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Roadmap to Illinois Class Actions

LEROY J. TORNQUIST*

Although the class action has existed as a litigation device for over two hundred years, the Illinois case law governing such actions in state courts is unsettled. Illinois, to date, has no statute or rule of procedure to govern class actions comparable to Federal Rule of Civil Procedure 23. Consequently, recent increases in the use of class actions within the state have generated procedural problems without precedent. Professor Tornquist examines many of the basic procedural questions to be encountered by the attorney who prosecutes or defends an Illinois class action. They include issues of jurisdiction, venue, pleading, discovery, settlement, notice, trial and appeal as such matters uniquely relate to the class action. He concludes by suggesting that the Illinois Supreme Court or General Assembly adopt a statute or rule to govern such cases and that it be incorporated in the state's relatively modern code of civil procedure.

Historically, class actions originated in the 18th and 19th century practice of England.1 They were adopted by equity courts to avoid the technical requirements of the law courts that all persons who may be affected by a judgment be named as parties and be given notice.2 Even though class actions have existed for centuries, their relative importance has increased recently in all jurisdictions due to the increased awareness

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2. For an analysis of the development of class actions see South East Nat. Bank v. Board of Education, 298 Ill. App. 92, 18 N.E.2d 584 (1938), quoting at length from J. STORY, EQUITY PLEADINGS (9th ed. 1918).
of consumer-minded groups concerning enforcement of their legal remedies through the use of class actions. They have “sprouted and multiplied like the leaves of a green bay tree.” Today the class action is available in every jurisdiction in one form or another.

The increased use of class actions has created difficulties because the courts are not equipped to handle the procedural complexities of the class action. This is particularly true in Illinois where common law equity rules and precedents determine the propriety of class actions. Although there are many Illinois decisions which deal with the issue of whether or not a class action should be allowed, they are not consistent in that determination. Furthermore, they shed little light on the specific procedural problems which must be considered by an attorney such as pleading, notice to the class, intervention, jurisdiction of the subject matter and parties, venue, discovery, settlement, trial and appealability. It is the purpose of this article to present some of the basic problems encountered by an attorney who prosecutes or defends against a class action in Illinois.

**Policy Reasons for and Against Class Actions**

Policy reasons for or against allowing the class action are particularly important because the Illinois courts have broad discretion in deciding whether or not to permit such an action. How the courts interpret the nebulous standards for maintaining a class action depends in part upon how effectively counsel can argue policy. Following are some of the policy reasons for allowing or refusing to allow a class action to be maintained.

There are several reasons why class actions are difficult to sustain in Illinois. First is the reluctance of the courts to tamper with the historic common law principle that a defendant is not bound by an in personam judgment rendered in a suit in which he is not designated as a party and as to which he has not been personally served with process. Since the final decree in a class action binds all plaintiffs, appearing in person or by representation, it must follow that the decree...

is res judicata as to all members of the class. Even though class actions developed in the equity courts to circumvent the requirement of naming all plaintiffs as parties and notifying them, courts think of it as an unusual procedural device. The burden is on the representative to show substantial benefits to the litigants and the court before a class action is justified.

Another factor influencing courts to limit class action suits, although not often articulated, is that they are by their nature time consuming and difficult to manage. Because of such unmanageability, many federal cases have been dismissed or the scope of the class has been significantly reduced. For example, some courts have been reluctant to undertake the “harrowing experience” of a class action and have noted the “unusual burdens upon an already overburdened federal court system” and the “sizeable judicial resources” consumed by them. This problem is aggravated in Illinois, where there is no statute or Supreme Court Rule to guide the courts in administering the action. The decisions are numerous and conflicting.

Another reason for dismissing a class action is that an analysis of a plaintiff’s claim may disclose that a recovery is directed to the plaintiff’s lawyer’s profit rather than to the plaintiff’s own interest or to the class he has elected himself to represent. It is acknowledged that fees in a class action may be extremely large. In a dissenting opinion one federal judge has stated:

Obviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them.

