. Shevin, 407 U.S. 67 (1972), where the court refused to allow the class action procedure since a favorable decision for the plaintiffs would have applied to all the class members in any event.
representative party in a consumer class action and, if so, Rule 23(b)(3) should be utilized.

Perhaps it is wise to insert a caveat at this point in discussing the civil rights class action to avoid misleading the reader. Although the civil rights class action is normally thought of in the context of Rule 23(b)(2), the civil rights claim may also be pursued in other forms of class actions under Rule 23 when monetary damages are sought in conjunction with equitable remedies. An important use of the civil rights statutes for pursuing Rule 23(b)(3) consumer class actions seeking monetary damages will be discussed in the second part of this note. 29

c. Rule 23(b)(3) Class Actions: Predominant Common Questions and Superior Action

The final category of class action is the “Predominant Question/Superior Action” class action under Rule 23(b)(3). As previously noted, this is the most important category with respect to class actions for consumer remedies. Under this category, pecuniary damages may be awarded, adding both incentive and threat elements to the class action. The possibility of pecuniary award is a tremendous incentive for the representative parties, not to mention attorneys representing them. However, this incentive element has been a primary source of criticism of the consumer class action since it may, and frequently does, lead to “bounty hunting” by attorneys. 30 In addition to the incentive elements, the availability of damages under Rule 23(b)(3) is a powerful threat to the unscrupulous elements in the consumer trade industry. Because of this threat element, many courts have been reluctant to allow the consumer class action to proceed. 31 However, by applying the “cautious view” to Rule 23(b)(3), as recommended by many commentators, 32 there should be no reason why the courts should not allow the consumer class representative to pro-

29. See part II. infra.
32. See note 9 supra and text accompanying.
ceed in a proper case, pecuniary damages notwithstanding. Such a proper case would be one in which the class is "manageable" and in which the nature, severity or magnitude of the grievance indicates the class action is the best procedure available for re-
dress.

Of the three forms of class actions under Rule 23, the Rule 23(b)(3) class action is the most technical. The opening phrase, "the court finds," clearly indicates the important function of ju-
dicial discretion in applying this rule. The court, in its broad discretion, must find that the common questions required by Rule 23(a), predominate over questions affecting only individual class members. Additionally, the court in its discretion must find the class action procedure superior to any other procedure the class may have individually or jointly pursued. To aid the court in determining whether these requirements have been met, Rule 23(b)(3) sets out a non-exclusive list of four "pertinent matters" for consideration. Roughly restated, these considerations are whether the individual members of the class would better have their interests protected by separate actions, whether litigation on the subject matter has already commenced in other courts, whether the forum selected is the proper or best forum, and whether the class action is "manageable."

The "predominant question" requirement of Rule 23(b)(3) was intended by the drafters to limit the scope of the class action and narrow a class to allow the class representative to properly represent it. Pursuant to that purpose, the court has discretion to utilize the "safety valves" in Rule 23(c) for the elimination of corollary issues, thus tailoring the class to the predominant ques-
tions presented.\textsuperscript{33} The court may even create sub-classes, if neces-
sary, and allow determinations of some predominant questions to apply to only part of the original class. While the problem of determining the predominance of the questions of law and fact has frequently been a preplexing one, the problem can usually be resolved by applying the "common nucleus of the operative facts" test.\textsuperscript{34}

The "superiority" requirement of Rule 23(b)(3), like the "predominant question" requirement, is a device for limiting the class action. The limitation is not on the applicability of the class

\textsuperscript{33} 7A \textsc{Wright} \& \textsc{Miller} § 1777 (1972).
\textsuperscript{34} \textit{Id.} at § 1778.
action to the question presented, but on the very use of the class action procedure. If the court finds another form of procedure is better suited for the parties or dispute involved, the court may dismiss the class action. In the normal consumer action the consumer will hardly seek separate action and joinder is usually practical; therefore, the use of the Rule 23(b)(3) class action appears to be not only the superior procedure but the only practicable procedure available for redress. If the court applies this practical viewpoint, the typical consumer class action should meet the test of superiority. There is, of course, the important question of the "manageability" of the class action—one of the "pertinent matters" specifically listed in Rule 23(b)(3) for consideration. When the consumer class is deemed unmanageable by the court, the action may be dismissed regardless of the merits of the class action.

The requirements of Rule 23(b)(3) are broadly phrased as a device of the drafters to give the courts great leeway in determining whether the class action can or should be maintained. However, this device gives little guidance to the parties seeking to pursue a remedy via the Rule 23(b)(3) class action category. The only real, practical guidance in the rule is implied: find a sympathetic court willing to prod the class action through to its end. Without a sympathetic court, the Rule 23(b)(3) class action may never get past Rule 23(c)(1). Hopefully, much of the difficulty in interpreting Rule 23(b)(3) will diminish as precedents harden into rules which will guide both the representative party and the court.

(i) Rule 23(c)(2): Notification Requirements for Rule 23(b)(3)

Class Actions

In addition to the aforementioned problems in establishing a Rule 23(b)(3) class action, there may exist special problems regarding class notification. Without fully considering the problems of notice and the coexisting question of due process in Rule 23(b)(3) class actions, it is important to point out that Rule

35. Id. at § 1779. But see Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972), where the court ruled that adequate statutory remedies displace the need for class actions. This new development is discussed in greater detail infra.

36. 7A WRIGHT & MILLER § 1780 (1972).

37. See Appendix infra for Fed. R. Civ. P. 23(c)(1).
23(c)(2) requires the court to notify all Rule 23(b)(3) class members of the impending action by the "best notice practicable under the circumstances." Rule 23(c)(2) further requires that this notice must advise the class member he must request exclusion from the class by a specified date or he will be bound by any judgment, including costs if the class action fails; and finally that any class member desiring personal representation may be represented by his own counsel in the class action.

Administering the requirements of notice under Rule 23(c)(2) may prove to be the biggest obstacle the class representative and the court will face in a Rule 23(b)(3) class action. Consequently this may encourage the court to find reasons to dismiss the class action as unmanageable under Rule 23(d)(1). The Rule 23(c)(2) requirement that notice be given only in "the best manner practicable" should be, however, a sufficient "safety valve" by which the court can effectuate notice and allow the action to be maintained. Although the responsibility for notifying the members of the class rests with the court, the representative party should devise alternative methods of notification for the court to utilize.

The "opt out" feature of the Rule 23(c)(2) notice requirement is perhaps the most innovative and drastic change from the old rules. The old Rule 23 excluded class members who did not specifically request to be included in the class. The revised rule provides that the Rule 23(b)(3) class will be all inclusive of identified members unless the members request exclusion. Therefore, Rule 23(b)(3) class action judgments will be res judicata as to all class members not opting out, unless class members seeking subsequent judgments can successfully attack the notice provided by the court presiding over the class action. To preclude later adjudication of the notice requirement by a dissident class member, the court initiating notice should endeavor to be as thorough as practicable in notifying all class members and allow adequate time for class members to request exclusion.

38. Id.
39. But see Wright & Miller § 1780 (1972) wherein the courts are encouraged to avoid evasion of judicial responsibility by making earnest efforts to carry out the design of the class action procedure.
II. PROBLEMS ENCOUNTERED IN BRINGING AND MAINTAINING
CONSUMER CLASS ACTIONS UNDER EXISTING FEDERAL STATUTES

The first part of this note discussed the provisions of Rule 23, emphasizing the requirements to be met, frequently analyzing the rule's applicability to the consumer class action. This part of the note will attempt to address other, more specific problems concerning the utility of the class action by the consumer-plaintiff, emphasizing recent developments. Problems of obtaining federal jurisdiction and problems in meeting related, and increasingly stringent, requirements of Rule 23 consumer class actions will be discussed.

The analyst of Rule 23 will detect a growing trend away from the early, optimistic aspirations for the rule toward narrow applications of the rule. Although this negative trend is in its infancy and rides a crest of consumer class litigation, the trend is showing signs that it may grow into the rule. The early warnings issued by Kaplan, Frankel, and Wright that abuse of Rule 23 would decrease its respect and utility have unfortunately been unheeded. War on the consumer class action is beginning to erupt in the courts and in the commentaries because of the "wretched abuse" of the rule from the bar, confusion and dismay at the bench, and the general failure of the rule to give any real compensation to the consumer. Although the signs of terminal illness may be beginning to show, Rule 23 consumer class actions nevertheless remain a powerful tool for consumers when properly utilized and are an awesome threat to class action defendants.

Since Rule 23 can not confer jurisdiction on the federal courts, the consumer class representative must find a basis for federal jurisdiction in order to proceed with a consumer class action under Rule 23. There are many statutes granting federal jurisdiction, but most litigants obtain federal jurisdiction by alleging that a "federal question" is in issue or by alleging "diversity of citizenship" between plaintiff and defendant. Because federal question and diversity jurisdiction both require that the amount in controversy exceed $10,000, special problems exist for the "small claimant"—consumer class action.

40. See note 9 supra.
42. Id. at § 1332.
While other requirements for federal jurisdiction must be met, such as justiciability, standing, and ripeness, they will not be discussed. Some of these requirements are impliedly incorporated into Rule 23. Requirements not incorporated into the class action rule must be met, as in any suit in federal court, or jurisdiction will be denied.