This reasoning, in my opinion, is ill-founded. The philosophy of class

8. Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).
14. E.g., in Ives v. City of Chicago, 30 Ill. 2d 582, 198 N.E.2d 518 (1964), a taxpayer class action, the fund created was $811,950.00 and the fees allowed were $249,557.82; in F. Monroe Cigar v. City of Chicago, No. 62S 12533 (Cir. Ct. Cook Cty. 1962), a license fee case, the fund was $829,062.00 and the fees allowed were $258,688.06.
actions, like the adversary system in general, is based on self-interest as the motivating force. One is more likely to help his fellowman if by doing so he helps himself. The class action is an attempt to use man's natural instinct to act in his own self-interest in order to achieve justice and procedural efficiency in mass litigation. To provide representation which is in the best interest of the class, it is necessary to compensate the attorneys for their professional legal services. In effect the named plaintiffs and their attorneys are assuming the position of a "private attorney general." They will only be compensated if successful, and the award of attorney's fees will rest in the discretion of the court. The court has the burden of protecting the unnamed members of the class from unreasonable fees.

There are several reasons for expanding the use of class actions in Illinois. First, the class action relieves plaintiffs from the rule of compulsory joinder where joinder is impracticable. Although the joinder provisions of the Illinois Civil Practice Act have been relaxed, there remain situations where non-joinder will lead to dismissal of an action.\(^{16}\) The number of parties may make joinder impracticable or joinder of parties may be impossible if one of the necessary parties is unborn or out of the jurisdiction. Even if joinder of a large group is accomplished at great time and expense, death of a party may result in abatement and prevent or delay rendering of the decree.\(^ {17}\) In order to maintain the class action, plaintiff will have to show that it is impractical to join all parties.

Second, class actions avoid the multiplicity of lawsuits which would arise if each member of the class filed a separate claim against the same defendant. Therefore, class actions protect the defendant from multiple claims and the judicial system from overwork. Furthermore, there is a basic fairness in obtaining a consistent determination on a question affecting persons having a similar legal situation in a particular forum. Critics reply that class suits create more work for the court system because they result in claims which would not otherwise be pursued. Furthermore, the tremendous amount of judicial time required to manage even one class suit is well-acknowledged.\(^ {18}\)

Third, with today's complex financial and commercial transactions, individuals may not be aware of violations of their rights. Diligent in-

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individuals who file the class action would in effect protect the rights of the less diligent and less informed.

Fourth, in many cases the dollar value of a valid claim may not justify an individual's payment of the non-taxable costs of a legal action, but the value of many individual claims would allow claimants to share the non-taxable costs and risks of litigation. In addition, the magnitude of a class action, as opposed to that of an individual claim, would encourage a lawyer to take a case on a contingent basis because of the possibility of a large recovery and consequently large fees. In short, absence of a class action procedure would prevent many individuals from seeking legal redress of a valid claim because the claim, and thus the fee, is too small.

Fifth, a class action although civil in nature may have a deterrent effect upon a potential wrongdoer because of the sobering thought of a large verdict on behalf of all who have been wronged.

WHAT IS AN ILLINOIS CLASS ACTION?

A class action is a suit by one or more plaintiffs on behalf of a class of individuals who have common rights. All members of the class are before the court by representation. The terms "representative suit" and "class suit" as applied thereto are used interchangeably. Generally, the word "representative" refers to the named individuals bringing the action while the word "class" embraces the entire group which the named persons purport to represent.

It is well settled that plaintiffs may maintain a class action in Illinois. However, the matter of what constitutes a valid class action in Illinois is governed by common law equity rules and precedents, and the shaping of that law has been a slow process, in contrast to the situation in states that have adopted class action statutes.

Therefore, questions of first impression are more likely to appear in Illinois. When they do, an attorney must look outside Illinois and use authority from other jurisdictions. Fortunately, the federal


20. An exception is found at ILL. REV. STAT. ch. 110, § 52.1 (1971), which relates to procedures whereby a class action is compromised or dismissed.
courts have wrestled with many of the procedural difficulties and frustrations which have not yet been presented to the Illinois courts. Many of the federal cases deal with constitutional issues raised by all class actions. Some of the cases deal with jurisdictional issues which vitally concern the Illinois lawyer who seeks a federal forum. Furthermore, although not directly applicable, the reasoning contained in the federal cases interpreting the class action provision in Rule 23 of the Federal Rules of Civil Procedure may serve as a guideline to interpretation of Illinois problems. Therefore, I will refer to federal cases when they are applicable to Illinois class actions by analogy or when the federal courts provide a viable alternative forum.