In order to fully appreciate some of the basic problems concerning the utilization of the various federal statutes granting federal jurisdiction and the courts' application of these federal laws to the consumer class action, threshold policy questions should be considered: Should "small claim" litigants have the authority to act as "private attorneys general" by bringing class actions against vital segments of the national commercial industry in order to prevent consumer abuse, or should control and regulation of the commercial sector be solely accomplished by governmental agencies?

The best demonstration of this threshold policy conflict is reflected in the current effort to have a special consumer class action bill passed by Congress. The Administration bill provides for private action only after action has been brought by the attorney general for a consumer abuse violation, an injunction has been issued and the defendant has violated the injunction.43 This three step approach clearly illustrates one view that private litigation is not the preferred course for controlling commercial activity. On the other hand, there are numerous similar bills proposed in Congress which allow direct private action. The Magnu-son44 and Bayh45 proposals are representative, each allowing the class action to proceed immediately after the original violation. Although no affirmative action has been taken on any of these bills to date, there is increasing pressure for action and a compromise bill will probably be passed. It is difficult to predict which view will predominate. Until such a bill is passed, the consumer class litigant must find avenues in existing federal statutes for entry into the federal courts.

A. Jurisdictional Amount: The Snyder Aggregation Prohibition

Prior to 1966, the federal courts had adopted a special rule
with respect to computation of jurisdictional amount required for federal jurisdiction. The rule stated that parties to a joint action could not aggregate or accumulate their separate claims in order to arrive at the requisite amount, regardless of the similarity of their claims except under strict, technical circumstances. Many commentators and many courts believed the new Rule 23 had eradicated the aggregation prohibition because the "spirit" of the new rule was to allow "small claimants" to have their day in court.\(^46\) Much to the dismay of many writers, however, in 1969 the Supreme Court in Snyder v. Harris\(^47\) precluded accumulation of damages by "small claimants" to meet jurisdictional amount requirements.

One of the two conflicting lower court cases from which the Snyder decision arose was Gas Service Co. v. Coburn.\(^48\) In Coburn the class representative was a consumer who alleged a gas distributor had illegally overcharged the class of 18,000 consumers. Federal jurisdiction was based on diversity of citizenship, necessitating a claim of the usual $10,000 jurisdictional amount. The class representative's personal damages amounted to a meager $7.81, but the lower court allowed jurisdictional amount computation by aggregating all 18,000 claims, easily exceeding the $10,000 required. The lower court, in allowing aggregation, stated that Coburn was an "ideal class action." The Snyder court was unimpressed.

The Snyder court held that the amount in controversy cannot be aggregated unless the cause of action alleged in behalf of the class is "joint and common" to the whole class, as opposed to "separate and distinct" claims. Ironically, it was Justice Black, an original critic of the new Rule 23 for its susceptibility to judicial discretion,\(^49\) who wrote the Snyder opinion, requiring the application of the highly subjective "joint/common—separate/distinct" dichotomy. Addressing himself to the 1966 revision of Rule 23 in his Snyder opinion, Justice Black concluded that the new rule could not have changed the traditional requirements for determination of jurisdictional amount. While the Snyder court denied a return to the application of the


\(^{48}\) 389 F.2d 831 (10th Cir. 1968).

narrow pre-1966 class action interpretations,\textsuperscript{50} the implication was undeniable: the court had rejected the new Rule 23 as a panacea for "small claimants."

The restrictive view of Snyder has been widely criticized for its return to the vague and impractical standards rejected by the drafters of the new Rule 23.\textsuperscript{51} Requiring all claims to meet the ambiguous "joint and common" test in effect denies "small claimants" their most likely avenue into the federal courts—diversity jurisdiction. Furthermore, it is not likely that the Supreme Court will overrule Snyder because (1) Snyder stands for the strongly defended Supreme Court policy of limiting federal jurisdiction and (2) the number of class actions filed is extremely high despite the Snyder limitation. There is fear that without the Snyder prohibition on aggregation, the federal courts, through the "diversity of citizenship" statute, will be engulfed by "state cases" or controversies of a purely local nature.

Does Snyder prohibit all "small claimant" class actions? An affirmative answer to this question in 1969, after the Snyder decision, would have required a naive discounting of the ingenuity of that "valiant and ever faithful 'small claimant' watchdog"—the local plaintiff's attorney. Numerous methods have been "discovered" (or created) in order to get the class action into federal court. One approach has been a direct assault on the Snyder mandate by trying to find technical loopholes in the aggregation prohibition.

A recent, but futile, diversity of citizenship class action involved an attempt by the class representative to meet the jurisdictional amount for the whole class based on his claim alone, since none of the absent class members had a $10,000 claim.\textsuperscript{52} The district court, however, held that Snyder implicitly requires each class member to have a $10,000 claim, a decision which certainly prevents "run of the mill" consumers from crowding the federal dockets. A more successful attack on Snyder has been the finding of a "trust fund" in which the class members have sufficient "integrated interest" to allow aggregation, although the claims are not technically "joint." Isolated cases involving race horse owners as a class, suing race track owners for failure to pay money

\textsuperscript{50} Snyder v. Harris, 394 U.S. 332, 341 (1969).
under a purse contract,53 and employees as a class suing an employer for failure to pay shares under a profit sharing pension plan54 have allowed "trust fund" aggregation. The subjective test for such aggregation, however, is hardly a practical one under which a litigant can safely proceed. A much less sophisticated attempt to avoid Snyder is recommended by one successful plaintiff's attorney who unabashedly recommends the simple solution of increasing pecuniary damage allegations.55

B. Federal Statutes and Doctrines Granting Jurisdiction Without Regard to Amount in Controversy

In the wake of Snyder, the best manner to proceed with a consumer class action is to locate a federal statute granting federal jurisdiction without requiring the higher jurisdictional amount requirement. There are numerous federal statutes granting federal jurisdiction without regard to amount, but most have such a highly specialized purpose that they cannot be adapted to a consumer class action.56 A few federal statutes do specifically allow or have been construed to allow private civil action for consumer abuse. Remedies available under these statutes vary from equitable relief to punitive damages. The type remedy sought is gaining in importance in determining whether the consumer class action may be maintained: class actions seeking large pecuniary damages are being looked upon with increasing disfavor by the courts.

Federal laws under which consumer class actions have been brought include antitrust laws, securities fraud laws, civil rights laws and consumer credit protection laws. In addition to these major statutes, several other methods have been utilized by consumer class litigants to gain entry into the federal courts. The following discussion will survey the causes of action currently available to consumer litigants, which may be pursued under federal laws and judicial doctrines granting federal jurisdiction over the action.

54. Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969).
56. See, e.g., C. Wright, LAW OF FEDERAL COURTS § 32, at 108 (1970) which gives a comprehensive listing of federal statutes that do not require amount in controversy for federal jurisdiction.
1. Antitrust

Perhaps the most important statute granting federal jurisdiction without regard to amount in controversy in consumer class actions is found under Section 4 of the Clayton Antitrust Act which states in part:

*Any person* who shall be *injured in his business or property by reason of anything forbidden in the antitrust laws* may sue therefore in any district court of the United States in the district where the defendant resides or is found or has an agent, *without respect to amount in controversy,* and shall recover threefold the damages . . . and cost . . . including reasonable attorney's fees.⁵⁷

While the "treble damage statute" was clearly designed to be used by businessmen against businessmen for unlawful monopolies, combinations, conspiracies and price fixing,⁵⁸ the statute was broad enough in terms—"any person" and "injury in his property"—to allow a suit by anyone proving an antitrust violation and consequential damages. As early as 1906 the Supreme Court stated that "injured in his property" means, among other things, being led to pay more for something than it is worth.⁵⁹ Therefore, the stage was set at an early date for the consumer antitrust suit.

Prior to 1966, private actions under the antitrust laws were rare since the cost of separate lawsuits by small claimants was prohibitive. Since then, however, numerous consumer class antitrust suits have been filed under the revised Rule 23.⁶⁰ The leading examples of such an action is *Eisen v. Carlisle & Jacquelin.*⁶¹

In *Eisen,* the class action was brought by a consumer-investor on behalf of 3,700,000 class members for treble damages from an alleged conspiracy by defendants to fix the commissions on certain securities transactions. The claims of the class repre-

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⁶¹. 391 F.2d 555 (2d Cir. 1968).
sentative only amounted to $70.00. The lower court in Eisen dismissed the class action, finding the lack of intervention by other class members to be proof of the absence of a predominance of common questions.\(^\text{62}\) The court of appeals reversed, stating that Rule 23(b)(3) was drafted to aid “small claimants” and that the facts in the case presented a proper situation for the class action procedure.\(^\text{63}\)

The Eisen decision is primarily praised as the landmark case judicially establishing the “small claimant” purpose of the revised Rule 23. It points up, however, many of the weaknesses of the new Rule 23 and the controversy surrounding class actions. Although the Eisen class action was begun in 1966, it has yet to be completed even though many separate opinions on various issues have been filed.\(^\text{64}\) Problems in the management of large classes, as in Eisen, have caused delays and technical difficulties. Compounding the chagrin of the opponents of class actions is that the estimated treble damages for each of the 3,700,000 class members in Eisen will only amount to $3.90.\(^\text{65}\) There are also practical difficulties involved in antitrust class actions because of the necessity of proving the elements of liability for the antitrust violation.\(^\text{66}\) Normally the elements of antitrust suits include a violation of an antitrust statute, causal connection between the violation and the plaintiff’s claim, and proof of damages. In the class action


\(^{63}\) 391 F.2d 555, 560 (2d Cir. 1968). But see, Eisen v. Carlisle & Jacquelin, 41 U.S.L.W. 2586 (2d Cir. May 1, 1973) wherein the Second Circuit Court of Appeals dismissed the Eisen class action because of the refusal of the class representative to pay the costs of actual notification of 2,250,000 class members, whose identification was reasonably ascertainable. This case contains strong language condemning the use of the Rule 23 class action by large consumer classes and represents one more giant judicial step in the direction away from the “small claims” purpose of the class action procedure. This latest Eisen case was reported only weeks before the final proofs of this note were sent to press and therefore is not reflected in the text.

\(^{64}\) 50 F.R.D. 471 (S.D.N.Y. 1970) (further information required of both parties before a determination of class manageability and notice requirements); 52 F.R.D. 253 (S.D.N.Y. 1971) (Class action maintainable, preliminary hearing called to apportion costs); 54 F.R.D. 565 (S.D.N.Y. 1972) (plaintiff likely to prevail, therefore, defendant to bear 90% of notice costs); rev’d, 41 U.S.L.W. 2586 (2d Cir. May 1, 1973) (class action dismissed where class representative refuses to pay costs for actual notification of all class members who are reasonably identifiable). See also Comment, Eisen v. Carlisle & Jacquelin: “Frankenstein Monster Posing as a Class Action?” 33 U. Prrr. L. Rev. 888 (1972).


\(^{66}\) Id. at 382; Note, Consumers and Antitrust Treble Damages: Credit-Furniture Tie-ins in the Low Income Market, 79 Yale L.J. 254 (1969).
there are numerous choices concerning the development of the elements of the antitrust case. For example, the court may: (1) dismiss the class action for lack of manageability in establishing proof of causal connection and consequential damages; (2) allow the class action to proceed, but only for the determination of the antitrust violation, requiring each claimant individually prove his own right to damages; or (3) eliminate the element of causal connection, creating strict liability for any antitrust violation. The Eisen court held that the trial on the class action issue could determine all the damages to the class and divide the damages among the class at a later time.67

Critics point out that the antitrust lawsuit is distorted when separate trials are required to prove separate elements of the claim. Naturally, the pro-business critics decry the creation of per se liability of defendants to a large class of litigants. There are also fears that an unfavorable class action "backlash" may eventually sound the end of the traditional antitrust suit, unless the courts can logically distinguish "antitrust" from "consumer protection" litigation.68

Alternatively, advocates of the consumer class antitrust suit point out the abuses consumers suffer and the need for relief. While the estimated attorney's fees in Eisen are projected to be $5,000,000, the supporters of the consumer class action claim that such fees will enhance the utility of the rule and therefore increase its effectiveness in curbing consumer abuse.69 These excessive fees, however, sometimes lead to the "bounty hunting" expedition which is said by some to be the most serious fault with the consumer class action.70

Two special developments have emerged in the consumer class antitrust suits that deserve particular attention. The first is the application of the Multidistrict Litigation Statute71 to the consumer class action field. This statute permits consolidation of

related actions brought in more than one federal district court, for the purpose of determining common issues. The various actions, when consolidated, are brought into one convenient federal forum and a panel is assembled to decide which issues are common. Frequently, determination of these common issues is dispositive of the cases, greatly reducing the number of federal cases. The second important development in the field of consumer class litigation is the use of the Rule 23 class action by state and local governments to protect their constituents from consumer abuse. Generally, the state attorney general's office files the class action in behalf of its citizens, proceeding thereafter in the same manner as any other class action representative. These two developments in class actions have been demonstrated in a most dramatic way by a series of recent cases involving class suits against pharmaceutical companies for conspiracy and fraud in violation of antitrust laws.

The pharmaceutical cases followed an attempt by the Federal Trade Commission to prosecute several pharmaceutical companies for violations of the Federal Trade Commission Act. Since the F.T.C. Act does not provide for private action, consumer groups sought damages from the pharmaceutical companies in the form of antitrust class actions. So many suits were filed that the parties invoked the Multidistrict Litigation Statute to decide the common issues in all the suits. Without a full discussion of every rampart of the pharmaceutical decisions, a brief overview of the nature of the various classes involved and some of the basic determinations by the court in these decisions will be enlightening in considering the current utility of class action procedure in consumer protection litigation.

Parties in the pharmaceutical cases have included: (1) governmental entities, including states, counties, and cities, attempting to represent individual consumer and commercial constituents within their jurisdiction, and others similarly situated;

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73. See, e.g., In re Coordinated Pretrial Proceedings in Antibiotic Actions, 333 F. Supp. 267 (S.D.N.Y. 1971) which contains ten written orders concerning the maintenance of actions by numerous plaintiffs and class representatives.
74. Id. at 317, wherein the court reviewed the Federal Trade Commission's action against the defendants which was subsequently reversed on appeal. American Cyanamid Co. v. F.T.C., 363 F.2d 757 (6th Cir. 1966).
commercial entities, including wholesalers and retailers of the pharmaceutical products involved in the antitrust dispute, attempting to represent themselves and other similar commercial entities nationwide; (3) public entities, including hospitals, attempting to represent themselves and other similar public entities nationwide; (4) consumers, attempting to represent themselves and other consumers nationwide; and (5) miscellaneous parties, including the United States and foreign countries. Common questions for determination have included: the definition of the various classes, the capacity of the representatives and their ability to fairly and adequately represent the class, commonality of questions and superiority of the class action procedure. Needless to say, the problems faced by the court in making even the most general recommendations for procedure are stupendous.

Representative of the problems posed in the pharmaceutical cases is a recent, related series of cases brought against pharmaceutical companies for other alleged antitrust violations. In re Ampicillin involved forty-six separate actions all moved into the District Court for the District of Columbia under the Multidistrict Litigation Statute for preliminary determinations. Of the forty-six actions, forty were class actions of nearly every description. The Ampicillin court established several basic criteria to be met before these various class actions could proceed. The defendants attempted to have the class actions dismissed for failure of the class action to be the superior form of procedure, for lack of "commonality" of interests and claims among the separate classes, and because the claims were without merit. The Ampicillin court, however, found that the class action procedure was superior to other procedures and refused to look to the merits of the claims at this preliminary stage. The court reaffirmed the right of a governmental entity to represent, in class actions, lesser entities and citizens located within its jurisdiction. Most importantly, the court denied the right of a governmental entity to proceed as a class representative in behalf of individuals and entities located without its own jurisdiction. From this restriction on the scope of the class suit brought by governmental entities staffed with many public attorneys, the court deduced that indi-

vidual consumer class representatives could not fairly and ade-
quately represent a "national class" of consumers similarly situ-
ated. The court came to a different result, however, when the
class representative was a commercial or public entity attempt-
ing to represent similar entities. The court held that although
these latter classes may often be unwieldy the class members
were easily identifiable and the class would be manageable.

While the Ampicillin court has apparently closed the door on
a true "national consumer class action," it has certainly paved
the way for class action by state governmental entities. Claims
by individual consumers within a defined area may still be pur-
sued as class actions under the Ampicillin rules, but attorneys for
states, counties and cities are considered better able to "fairly
and adequately" represent the consumer class. Clearly, the
Ampicillin rules would eliminate much of the "bounty-hunting"
criticism of private consumer class actions. The pharmaceutical
cases represent an attack on consumer abuse by large, nationwide
businesses, when much consumer abuse is carried on by lesser,
local businesses.77 Consequently, there are many local consumer
abuses suitable for antitrust class action remedy since antitrust
law may reach intrastate as well as interstate monopolistic prac-
tices. Absent effective, prompt action by the local government,
the antitrust class action by the private consumer should be ac-
ceptable, even under the Ampicillin rules.

In summary, the consumer class representative in the anti-
trust class action should be prepared to show the probable exist-
ence of an antitrust violation and probable existence of conse-
quential damage to himself and the class he represents. After
establishing these factors, the class representative must meet the
full requirements of Rule 23. Having established the probability
of the antitrust damages and the superiority of the class action
procedure, including adequate representation and manageability
of the class, the case may then proceed to a determination on the
merits. Because the antitrust suit is so firmly established as a
primary tool for guarding against restraints of trade by conspira-
cies to monopolize, the courts are hard pressed to deny the class

commerce, although local in nature). See also Note, Consumers and Antitrust Treble
action when that procedure is clearly superior and the class is manageable.\textsuperscript{78}

2. Securities Fraud

Although securities fraud is not normally considered a consumer abuse, it is important to discuss this area of federal law with respect to the impact of the new Rule 23 in class litigation, because the problems raised in the securities fraud class action cases are closely analogous to the problems raised in other consumer class actions. Small investors, like consumers, are "small claimants" and are dependent upon the Rule 23 class action for remedy. Moreover, the development of statutory fraud in class litigation, reflected in the securities fraud class suits, may prove to be important persuasive authority in the event Congress passes legislation to combat consumer fraud.