MAY THE CLASS ACTION BE MAINTAINED?

Before an action is filed, an attorney must analyze the facts to determine whether a class action may be maintained, and if so, who should constitute the class.

If there is only a small group, the attorney may decide to attempt joinder of all the individuals as plaintiffs. If the prospective class is too large, the representatives and members of the class may not have a common interest in the subject matter of the suit or the remedy, and the action will be dismissed. Then what does constitute a valid class action? To sustain a class action the number of the aggrieved parties must be so great that it is impracticable to join them as parties, and the representative and members of the class must have a common interest in the subject matter of the suit and a common interest in the remedy. In addition, most Illinois courts have required a “common fund” and an equitable cause of action. These requirements will be discussed later in this article.

The court in *Moseid v. McDonough* refined the common interest test by establishing additional standards:

Factors to be considered in applying this test are: Whether the claims of all members of the class share a common question of law and fact, such as the existence of a common fund from which relief can be given (*Kimbrough v. Parker*, 344 Ill. App. 483, 486, 101 NE2d 617; *Flanagan v. City of Chicago*, 311 Ill. App. 135, 160, 35 NE2d 545); whether the causes of action of the members of the class arise from the same transaction (*Peoples Store of Roseland v. McKibbin*, 379 Ill. 148, 154, 39 NE2d 995; *Material Service Corp. v. McKibbin*, 380 Ill. 2d 226, 236, 43 NE2d 939); whether one party can adequately represent the rights and interests of all other members of the purported class (*Newberry Library v. Board of Education*, 387 Ill. 85, 90, 55 NE2d 147); whether the number of possible class members renders separate litigation impossible or impractical (*South East National Bank of Chicago v. Board of Education*, 298 Ill. App. 92, 114, 18 NE2d 584); and whether there exists a purely equitable cause of action (*Fetherston v. National Republic Bancorporation*, 280 Ill. App. 151, 160).27

Another independent requisite of class actions is that their entire procedure must meet the requirements of due process of law under the state and federal constitutions. This is particularly significant in class actions because absent members of the class may be bound by the result of the lawsuit even though they are not designated as parties and have not been served with process. Therefore, constitutional questions concerning proper notice to the absent class members, personal jurisdiction, and adequacy of representation may arise. These subjects will also be discussed subsequently.

The Illinois decisions determining when a class action may be maintained are conflicting.28 Following is a discussion of some of the areas of uncertainty.

*Is A Common Fund Required?*

A common fund is a fund from which the members of the class could recover. There is a question whether a "common fund" is required to maintain a class action where monetary relief is requested.

In *Peoples Store of Roseland v. McKibbin*, the court dismissed a class action on behalf of certain sellers of goods to recover improperly collected sales taxes on the ground, among others, that there was no

"common fund" from which members of the class could recover.\textsuperscript{29} There, none of the members of the class, with the exception of the plaintiff, had paid under protest the tax claimed to be illegal. Therefore, the money had been turned over to the State Treasurer without restriction and deposited into the general fund of the State of Illinois. Thus there was no fund in existence. In many subsequent cases in which class actions have been sustained, the courts have been careful to point to the existence of a "common fund."\textsuperscript{30}

However, one Illinois court has indicated that the existence of a common fund was only a "factor to be considered."\textsuperscript{31} Furthermore, in \textit{Reardon v. Ford Motor Co.},\textsuperscript{32} the court denied the right to maintain a class action, but as dicta stated:

\begin{quote}
We do not deem it to be mandatory that there be \textit{in esse} a common fund in every instance if a class action is to be sustained for we are aware of the many cases where such an action was permitted in the absence of such a fund.
\end{quote}

However, the court distinguished cases which had not required a common fund and said that here a common fund was required.

In \textit{Reardon} the court refused to accept the representative's argument to create a common fund of $5,000,000 from the defendant's general assets. The court indicated that this would destroy the "common fund" requirement since one could be created at will from general funds in all tort and contract actions, and that this was not the intent of the case law in Illinois.