There are several categories of federal securities regulation laws, all of which have been construed to grant jurisdiction without regard to amount in controversy.\textsuperscript{79} The primary securities fraud statutes are the Securities Act of 1933, which regulates initial distribution of securities,\textsuperscript{80} and the Securities Exchange Act of 1934, which regulates trading of securities after the initial distribution.\textsuperscript{81} These two statutes have been the most prolific sources of securities fraud litigation.

Traditionally, the class action suit has been recognized as the primary device for enforcement of the federal securities statutes.\textsuperscript{82} The pre-1966 Rule 23 provided for two types of shareholder class suits: the traditional class suit, and the "shareholder derivative" suit, which was a suit by shareholders to enforce a corporate right in favor of the corporation instead of in favor of the shareholder class. The 1966 revision of the Federal Rules removed the "shareholder derivative" action from Rule 23 and created a separate rule for this purpose.\textsuperscript{83} This change, however, did not affect the

\textsuperscript{78} See, e.g., \textit{Summary and Analysis}, 41 U.S.L.W. 1022 (Aug. 8, 1972) commenting on the continuing vitality of antitrust enforcement by the Supreme Court.

\textsuperscript{79} L. Loss, \textit{Securities Regulation} at 2005 (temp. stud. ed. 1961). Although the Securities Exchange Act of 1934 does not specifically grant a federal civil action, it has been the source of much private class action litigation.


\textsuperscript{81} Id. at § 78b.

\textsuperscript{82} L. Loss, supra note 79, at 1819.

\textsuperscript{83} Fed. R. Civ. P. 23.1.
shareholder class action for monetary and equitable remedies under Rule 23.

The 1966 revision has, as previously pointed out, put new teeth into Rule 23, giving class actions greater impact. Therefore, the new Rule 23 class action is more attractive now for use by small claim shareholders to guard against fraudulent practices by corporate officers, corporate directors, and traders in securities. This new impetus has, however, altered the traditional elements required in the securities fraud lawsuit.

Statutory fraud is based on common law fraud and has retained many of the common law rules for determining liability. At common law, fraud contained six elements: "There must be (1) a false representation of (2) a material (3) fact; . . . (4) [intent to deceive by the vendor or] scienter . . . ; (5) the plaintiff must justifiably rely on [the false representation] and (6) suffer damage as a consequence." The courts, in interpreting the securities fraud statutes, have gradually eliminated the more technical requirements of common law fraud, leaving three basic requirements: misrepresentation, reliance or causation, and damages. These basic requirements create unique problems in the class action lawsuits because of the inherent difficulties in proving reliance and damages when dealing with a large class of litigants.

Should the courts dismiss class actions because of the inability of the class representative to establish proof of reliance and consequential damages for the entire class? The Advisory Committee's Note on the new rule recognized this problem and stated as follows:

[F]raud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages . . . . On the other hand, . . . a fraud case may be unsuited for treatment as a class action if there was a material variation in the representations made or in the kinds or degrees of reliance . . . .

84. L. Loss, supra note 79, at 1431.
Despite the Advisory Committee's alternative of separate trials on the elements of fraud, the cases are split on whether the class action may proceed without first showing at least a probability of success in proving all the elements of statutory fraud. While at least one court has held that the variance of reliance among the class was unimportant, virtually eliminating the reliance element from the class representative's case, commentators have feared that such a course will lead to "per se" liability. The critics point out that, even when separate hearings on reliance and damages are required, the resulting prejudice of the initial finding of the statutory violation will render the defendant virtually helpless.

While the foregoing considerations of the problems related to the theory of statutory fraud, when applied to class actions, do not currently have great significance in "pure" consumer class actions, they may yet have a great significance in consumer litigation. Consumer fraud, the worst consumer abuse of all, includes false advertising, deceptive business practices and numerous other consumer misrepresentations. Unfortunately, none of these consumer abuses can currently be remedied by private action in the federal courts, and few states offer more than consolation to their consumer constituents. If new federal legislation is passed allowing civil remedies for these consumer abuses, the securities fraud class action precedents will be quite useful to the courts and consumer class action litigants.

Apart from the strictly theoretical consideration, the securities fraud class suits have made important contributions in the development of class action guidelines. The leading securities fraud class action is Green v. Wolf Corp. in which a United States court of appeals recognized and accepted the utilization of Rule 23 class actions as an appropriate device for a class of small claim shareholders. In Green, the shareholder class consisted of more than 2,000 members, seeking actual and punitive damages for the issuance of three allegedly fraudulent prospectuses produced by the defendants. The lower court dismissed the class action, but

89. See note 149 infra and the text accompanying.
the court of appeals reversed, finding all the basic requisites for a Rule 23(b)(3) class action present.

In a carefully prepared opinion, given the background and necessity for the class action in securities fraud cases, the Green court made step by step determinations of whether each requirement of Rule 23 had been met. On the issue of commonality of questions, the court found that the alleged misrepresentation in the prospectuses was a common question of the whole class and could be decided at once in the course of the class action procedure. While deciding that the common questions presented predominated over individual issues of reliance, the court left open to the lower court the question of whether to order separate trials on reliance and damages in the event the class representative proved the statutory violation. On the issue of "superiority," the court displayed its generous attitude concerning Rule 23, holding that the class action was the best remedy available, since none of the other class members was "injured seriously enough to motivate a solely individual action."\(^{91}\) Finally, the court ruled against an allowance of punitive damages, in keeping with established doctrine in securities fraud cases.

Green has been widely cited for its liberal application of Rule 23 class action procedural requirements in securities fraud violations. Liberal application of Rule 23 in favor of the class in the early stages of litigation\(^{92}\) and recognition of the "small claimant" ideals of the Rule 23 drafters,\(^{93}\) are two of the Green court class action principles which appear in many cases allowing maintenance of class actions. No cases have been found explicitly refusing to follow the Green court's application of Rule 23, although some courts have limited Green to its particular facts.

Another case involving a securities fraud class action is Dolgow v. Anderson.\(^{94}\) Because of its requirement of a finding of "probable success on the merits" before the class can proceed, Dolgow is one of the most widely discussed and most controversial of all class actions. Dolgow involved a large class of many thousands of stockholders seeking damages for an alleged attempt by a corporation and its directors to inflate the selling price of the

\(^{91}\) Id. at 301.
\(^{92}\) Id. at 298.
\(^{93}\) Id. at 295.
\(^{94}\) 43 F.R.D. 472 (E.D.N.Y. 1968).
corporation's stock. The lower court, in a meticulously outlined and comprehensive opinion discussing the need for and desirability of class actions for enforcement of securities regulations, called for a preliminary hearing in which the class representatives were required to establish a possibility of success on the merits of their cause of action. At this hearing the lower court granted a summary judgment for defendants. Upon appeal by the class representatives, the court of appeals reversed, based on its belief that the summary judgment was granted without due cause. Upon remand, the district court [in an opinion hereafter referred to as *Dolgow III*] again dismissed the class action for the same reasons it had originally used.

The *Dolgow III* court reaffirmed its original basis of dismissal explaining the necessity of the class litigant to show, preliminarily, that the class action procedure was necessary due to the special problems involved in large class actions. The court had taken extensive testimony from the class representatives in the preliminary hearing, and from this information it had determined that the class action was without merit. Therefore, the class action was dismissed since: (1) the class representatives each had a sufficiently large claim to seek an individual remedy; (2) notification of all class members would require undue trouble and cost to defendants; and (3) the class representatives had failed to show a "substantial possibility" of succeeding with their claim. Pursuant to the instructions of the circuit court, the court in *Dolgow III* extensively outlined the data presented at the preliminary hearing, which the court held as substantiating the summary judgment.

The *Dolgow III* case has been criticized as an unwarranted restriction of Rule 23. The requirement of a preliminary hearing where the class representative must show "substantial possibility of success" before the class action can proceed has the effect of a "prejudgment judgment," which purists abhor. On the other hand, *Dolgow III* is not without ardent supporters who point out

95. *Id.*
96. 438 F.2d 825 (2d Cir. 1970).
98. See, e.g., Mersey v. First Republic Corp., 43 F.R.D 465 (S.D.N.Y. 1968). But see *Eisen v. Carlisle & Jacquelin*, 41 U.S.L.W. 2586 (2d Cir. May 1, 1973) wherein the court soundly criticized the "minihearing" approach of the *Dolgow* cases for its abuse of the Rule 23 "mandate" to notify class members prior to proceedings on the merits.
such practical benefits of the preliminary hearing as the elimination of unnecessary costs and excessive deliberations. Although the full importance of Dolgow III is yet to be known, Rule 23 is laden with judicial discretion, and it would seem to be a safe prediction that the preliminary hearing will be increasingly utilized to arrest many attempted class actions. This should be particularly true when the class is very large.

3. Civil Rights

Civil rights legislation is a rapidly developing area of federal law under which consumer class actions may be brought without regard to amount in controversy. Traditionally, the federal civil rights laws have been utilized primarily to enforce constitutional prohibitions against racial discrimination resulting from "state action" by allowing complainants to bring class actions in federal courts for equitable relief. Recently, however, the United States Supreme Court has recognized the plight of lower class consumers who have been victimized by state authorized, "legitimate" business practices, such as prejudgment garnishment of wages and summary "claim and delivery" procedures. The utility of the civil rights laws in asserting these consumer claims via class actions was recently upheld in Lynch v. Household Finance Corp. and a new era of civil rights litigation—deterrence of consumer discrimination—was ushered in.

The controversy in Lynch centered around whether the civil rights laws were to be construed as including only "personal rights" or whether "property rights" should also be protected. The plaintiff in Lynch was a consumer who sought to represent a class seeking equitable relief against a finance corporation and state officers for garnishing her savings account and attacking other assets without a prior hearing but pursuant to state law. The class representative sought federal jurisdiction under Section 1343 of Title 28, United States Code, which states in part:

100. See, e.g., Advisory Committee's Note, 39 F.R.D. 98, 102 (1966) and the civil rights cases cited therein.
Section 1343. Civil Rights . . . The district courts shall have original jurisdiction of any civil action authorized by law . . . commenced by any person: . . .
(3) To redress the deprivation, under color of any state law, statute, ordinance, custom or usage, of any right . . . secured by the Constitution . . . or Act of Congress providing for equal rights of citizens . . . .

A three judge panel convened to hear the complaint but dismissed the case for lack of subject matter jurisdiction. The lower court held that the Civil Rights Act only protected "personal rights" and since the class representative's claim involved primarily a "property right," the claim must be dismissed.

The Supreme Court reversed the lower court in Lynch by expressly rejecting the dichotomy between "personal" and "property" rights under the federal civil rights laws. The Court traced the history of civil rights law in the United States and indicated the practical necessity of protecting property rights as well as personal rights. In pointing out that many civil rights claims involve "mixed cases" where both personal and property rights are involved, the Court stated that maintaining a distinction between these rights is a "virtual impossibility."

The effect Lynch will have on the utilization of civil rights legislation in consumer protection litigation remains to be seen. It definitely opens a new door to the consumer, but the course is yet uncharted. Prerequisites for the consumer civil rights class action are that there must be some form of "state action," which is discriminatorily applied to the consumer class without a rational basis, as opposed to the application of the same "state action" to other groups or individuals. Even if these conditions exist, other problems must be solved. Must the claimants be recognized as "indigents," or can a middle class consumer allege that the "custom and usage" of a particular business, operating under state law, deprive the consumer of "equal protection"? In such a situation, can the consumer automatically get into federal court? Could such a consumer represent a class of similarly situated consumers? Even with the Lynch doctrine widening the

107. Id. at 550-51.
scope of civil rights protection, it is obvious there will be many problems to solve before a consumer can readily proceed with a class action under the civil rights laws.

One of the primary considerations of the consumer class representative attempting to assert a claim under the civil rights laws is which type relief will sufficiently satisfy the claim and redress the harm alleged. This decision will largely dictate the category of class action to be utilized and consequently, what requirements of class action maintenance must be met. There are many situations, as in Lynch, where equitable relief alone may sufficiently satisfy the complaint of the consumer class. The consumer class representative will normally prefer a monetary remedy, however, to retain competent legal counsel and to achieve the corrective impact monetary judgments have on the defendant. The Civil Rights Act specifically allows for recovery of "'damages . . . or other relief under any Act of Congress providing for the protection of civil rights . . . .'" Therefore, the only apparent problem for the class litigant seeking damages is to find an appropriate federal civil rights law. The stalwart civil rights law utilized for this purpose, as well as for equitable remedy purposes, is section 1983, which creates civil liability for deprivation of constitutional rights.

The most widely cited civil rights consumer class action is a pre-Lynch case, Contract Buyers League v. F. & F. Investment, in which the plaintiff class sought "various relief" under the Civil Rights Act, as well as under securities fraud, antitrust and state credit laws. The class in Contract Buyers League consisted of minority home buyers who alleged that defendant home sellers operated a scheme especially designed to profit from the plight of the urban Black in securing adequate housing. Notwithstanding the complex problems of fact and legal issues, the court found the class action procedure was proper due to the overriding predominance of key issues. Contract Buyers League is distinguishable from a "true" consumer class action since the class consisted of a racial minority group and made a civil rights

108. See note 28 supra and the text accompanying.
claim even more appropriate. In light of the Lynch decision, however, it would seem that any class of abused consumers should be able to proceed as the class in Contract Buyers did, even without the racial discrimination undertones which permeated the Contract Buyers case.\textsuperscript{113}

4. Consumer Credit Protection

While several other federal laws have been and are being effectively utilized by consumers to combat consumer abuse, the Consumer Protection Act of 1968\textsuperscript{114} is the only federal law specifically designed for consumer protection which allows private action. The CCPA was designed to control and prevent consumer abuse in the field of consumer finance—credit lending and credit buying of consumer goods and services—by (1) encouraging competition among dealers in the consumer credit trade and (2) disclosing to the consumer the actual cost of borrowing or buying on credit. To insure enforcement of its provisions regulating consumer credit financing, the CCPA specifically provides civil liability for certain violations in addition to its provisions for administrative enforcement.

The CCPA has six titles. Title I provides for disclosure of credit terms, the regulation of credit transactions, credit card issuance and credit advertising. Title II provides for criminal sanctions against the practice of extortionate credit transactions, commonly called "loan sharking." Title III restricts the use of garnishment procedures to maximum limits of consumer earnings. Title IV provides for the establishment of a commission for the continuing study of consumer finance problems. Title V is a standard enabling provision. Title VI regulates the manner in which consumer credit finance reporting is compiled and disseminated and requires disclosure of personal information upon the request of the consumer. Of the six titles under the CCPA, only Title I and Title VI specifically provide for civil action by the consumer debtor.

\textsuperscript{113} But see Bahom v. Southern Bell Telephone & Telegraph Co., 55 F.R.D. 478 (W.D. La. 1972) which denied female telephone operators the right to maintain a class action for monetary damages for alleged sex discrimination.

\textsuperscript{114} 82 Stat. 146 (codified in scattered sections of 15 and 18 U.S.C) (hereinafter referred to as the CCPA).
a. The Truth-In-Lending Act

Title I of the CCPA, referred to as the Truth-in-Lending Act (hereafter the TIL), is subdivided into three chapters: Chapter 1—General Provisions; Chapter 2—Credit Transactions; and Chapter 3—Credit Advertising. Of these three chapters, chapter 2 is the most important. Chapter 2 contains strict disclosure requirements for credit transactions, and most importantly it contains a provision allowing civil action in federal court for violations of certain disclosure requirements.\(^{115}\) Because of the private right of action provided in section 130, this act has been the source of nearly all consumer litigation under the CCPA.

One of the primary difficulties in interpreting the TIL involves the extent of jurisdiction granted under section 130, which states in part:

\textit{Civil Liability}

(a) . . . (A)ny creditor who fails in connection with any consumer credit transaction (otherwise defined in this chapter) to disclose . . . any information required . . . is liable to (the debtor) in an amount equal to the sum of

(1) twice the amount of the finance charge . . . (but in no case) less than $100 nor greater than $1,000; and

(2) in the case of successful action . . . a reasonable attorney's fee as determined by the court.

\ldots

(e) . . . Any action under this section may be brought in any United States district court, or in any court of competent jurisdiction, within one year from the date of the occurrence of the violation.

While some litigants have attempted to have the courts apply section 130 to other CCPA provisions, the courts have uniformly limited the cause of action and grant of federal jurisdiction of section 130 to chapter 2 of the TIL.\(^{116}\) There is some dispute, however, within chapter 2 concerning the extent to which section 130 should be applicable. Some courts have interpreted section

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\(^{115}\) Truth In Lending Act § 130(e); 15 U.S.C.A. § 1640(e) (Supp. 1972).

130 as only allowing federal jurisdiction over disputes concerning failure to comply with disclosure requirements. Other courts have interpreted section 130 as allowing federal jurisdiction over any of the “rights” granted to consumer debtors under chapter 2, including for example, the right to recission within three days of the credit transaction. Recently, one federal circuit court dismissed a dispute over the extent of section 130’s applicability by allowing federal jurisdiction over all “private rights” under the TIL through 23 U.S.C. §1337, which grants federal jurisdiction over controversies arising under federal trade and commerce regulatory statutes. Whether this decision renders the jurisdictional portion of Section 130 superfluous depends upon the acceptance of this application by other courts. The full impact of 28 U.S.C. §1337 will be considered in greater detail in the next part of this note.

Because of the technical complexities of the disclosure requirements in “consumer credit transactions” under the TIL and difficulties encountered by creditors in complying with them, Section 130 has provided consumer class litigants with numerous opportunities to seek redress in the federal courts. Cases for consumer class damages under the TIL abound, with many suits seeking to recover enormous fees for very minor disclosure infractions. The temptation for “bounty hunting—consumer protecting” attorneys has been too inviting for resistance, and consequently the Rule 23(b)(3) class action for TIL violations has rapidly “fallen into disrepute in the courts.” These consumer class “strike suits” have led to the emergence of special restrictive interpretations of Rule 23 for consumer class actions, interpretations which may render them virtually useless under the TIL.