There are cases in which class actions seeking only injunctive relief have been upheld in the absence of any "common fund."\textsuperscript{33} In these cases no fund was necessary since monetary relief was not requested. The "common fund" rule severely limits the use of class actions for money damages by consumers and, as will be pointed out, those claimants will in most cases be unable to obtain federal jurisdiction. In my opinion the "common fund" doctrine does not serve any useful purpose. Courts of other commercial states have relaxed or eliminated

\begin{footnotes}
\item[29.] 379 Ill. 148, 39 N.E.2d 995 (1942).
\item[31.] Moseid v. McDonough, 103 Ill. App. 2d 23, 27, 243 N.E.2d 394, 396 (1968). However, the court was careful to indicate that the statutes created a "County Law Library Fund."
\item[32.] 7 Ill. App. 3d 338, 344-45, 287 N.E.2d 519, 524 (1972).
\end{footnotes}
the doctrine. The federal courts do not require a common fund. Illinois should follow their lead and declare the doctrine dead by judicial decision, statute or court rule.

Community of Interest in the Subject Matter

The application of the community of interest rule to particular facts has caused considerable difficulty. One basic issue raised in applying the rule is whether distinct transactions by members of the class with the defendant destroy the required community of interest in the subject matter.

For example, Newberry Library v. Board of Education involved a class action on behalf of holders of school bonds to collect unpaid and overdue interest. The Illinois Supreme Court held that no class action could be sustained even though the bonds were issued simultaneously and were identical in terms because claims of members arose out of separate and distinct transactions. Defenses such as payment or settlement of claim might be good against some class members but not against others. Therefore, there was not a sufficient community of interest in the subject matter. This, of course, is a persuasive argument in a case based on fraud and deceit, where individual questions of liability and defense arise in the defense of the allegations of fraud.

Some writers have argued that the Newberry court evidenced hostility toward class actions as a result of the United States Supreme Court decision in Hansberry v. Lee, which had reversed a decision of the Illinois Supreme Court. In any event the Newberry test regarding community of interest in the subject matter creates a difficult hurdle for representatives.

However, it is difficult to reconcile Newberry with subsequent decisions. In Kruse v. Streamwood Utilities Corporation, Kimbrough v. Parker, Holstein v. Montgomery Ward & Company, and Smyth...
v. Kaspar, the courts allowed class actions where there were distinct transactions with the defendant.

In Harrison Sheet Steel Co. v. Lyons, customers of a retailer brought a class action to recover improperly collected sales taxes. In reply to defendant's argument that there was not a community of interest in the subject matter, the court said:

The company also contends that there is a possibility that individual questions may arise between itself and the members of the class. But the hypothetical existence of individual issues is not a sufficient reason to deny the right to bring a class action. Where it appears that the common issue is dominant and pervasive, something more than the assertion of hypothetical variations of a minor character should be required to bar the action.

Harrison did not overrule any earlier Illinois decision which restrictively interpreted and applied the community of interest requirement, but it permitted the class action to proceed notwithstanding separate and distinct transactions with the defendant. The court recognized that the defendant's right to defend against any individual issues will not be impaired and that the defendant cannot contend that it will suffer any inconvenience by litigating those issues in a single action rather than separate actions. The court required a community of interest, not in every issue of the controversy, but only in the "dominant and pervasive" issue.

Of course, the community of interest in the subject matter could be destroyed because of a significant difference between the representative and members of the class created by separate transactions. For example, if separate transactions in a fraud case created differences in proof of the fact of a representation, its falsity, and reliance, the action would in effect become multiple lawsuits tried under the guise of a class action. Each member of the class would then have to establish his right to recover on the basis of facts peculiar to his own circumstances. The purpose of the class action would be defeated.

For this reason the use of a class action is generally prohibited in a

44. For decisions from other jurisdictions allowing class actions in situations where there were considerable variations in the facts relevant to each member of the class, see Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); Contract Buyers League v. F & F Investment, 48 F.R.D. 7 (N.D. Ill. 1969).
46. Whether there must be individual proof of reliance is subject to dispute. Compare Morris v. Burchard, 51 F.R.D. 530 (S.D.N.Y. 1971), with Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).
mass tort situation. Therefore, the experience of the federal courts in handling the mass tort is enlightening.

Use of the Class Action In the Mass Tort

The Advisory Committee's Notes to the 1966 Amendments of the Federal Rules rejected the idea that a class action is proper where the action is for a "mass tort" because:

. . . significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. (Emphasis added.)