The leading case restricting class actions under the TIL is Ratner v. Chemical Bank New York Trust Co. It is most significant that the Ratner decision was written by Judge Marvin E. Frankel, sitting in the United States District Court, Southern District of New York. Judge Frankel has long been a respected authority on the Rule 23 class action and had adopted at an early

120. See note 172 infra and the text accompanying.
121. See note 9 supra and the text accompanying.
date, an optimistically cautious attitude toward Rule 23. He acknowledged the rule’s social value, while remaining wary of its potential for abuse. The Southern District of New York Court is a gold mine of class action precedent, that district court having heard an amazing number of class action suits.

The highly technical issue in Ratner was whether the TIL required the disclosure by the defendant bank of a “nominal annual percentage rate” of interest on open end credit billing, even though no finance charges had been assessed. The class representative sought to represent as many as 130,000 of the defendant bank’s consumer-customers who, as members of the bank’s “Master-Charge Credit Card Plan,” had received financial statements omitting the “annual percentage rate.” The bank’s position, supported by a staff opinion letter from the Federal Reserve Board, was that no “annual percentage rate” was required until a chargeable balance existed in the customer’s unpaid account. Both Ratner litigants requested the court to make a preliminary decision on the merits of the TIL claims before deciding whether the class action could be maintained.

The Ratner court concurred with the request of the parties and temporarily postponed for a later hearing the issue of whether the class action could be maintained. This postponement was a significant recognition by the parties and the court of the desirability of precluding, when possible, the costs and complexities of notifying the class members. Turning to the merits of the

123. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39 (1967), wherein Judge Frankel stated:
I think we may venture to hope that the fears of such weighty dissenters will prove to have been unfounded. While there is much novelty and room for doubt in the new Rule, it is, by the same token, a mandate to adopt judicial procedure to constantly changing, increasingly complex patterns of litigation.

124. See, e.g., Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F.R.D. 375, 377 (1972) commenting on the American College of Trial Lawyers, Report & Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972) as follows:
The Trial Lawyers Study is the only available statistical study on class actions . . . . It shows that from 1967 to 1971 the number of class actions filed in the Southern District of New York increased four-fold. And more than 53% of the actions commenced in 1966 were still pending in 1971.

See also Garwood, Truth-In-Lending After Two Years, 89 BANK L.J. 3 (1972) wherein the Ratner court’s rejection of the “staff opinion letter” from the Federal Reserve Board is criticised by the author of the letter.

126. Compare the Ratner court’s postponement of the class action issue with Dolgow
Ratner complaint, Judge Frankel found that the complaint was valid, based on his interpretation of the TIL and the underlying purpose of the laws to "put the borrower on notice before the plunge." 127

Immediately following the initial determination of the TIL violation by the defendant-bank in the first Ratner opinion, waves of shock hit the consumer finance industry. Early fears of massive damages from class action judgments based on minor technical violations of the TIL had apparently materialized. Judge Frankel, however, after nearly seven months of hearings, deliberation and consideration, decided the consumer class action for damages was not maintainable. 128 Judge Frankel based his denial of the class action on a new doctrine developed in the TIL class action cases. When a statute allows an adequate remedy within its own provisions, this doctrine states that the Rule 23(b)(3) category of class actions cannot meet the test of "superiority" of actions. Supporting his decision, Judge Frankel pointed out there was no "affirmative need" for the class action procedure and that aggregation of the fines, under the class action procedure, "would carry to an absurd and stultifying extreme" the remedy designed by Congress, since the class would have been entitled to as much as $13,000,000.

In summarizing his decision against the class action, Judge Frankel stated:

[Rule 23 calls] for the exercise of some considerable discretion of a pragmatic nature. Appealing to that kind of judgment, defendant points out that (1) the incentive of class action benefits is unnecessary in view of the [TIL's] provisions for [fines, costs and attorney's fees] and (2) the proposed recovery . . . would be a horrendous, possibly annihilating punishment unrelated to any damage to the purported class or to any benefit of the defendant, for what is at most a technical and debatable violation of the [TIL]. These points are cogent and persuasive . . .

[T]he allowance of this [action] as a class action is essentially inconsistent with the specific remedy supplied by Congress and employed by plaintiff in this case. It is not fairly possible . . .

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v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), requiring a pretrial showing by the plaintiff-class representative's substantial probability of success.


to find the [Rule 23(b)(3)] form of class action "superior to" [the TIL remedy].

The Ratner doctrine prohibiting TIL class actions has rendered a devastating, if not fatal, blow to the aspirations of those heralding consumer class actions under the TIL. The considered and experienced view of Judge Frankel has been quite influential in other courts.

The inherent difficulties courts have always experienced with class actions, coupled with the abuses of the class action by attorneys representing the class, will undoubtedly accelerate the demise of the TIL consumer class action under the Ratner doctrine. At a time when class actions of every imaginable type are crowding the court's dockets, the Ratner doctrine has given the courts a logical, legal rationale for dismissing class actions.

b. The Fair Credit Reporting Act

As previously mentioned, in addition to Title I, Title VI of the CCPA provides for civil liability and federal jurisdiction over claims against consumer credit institutions for violations of its regulatory provisions. Title VI, referred to as the "Fair Credit Reporting Act" [hereafter the FCRA], allows private action whenever a "consumer reporting agency or user" thereof willfully or negligently fails to act "with fairness, impartiality and a respect for the consumer's right to privacy" while compiling and reporting consumer credit information. Prior to the FCRA, the consumer had no access to information concerning his own credit status, and haphazard practices by consumer reporting agencies had caused unwarranted denials of credit to numerous consumers. Because of the personal nature of the abuse to

129. Id. at 416. The court, nonetheless, awarded the plaintiff $100 for the fine, plus $20,000 attorney's fees.

130. It is interesting to compare the logic behind the Ratner decision with the rationale the courts apply in allowing class actions in antitrust and securities fraud. The antitrust and securities fraud statutory schemes are remarkably similar to that of the Consumer Credit Protection Act, but the courts seem to have an aversion to the consumer credit debtor, while embracing the antitrust and securities fraud litigant.


which the FCRA addresses itself, it does not seem likely that a violation would be adaptable to the class action form without extensive and costly discovery procedures for establishing abuse to a defined class. In any event, the Ratner doctrine, denying class actions, may be applicable to any attempted class action under the FCRA since the FCRA contains provision for actual and punitive damages, costs, and reasonable attorney’s fees.

5. Minor Federal Statutes

The adaptability of various federal statutes to the class action procedure has been demonstrated by successful class actions under such diverse statutes as the Automobile Dealer’s Day in Court Act and the National Environmental Policy Act. In an effort to find new remedies for consumer abuse, commentators have examined new federal statutes and have even suggested new applications for some obscure statutes for possible use in consumer class actions. Unfortunately, attempts to “discover” causes of action adaptable to the consumer class action under these minor statutes have not been successful.

One recently passed federal statute, the Economic Stabilization Act of 1971, provides consumers with a private right of action for willful or negligent noncompliance with the Act’s requirements for price controls. Section 210 of the Act allows any consumer “suffering from any act or practice [to] bring action in any District Court of the United States, without regard to amount in controversy” for equitable or legal relief. Interestingly, the Act provides fines for willful violations, but does not provide similar fines for negligent violations. This situation would apparently allow consumer class actions for negligent violations, while the Ratner doctrine would deny a class action for willful

135. Id. §§ 616 and 617, 15 U.S.C.A. §§ 1681n and 1681o, provide for actual damages, costs and reasonable attorney’s fees. § 616 also provides for punitive damages for “willful noncompliance.” § 618, 15 U.S.C.A. § 1681p, provides for federal jurisdiction over claims brought under the Fair Credit Reporting Act.


139. § 210(a), 85 Stat. 743 (1971).
violations. The anomaly created by these provisions of the Act, when the Ratner doctrine is applied, would probably be overcome by the exercise of judicial discretion, in a dismissal of the class action as being inconsistent with the purpose of the Act whether the alleged violation is willful or negligent. Consequently, the consumer class representative is not likely to find a convenient vehicle for litigation in the Economic Stabilization Act of 1971.

One example of an innovative attempt to utilize an existing federal law to attack a consumer abuse involved the Lanham Trademark Act of 1946 [hereafter the LTA].

Although the LTA was clearly designed to prevent unfair competition between commercial businesses, the provision of the LTA allowing for private action in federal court is worded as follows:

Section 43(a)—Any person who shall affix, apply or annex, or use in connection with any goods or services, or any container or containers for goods, a false description or representation, . . . and shall cause such goods and services to enter commerce, and any person who shall with knowledge of the falsity . . . cause or procure the same to be . . . used in commerce . . . shall be liable to a civil action by any person doing business . . . or any person who believes that he is or is likely to be damaged by use of such false description or representation.

Section 43(a) was "discovered" and suggested for reactivation as a consumer protector since it appeared, on its face, to provide the consumer with a device to combat consumer fraud.