It is possible that the circumstances of a "mass tort" action would be such that the issues of liability and defenses would depend on an identical set of facts for each class member. A class action would be advisable in such a situation. For example, in American Trading and Production Corp. v. Fischbach & Moore, Inc., the Federal District Court for the Northern District of Illinois allowed a class action to proceed against defendants who were allegedly negligent in construction and maintenance of electrical wiring in the McCormick Place exposition center in Chicago. The plaintiff class was composed of commercial firms whose goods were destroyed in a fire which they claim had its origin in the defective wiring. It was precisely because of the identity of proof to be presented by the various plaintiffs on the issues of negligence, proximate causation and defenses to liability that the action was allowed to proceed on a class basis.

It should be pointed out that this action involved a tort which occurred in Illinois, and the action was brought on the basis of diversity of citizenship. There is a serious question of whether this class action would have been permitted in an Illinois court because the complaint asked for only legal relief, and the existence of a common fund could not be demonstrated.

I agree with Professor Wright, who has stated that "the need for more efficient methods of disposing of large numbers of cases arising out of a single disaster has a high priority in improving judicial administration." Hopefully, the Illinois courts will allow a class suit in the mass

49. Id.
tort situation where the issues of liability and defenses depend on an identical set of facts.

Adequacy of Representation

In the landmark case of *Hansberry v. Lee*, the United States Supreme Court held due process of law required adequate representation in all class actions. The Court reversed the Illinois Supreme Court and held defendants were not bound by a prior court decree in which they were absent members of a class because they had not been adequately represented. In other words, absent members are not bound where their interests are antagonistic to or not wholly compatible with those of the representative.

Rule 23(a)(4) of the Federal Rules of Civil Procedure makes it a prerequisite to a class action that the representative parties "will fairly and adequately protect the interest of the class."

In *Eisen v. Carlisle & Jacquelin*, the court applied the adequacy of representation test, stating there must be no collusion between the litigants, and the representative may not have antagonistic interests to the remainder of the class. Furthermore, the adequacy of the representation must be determined by a qualitative rather than a quantitative test because if class suits could only be maintained where a majority of the class appeared, the class action procedure would be severely curtailed.

The ability of the attorney or attorneys for the class may be raised as part of the issue of adequate representation. This view was expressed by the court in *Eisen v. Carlisle & Jacquelin*:

To be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation.

Any attack upon the competency of the lawyer for the class may be strategically disastrous unless the incompetence charged is specific, supported by solid evidence, and so apparent as to be obvious. Otherwise, the court may give a solid endorsement of counsel's ability.

Several suits have been dismissed in Illinois because of a conflict of interest between the plaintiffs and other members of the class. Further...

51. 311 U.S. 32 (1940), rev'd 372 Ill. 369, 24 N.E.2d 37 (1939).
52. See Comment, 21 BOSTON U.L. REV. 132 (1941); Comment, 26 CORNELL L.Q. 317 (1941).
53. 391 F.2d 555 (3d Cir. 1968).
54. Id. at 562.
thermore, a class judgment obtained without adequate representation is subject to collateral attack.\footnote{57}

**Procedural Problems**

Assuming that the facts warrant the filing of a class action, an attorney must anticipate several problems not common to the customary lawsuit involving one plaintiff.

One of the first procedural problems is the preparation of the complaint. At this stage an attorney will have to analyze the facts to determine where he can obtain jurisdiction over the person, jurisdiction over the subject matter and proper venue.

**Jurisdiction**

Generally a final decision in an Illinois class action is binding upon all members of the class,\footnote{58} including class members who are not Illinois residents.\footnote{59} However, a constitutional question is raised by this procedure, i.e., whether a state court having acquired jurisdiction over parties who reside in the state in which it sits can issue an order which will bind nonresident members. Due process requires notice to interested parties sufficient to enable them to appear and be heard,\footnote{60} and due process also imposes territorial limitations on a court's jurisdiction over persons or property.\footnote{61} The interests of a state may enable a state court to extend its jurisdiction over individuals who are beyond its territorial limits,\footnote{62} in which case adequate notice is the primary means of protecting the parties involved.