Accordingly, in 1971, a consumer action was brought under the LTA for alleged deceit and false advertising by a ski-tour service in Colligan v. Activities Club of New York, Ltd. The lower court dismissed the class action for failure to state an actionable claim. In affirming, the circuit court extensively discussed the purpose of the LTA, rejecting the view of the consumer class representatives that the LTA should be used to redress consumer abuse. Furthermore, the court mildly chastised the con-

141. Id. § 43(a); 15 U.S.C.A. § 1125(a) (1983) (emphasis added).
143. 442 F.2d 686 (2d Cir. 1971), cert. denied, 404 U.S. 1004 (1972).
sumer class representatives for their attempt to expand the LTA and recommended that they utilize available local remedies.\textsuperscript{144}

There are new statutes, such as the Consumer Product Safety Act of 1972,\textsuperscript{145} which may allow limited consumer protection in the form of class actions and other old statutes, besides the Lanham Act, susceptible of broad interpretations allowing consumer actions. However, restrictive rules, exemplified by the \textit{Ratner} and \textit{Colligan} decisions, reflect growing judicial impatience with the Rule 23 class action procedure for consumer protection, which may preclude any new consumer remedies. The best prospect for advances in the field of consumer litigation lies in the passage of new legislation specifically allowing consumer class actions.

6. State Law and the Doctrine of "Pendent Jurisdiction"

As previously mentioned in connection with securities fraud,\textsuperscript{146} the single most abusive conduct perpetrated against consumers as a class is consumer fraud. Consumer fraud encompasses all deceptive consumer trade practices, including such common activities as product misrepresentation and false advertising.\textsuperscript{147} This abuse has never been effectively countered, either in common law or statutory law. There has traditionally existed a laissez-faire philosophy of \textit{caveat emptor} in the consumer trade industry that is partially based on the ideals of "rugged individualism," "Yankee ingenuity" and "the free enterprise system."

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{144} \textit{Id.} at 693.
\item \textsuperscript{145} Pub. L. No. 92-573 (Oct. 28, 1972), 41 U.S.L.W. 57 (Oct. 31, 1972). \S\ 23(a) of the Consumer Product Safety Act allows "Suits for Damages By Persons Injured," but only when there is a $10,000 "amount in controversy" claim. Consumers are not, however, limited in common law actions available locally prior to passage of the new law. \S\ 24 provides for "Private Enforcement of Product Safety Rules and Orders" required by the Act by any "interested person." Such an "interested person" may recover reasonable attorney's fees and costs, if successful.
\item \textsuperscript{146} See the discussion on Securities Fraud supra.
\end{enumerate}
\end{footnotesize}
However, modern complexities in consumer products and purchasing contracts, and the use by the consumer trade industry of advanced advertising and marketing techniques, along with the disarming impact consumer fraud has on the modern consumer, have called for the rejection of earlier anti-consumer philosophies.  

Except in a few progressive states, state common law and statutes fall far short of granting an adequate remedy to consumers. Actions at common law in deceit or fraud generally require extensive elements of proof—misrepresentation of material facts, reliance, causal connection—which are often difficult to prove. Additionally, the damage to the individual consumer is relatively small. Therefore, without an effective class action device which can be utilized by "small claimants," the common law remedies are useless. To meet the demands for consumer action, several states have adopted laws which allow private action for consumer abuse and laws which allow small claim class actions. The Uniform Deceptive Trade Practices Act was especially designed for adoption by all states and contains provisions to combat consumer fraud. Unfortunately, however, only a few states have adopted such progressive legislation and even where legislation exists the courts have been loath to allow consumer class actions, California being a significant exception.

Even if an adequate state remedy for consumer abuse existed, there would be the possibility of having the issue heard in federal court under the doctrine of "pendent jurisdiction." This discretionary doctrine allows federal jurisdiction over state claims when the "common nucleus of operative facts" upon which the federal claim is based is also justification for alleging a state claim. The doctrine of "pendent jurisdiction" may be utilized


152. Compare Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720 (1970) (dismissing a consumer class action brought under the state's Retail Installment Sales Act) with Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964 (1971) (allowing a consumer class action for fraud in connection with an installment contract plan).

to allow federal jurisdiction over state claims even when the accompanying federal claim has been dismissed and has been so utilized in consumer class actions under the Truth In Lending Act. One example of this is seen in the case of Garland v. Mobile Oil Corp.,\textsuperscript{154} in which the consumer class representative brought his claim for damages and equitable relief in federal district court under both the TIL and the Illinois Uniform Deceptive Trade Practices Act. The Garland court dismissed the claim under the TIL, holding that the TIL did not require disclosure of a "late payment charge." Since there was a possible claim under the state statute, the court maintained jurisdiction over the case and directed a pre-trial conference on the state claim.

Although the problem did not exist in Garland, since Illinois allows class actions in her state courts,\textsuperscript{155} an interesting technical problem may exist in the situation in which the consumer claimant has a valid state claim, but the state does not allow class actions. Should the federal court exercise the "pendent jurisdiction" over a consumer class action brought in federal court joined with a faulty federal claim if the state does not allow class actions? The answer would turn on whether the court viewed the state position on class actions as procedural or substantive. Although it would seem that the question is merely a matter of procedure and the federal court could apply its own rules, difficult questions regarding procedural vis-a-vis substantive law have been raised in the federal courts since Erie R.R. v. Tompkins,\textsuperscript{156} and the answer to such a problem would be difficult to predict.

Although there is a possibility of bringing a state consumer claim under federal jurisdiction through the doctrine of "pendent jurisdiction," this possibility can hardly be considered a solution to the problem of consumer abuse. In effect, the doctrine does little more than act as a boon to claimants who can satisfy their claim in state court without going into federal court, while the claimant residing in a state which has not provided for consumer action is no better off. Furthermore, since the exercise of "pendent jurisdiction" is purely discretionary, there is no reason to expect the federal courts to exercise their discretion uniformly in

\textsuperscript{154} 340 F. Supp. 1095 (N.D. Ill. 1972).
\textsuperscript{156} 304 U.S. 64 (1938).
favor of consumer class action claims when such claims are both burdensome and complicated. Indeed, the federal courts at an early date established a tradition of avoiding such "local matters" as consumer fraud for fear of opening a "Pandora's Box" of difficulties.157 Therefore, the doctrine of "pendent jurisdiction" will be of little value in consumer class litigation, absent the court's acceptance of a meritless federal claim, brought solely for the purpose of obtaining federal jurisdiction. The likelihood of such an event is, of course, minimal.


When Congress has enacted legislation designed to protect consumers, which does not specifically grant a federal cause of action, the problem arises whether such legislation implies a private right in the face of continued and unabated consumer abuse. Generally, the scheme of consumer protection legislation is for enforcement by federal agencies. Congress has enacted many laws and has created numerous agencies to aid consumers in the food and drug, trade practices, environmental protection and safe products areas. However, frequent demonstrations of the failure or inability of federal agencies in effectively carrying out the purpose of these laws has emphasized the need for the "small claimant" consumer class action to enforce consumer protection. The classic example of inaction by a federal agency is, of course, the Holland Furnace Co. cases where the Federal Trade Commission spent thirty years prosecuting one defendant for unfair trade practices against consumers.158 In fairness to the FTC, it should be noted that recently its activity in consumer protection has increased both qualitatively and quantitatively. However, agency inaction still exists due to the practical impossibility of regulating all abusive practices.

Absent clear statutory authorization for private action, should the federal courts allow class actions to come to the aid of the "small claimant"—consumer class when the federal agency charged with the responsibility has not acted? While there is no definitive answer to this question, there are several noteworthy

158. See In re Holland Furnace Co., 341 F.2d 548 (7th Cir. 1965), cert. denied, 381 U.S. 921 (1965).
examples in which the federal courts have granted private rights under federal law when no private right is specifically allowed. The most widely recognized federal cause of action in this situation is, of course, the right to private action under the Securities Exchange Act of 1934.159 This federal statute, while not granting a specific private action, has been a prolific source of private class suits for securities fraud, as previously discussed. The rationale justifying private action has been that without private rights of action this statute will go unenforced except to the limited extent of enforcement through the Securities Exchange Commission.160

Another example of private action under regulatory statutes not specifically allowing such action was recently articulated by the United States Supreme Court. In Allen v. State Board of Elections, the Court allowed private action in federal court under the "doctrine of implication" where federal administrative action had been insufficient to redress the wrong suffered by the claimant.161 Although the Allen case did not involve a consumer class action, it should be seriously considered for possible utility by the consumer class litigant.

In Allen, the Supreme Court held that a plaintiff could proceed under a provision of a federal regulatory act, the Voting Rights Act of 1965, although private remedy was not specifically granted in the Act. The Allen case is clearly distinguishable from the consumer class action seeking pecuniary relief since it was a civil rights case and the remedy sought was an injunction against alleged racial discrimination. The Supreme Court’s allowance of the action in Allen, however, was premised on the regulatory nature of the federal act, which the Court felt was indicative of Congress’ implied intent to allow private action:

The achievement of the Act’s laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General . . . . [T]he provisions of the Act extend to the States and the subdivisions thereof. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments . . . .162

159. See, e.g., J.S. Case Co. v. Borak, 377 U.S. 426 (1964), where the Supreme Court allowed a private action for damages under the Securities Exchange Act of 1934 in order to effectuate “congressional purpose.”
160. See, e.g., L. Loss, supra, note 79 at 1819.
162. Id. at 566.
As inviting to consumer class litigation as the Allen "doctrine of implication" may seem, it was refused application in consumer class suits in the case of Holloway v. Bristol-Myers. In Holloway, the class representatives brought an action under the Federal Trade Commission Act for the alleged deceptive trade practice of falsely advertising defendant's product, "Excedrin." The F.T.C. Act does not authorize civil action, but the class representatives raised interesting arguments favoring private action, and stated that the purpose of the Federal Act was to protect consumers from these acts, that the Federal Trade Commission had failed to act, and finally that the Supreme Court had authorized civil action under regulatory acts through the Allen "doctrine of implication." The Holloway court, however, held that the court was without jurisdiction, because the F.T.C. Act does not grant specific civil remedy. This fact, the court pointed out, was known to Congress which had several bills in committee purporting to amend the F.T.C. Act to allow consumer class actions.

With regard to the "doctrine of implication," the Holloway court restricted its application to the situation existent in the Allen case.

Notwithstanding the Holloway court's rejection of the "doctrine of implication," it would seem that the consumer class litigant may yet be able to utilize the doctrine effectively when the consumer abuse and federal agency inaction are both acute. The doctrine arose in the midst of wide public and judicial concern over civil rights and at a time when the tremendous pressures being applied to federal agencies authorized to enforce civil rights laws rendered them unable to prosecute every violation. It would seem that the same climate presently exists in the field of consumer protection litigation, and the "doctrine of implication" might yet be accepted by the courts. Unfortunately, other obstacles in consumer class litigation, as the manageability of large consumer classes and the impact of large amounts of damages on

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164. Id. at 20.
consumer class defendants, may preclude the courts from ever allowing the "doctrine of implication" to apply to consumer class actions.

Even if one assumes the court's acceptance of the "doctrine of implication" for purposes of providing the consumer class litigant with a cause of action under federal regulatory statutes, the question of federal jurisdiction may persist. To insure that the court will not dismiss the action for lack of federal jurisdiction, notwithstanding the recognized cause of action, the consumer class representative may be able to utilize Section 1337 of Title 28, United States Code, which states:

§ 1337. Commerce and anti-trust regulations.

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

The full impact of section 1337 on consumer class actions is not certain, but a partial analysis may be made from the existing cases.

Under normal civil actions, meaning those actions other than class actions, section 1337 has been construed to allow private action under federal regulatory statutes which do not provide for the specific action sought but do at least imply a "right" of such action.167 Since section 1337 does not alone constitute a cause of action, some other federal statute expressly or impliedly allowing a private right of action must be utilized in conjunction with it. Some courts have indicated that section 1337 should only apply where federal law has preempted state law168 or where all administrative remedies have been fully exhausted.169 Nevertheless, a plain meaning interpretation of section 1337 appears to grant federal jurisdiction for civil action, by individuals or class actions, under all commerce, trade and antitrust regulatory laws to which the "doctrine of implication" might be applied.

Two recent cases have considered section 1337 in consumer actions. The first case was Hawaii v. Standard Oil Co. involving

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an antitrust action by a state as *parens patriae* for damages suffered to the state’s general economy caused by the alleged unlawful conspiracies and monopolistic practices of the defendant.\textsuperscript{170} While interpreting the antitrust treble damages statute as not including damage to a state’s economy, the Court offered the following advice to the state concerning the right of private “small claim” suits, absent the permissibility of *parens patriae* representation by the state:

Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to amount in controversy. 28 U.S.C. § 1337; 15 U.S.C. § 15. Rule 23 . . . provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.\textsuperscript{171}

The Hawaii Court declared that a state could, in “certain circumstances,” properly maintain a class action. However, the Court clearly indicated its preference for the privately maintained class suit, pointing to the attraction of attorney’s fees in consumer class antitrust litigation and to the clear guidelines of Rule 23 as opposed to the undelineated *parens patriae* action.

The second recent case which considered the applicability of section 1337 to consumer class actions was the federal circuit court case of *Sosa v. Fite*.\textsuperscript{172} *Sosa* was an action by a debtor who sought to rescind a consumer credit transaction because of the creditor’s failure to make certain disclosures required by the Consumer Credit Protection Act of 1968. The lower court dismissed the action because it thought state law preempted the CCPA and because of the lack of federal jurisdiction based on the court’s narrow interpretation of the CCPA’s jurisdictional reach.\textsuperscript{173} The circuit court, in a brief opinion, rejected the lower court’s view that the state law preempted the CCPA and held that federal jurisdiction was properly requested. After alluding to the problems of determining the extent of the CCPA’s provision specifically granting federal jurisdiction over consumer credit transac-

\textsuperscript{170} 405 U.S. 251 (1972).
\textsuperscript{171} Id. at 266.
\textsuperscript{172} 465 F.2d 1227 (5th Cir. 1972).
\textsuperscript{173} Id. See note 115 supra and text accompanying for discussion of federal jurisdictional problems under the Truth-In-Lending Act.
tions, the court refused to decide the jurisdictional dispute based on that provision since the claimant had originally invoked section 1337. In deciding that federal jurisdiction was properly obtained under section 1337, the Sosa court stated:

[S]ection [1337] provides that the district courts shall have original jurisdiction of any civil action arising under any Act of Congress regulating commerce. . . . [The CCPA] was the result of an exercise of Congressional power under the Commerce Clause . . . . Further there can be no question that the "arising under" tests are met. Sosa's claim is a direct assertion of a federal statutory right . . . .

The future of section 1337 and the utility of the "doctrine of implication" in consumer class actions remains to be seen. It seems clear that section 1337 can properly be utilized in antitrust and consumer credit cases where the federal regulatory laws clearly create a right of private action. More uncertain are the regulatory statutes, like the Federal Trade Commission Act, which do not expressly create private rights, but in which private rights can readily be implied in order to enhance the enforcement of the law. The acceptance of the "doctrine of implication" coupled with federal jurisdiction under section 1337 would eliminate the difficult problem faced by the consumer class litigant addressing consumer abuses as deceptive trade practices and false advertising. The ambiguities inherent in applying these devices, however, would create many judicial problems, and the need for clear, definitive guidelines set by specific statutory rules continues to exist.

SUMMARY

By way of disclaimer, it is necessary to admonish the prospective consumer class representative and his counsel that the foregoing discussion of the technical requirements of Rule 23 class actions and the problems of the consumer class representative in finding an actionable claim under federal law is by no means totally comprehensive. Many problems concerning class action procedure were not discussed: there may be difficulties in the maintenance of the class action after the initial acceptance of the class action procedure; notice problems of great dimension exist under Rule 23 and are yet unresolved; and problems of proof of damages and subsequent distribution of damages to class members have not been uniformly treated in the courts. It would be
virtually impossible to make an exhaustive list of problems which may occur in class actions. Hopefully, some of the more important problems and considerations were discussed, giving the reader some insight into the complexities of consumer class actions and perhaps providing a starting point for the aspiring consumer protector, anxiously awaiting his day in court.

While there are many critics of the consumer class action who believe the Rule 23 class action has shifted from a rule of compensation to a rule of confiscation, there is much evidence to show the desirability of consumer class actions due to the failure of regulatory schemes at the local and national levels. The plain facts are that consumer abuse exists and is practiced by large, "legitimate" members of the consumer trade industry, as well as by "fly-by-night" operators. Furthermore, current regulatory statutes are largely ineffective in aiding consumers due to problems inherent in administrative action. Effective private action would do much toward curbing consumer abuse at all levels of the consumer trade industry.

Regretfully, the current trend in the courts is to restrict the use of consumer class actions in which the class and damages sought are very large. This restriction is purportedly intended to prohibit "unwarranted, malicious actions against 'legitimate' consumer trade businesses." Ironically, this trend may be establishing an inequitable rule, favoring defendants in large consumer class actions in that "the larger the crime, the easier the escape." Hastening the acceptance of restrictive rules for consumer class actions are the frequent attempts by attorneys to utilize the consumer class action to generate large fees. The courts, however, should be able to fashion reasonable tests to guard against consumer "strike suits," while allowing truly meritorious class actions. In the traditional antitrust and securities regulations class suits, long accepted as necessary for enforcement of federal regulatory laws, the courts have learned to recognize and distinguish malicious from worthy claims.

There, of course, remains the problem of finding a federal cause of action available for consumer protection from such abuses as consumer fraud. The answer would seem to lie in allowance of a private action, suitable for class actions, under the Federal Trade Commission Act. The demand for new legislation is great and it may be forthcoming soon. Until then, however, the aggrieved consumer will continue to make imaginative attempts
to “conjure up” remedies under existing law. Regardless of what new law may be passed, the consumer class action will continue to be a curious creature of the law which will be observed, praised and condemned by countless commentators to come.

MARTIN S. DRIGGERS

APPENDIX: RULE 23. CLASS ACTION

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

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

(1) the prosecution of separate actions by or against individual members of the class would create a risk of
   (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
   (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually
controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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

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

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

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

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

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

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