Although an Illinois court may have jurisdiction over the subject matter and the defendant, the issue is whether the court has power to bind unnamed class members who are nonresidents and who have not

\footnotesize{\begin{itemize}
\item [59.] Kimbrough v. Parker, 344 Ill. App. 483, 101 N.E.2d 617 (1951). In Holstein v. Montgomery Ward & Co., No. 68 Ch. 275 (Cir. Ct. Cook Cty. 1970), the Circuit Court of Cook County entered a judgment in favor of a class composed of residents of 32 different states. In the course of the proceeding, the court rejected a contention that the law of each state must be applied respectively to the claims of members from that particular state.
\item [60.] Hassall v. Wilcox, 130 U.S. 493 (1889).
\item [61.] Pennoyer v. Neff, 95 U.S. 714, 722 (1878), an early case concerning territorial limitations which has been distinguished in many other cases. For relatively recent cases, compare McGee v. International Life Ins. Co., 355 U.S. 220 (1957), with Hanson v. Denckla, 357 U.S. 235 (1958).
\end{itemize}}
been given notice of the suit. The Illinois courts are reluctant to permit a class action under these circumstances. In *Reardon v. Ford Motor Co.*, three plaintiffs, the owners of Ford automobiles, filed a complaint on behalf of all owners of Ford and Mercury automobiles of the model years 1965 through 1969 and owners of 1968 and 1969 Thunderbird automobiles (a class of approximately 4,000,000 individuals located throughout the U.S.). There was an allegation that the front wheel mechanism was defective. The court refused to allow a class action and pointed out:

Three individuals all from the State of Illinois attempt to "stand in judgment" for approximately 4,000,000 other individuals located in every state in the union. Procedural questions, evidentiary questions, and various defenses such as the statute of limitations vary from State to State. We do not believe that three plaintiffs all from the same State should be permitted to "stand in judgment" for 4,000,000 other individuals who may well desire to seek their own redress against the defendant.\(^6\)

Although the jurisdictional question was not faced squarely in *Reardon*, there are at least two arguments in favor of jurisdiction. When the Illinois courts are confronted with a class action involving nonresidents who are not notified, it can be argued that there is jurisdiction over the nonresident members on the theory that the representatives in court are for all purposes agents of the nonresident absentee members.\(^6\)

Furthermore, a court could treat the "common fund" within Illinois as a *res* and exercise in rem jurisdiction. The Supreme Court in *Hansberry v. Lee* indicated in dicta that upon a full and fair consideration of the common question a state court could constitutionally bind nonresident members of a class.\(^6\)

**Federal Jurisdiction**

Federal jurisdiction is an alternative to state jurisdiction and should not be overlooked by an Illinois attorney. If federal jurisdiction can be obtained, a class action may be available even if Illinois courts would not allow it.\(^6\)

Federal courts are of limited jurisdiction and facts creating jurisdiction must be present. The two basic types of federal jurisdiction are

\(^6\) 65. 311 U.S. 32 (1940).

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federal question and diversity of citizenship. Under diversity jurisdiction, state created rights may be enforced since Illinois substantive law applies. However, as will be pointed out later, the instances in which a state created right can be enforced through a class action in federal court are extremely limited.

Two important questions must be considered at the threshold of diversity jurisdiction. First, is there complete diversity of citizenship? Second, does the amount in controversy exceed $10,000 exclusive of interest and costs? Diversity jurisdiction requires that no plaintiff be a citizen of the same state as any defendant. In class actions the rule is that only the citizenship of the named parties is considered in determining whether diversity exists. By a careful selection of the named plaintiffs it is possible to satisfy the requirement of complete diversity of parties.

The second question is whether the individual claims of the class members can be aggregated for the purpose of exceeding the $10,000 amount in controversy requirement. The amount alleged in the complaint is determinative unless it was not made in good faith or recovery of the amount alleged is a legal impossibility. If the claims are joint or common, they may, of course, be aggregated. However, if the individual parties have several and separate interests even though they arise out of the same transaction, the claims cannot be added together to reach the jurisdictional amount. Generally, Rule 23(b)(3) covers factual situations involving several and separate interests.

The affirmation of the rule against aggregation, as a practical matter, emasculated the utility of Rule 23 of the Federal Rules of Civil Procedure in claims based upon state statutes or common law principles, and restricted the utilization of the class action, in effect, to federal question claims. A recent case further limited 23(b)(3) class actions to the narrow situation in which all class members meet the $10,000 requirement.

In Zahn v. International Paper Company, the Second Circuit United States Court of Appeals required that all plaintiffs, named and un-

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73. Fed. R. Civ. P. 23(b)(3) does not allow aggregation of claims.
named, meet the $10,000 jurisdictional amount. Therefore, under Zahn, a diversity action will not be allowed to proceed as a class action when the named members meet the jurisdictional amount but the unnamed members do not. The plaintiffs in Zahn successfully petitioned for a writ of certiorari in the United States Supreme Court.75

If the United States Supreme Court affirms this decision, consumer class actions based on diversity of citizenship will be all but eliminated. It will be extremely rare for all members of a class who meet the jurisdictional requirements and the other requirements of Rule 23 to have a claim in excess of $10,000. Furthermore, if they do, they will probably employ separate counsel to pursue their rights and file individual suits.

In addition, if Zahn is affirmed, it will be impossible for plaintiff's counsel to allege in good faith that each member of the class has a claim in excess of $10,000 when, in all likelihood, neither counsel nor the named plaintiffs would have sufficient knowledge to make such an allegation. They would not know each member of the class nor the amount of his claim. Furthermore, if such a good faith claim is made, the trial court may disregard it as a legal impossibility, as the lower court did in Zahn.76

In federal question cases the amount in controversy must exceed $10,000, and the Zahn case is equally applicable. However, it should be pointed out that there are a number of special jurisdictional statutes which are available without regard to citizenship or the amount in controversy, including but not limited to antitrust,77 securities,78 civil rights,79 collective bargaining,80 and truth-in-lending.81 Therefore, if the case arises under a federal statute, an attorney should search the special jurisdictional provisions of federal law.

Venue

In Illinois every action must be commenced in the county where any defendant who is joined in good faith resides, or the county where the cause of action arose.82 A private corporation is a resident of the

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74. 469 F.2d 1033 (2d Cir. 1972), cert. granted, — U.S. —, 93 S. Ct. 1370 (1973).
81. ILL. REV. STAT. ch. 110, § 5 (1971).
county where it has a registered office or other office or is doing business.\textsuperscript{88} Therefore, venue for the class action is the same as for all other actions in Illinois since the residence of the named representative is not considered. Choice of the named representative will not be a factor in proper venue.

If federal jurisdiction is founded on diversity of citizenship, suit may be brought “only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.”\textsuperscript{84} If jurisdiction is based on the presence of a federal question, the suit must be brought in the judicial district “where all defendants reside, or in which the claim arose.”\textsuperscript{85} For purposes of venue a “corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business.”\textsuperscript{88}

Residence of the plaintiffs is considered in federal class actions based on diversity of citizenship. Therefore, in diversity cases suit may be brought in any of several judicial districts. However, this is not possible in federal question suits because the residence of the plaintiffs is of no consequence. The residence of only the named parties is considered in applying the federal venue laws.\textsuperscript{87}

**Should the Complaint Be Filed In Chancery Or In Law?**

The use of the class action is truly equitable.\textsuperscript{88} It has developed in equity courts in Illinois, and at least one author states that “the use of the class representation technique is limited to courts of equity . . . there can be no class or representation suits in a law action.”\textsuperscript{89} Many cases have held that a class action is limited to courts of equity in Illinois.\textsuperscript{90} This rule raises several problems for an Illinois lawyer which need elaboration.

The Illinois Civil Practice Act is applicable to all civil proceedings both at law and equity, but as to all “matters not regulated by statute or rule of court, the practice at common law and in equity prevails.”\textsuperscript{91}

\textsuperscript{83} ILL. REV. STAT. ch. 110, § 6 (1971).
\textsuperscript{88} J. Story, Equity Pleadings 102 (10th ed. 1891); Comment, 4 J. Marshall J. Prac. and Proced. 217, 220 (1971).
\textsuperscript{89} Fox, Representative Actions and Proceedings, 1954 U. Ill. Law Forum 94, 97-98.
\textsuperscript{91} ILL. REV. STAT. ch. 110, § 1 (1971).
Furthermore, the 1964 Judicial Article eliminated the legal and equitable sides of the Illinois Circuit Courts for jurisdictional purposes. The merger of law and equity applies to procedure but does not destroy the differences between substantive common law and equity. Therefore, a judge must still apply equitable principles to equitable rights and legal principles to legal rights.

For a court of equity to exercise jurisdiction, the relief requested must be equitable in character and the remedy at law must be inadequate. Will a court of equity take jurisdiction of a class action complaint which prays for money damages? Illinois courts have held that a class action based on fraud, seeking only damages, is a case at law and will not lie. Of course, if a court of equity has taken jurisdiction over equitable matters, it may grant relief which is incidental to other matters before it in order to do complete justice between the parties. For example, damages may be granted as an incident to the granting of relief of an injunction. Therefore, plaintiff's attorney may include a request for money damages as long as it is incidental to the equitable relief. Private attorneys, in general, are unwilling to prosecute a class action complaint praying solely for injunctive relief because even if injunctive relief is granted there would be no fund to pay attorney's fees.

Before leaving this rule, however, it should be noted that Federal Rule 23 is applicable to actions solely for damages. Therefore, if all jurisdictional requirements can be met, an attorney can resort to the federal court and request only legal relief.

The equity courts possess possibilities which should not be overlooked. For example, temporary and permanent injunctive relief will prevent future damage to all named and unnamed plaintiffs. The temporary injunction is important because the consumer needs relief immediately. The final outcome of the lawsuit could be many years in coming. A preliminary injunction can be obtained in Illinois, but the defendant will petition the court to require the plaintiff to provide a bond to secure the defendant against any damages he may incur. If the bond is

required, it creates problems for the plaintiff's attorney. To a low-income consumer the cost of the bond may be beyond his means, or the risks inherent in filing a bond may be rejected by the named plaintiffs. In Illinois the requirement of a bond prior to the issuance of a temporary restraining order or a preliminary injunction is within the discretion of the court.\(^9\)

Another bonus available in equity courts is that they have great flexibility in tailoring their remedy to the need of particular circumstances. In addition, the enforcement techniques operate to coerce compliance by acting on the person of the wrongdoer and that is likely to be effective.\(^9\)

Special problems relating to pleading and jury trial in courts of equity will be treated subsequently.

**Notification of Pendency of the Action**

No Illinois cases were found which require notice to the class of the pendency of the suit prior to determination of the issues. If required at all, it is only necessary in a settlement or dismissal situation.\(^9\)

However, some question is raised concerning the constitutionality of a failure to notify the class of the pendency of the action.\(^9\) Although not strictly a class action, in *Mullane v. Central Hanover Bank & Trust Co.*,\(^10\) an action by a trustee for judicial settlement of the trustee's accounts, it was held that notice by publication to the beneficiaries was not sufficient as to those beneficiaries whose names and addresses were known to the trustee. The Court held:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Emphasis added.]

In *Eisen v. Carlisle & Jacquelin*,\(^10\) the Second Circuit United States Court of Appeals, quoting *Mullane*, held that:

> Notice, as an integral part of due process must be “reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”

\(^9\) ILL. REV. STAT. ch. 69, § 9 (1971).
\(^9\) ILL. REV. STAT. ch. 110, § 52.1 (1971).
\(^9\) Comment, 4 CREIGHTON L. REV. 268 (1971).
\(^10\) 391 F.2d 555, 568 (2d Cir. 1968).
However, there is some support for the Illinois rule in *Northern Natural Gas Co. v. Grounds*,\(^\text{102}\) where the court quoted from *Dolgow v. Anderson*:

The Supreme Court has indicated that adequacy of representation, not form of notice, is the crucial consideration. See *Hansberry v. Lee . . .* ("this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.")\(^\text{103}\)

If notice is required it should be the best notice practicable under the circumstances.\(^\text{104}\) Even though it may be argued that notice of the pendency of the action is not required to bind absent class members, proper notice will greatly strengthen the defendant's argument that the absentee is bound by an adverse judgment.

*Eisen III*\(^\text{105}\) is a significant case in this regard. There, an antitrust class action was filed against the New York Stock Exchange and major odd-lot dealers claiming that the odd-lot differential was excessive. The class consisted of some six million odd-lot investors. The trial court ordered that actual notice be given to those persons who had 10 or more odd-lot transactions (some 2,000 persons) and notice would be sent to 5,000 additional class members selected at random. The Second Circuit United States Court of Appeals rejected that formula and required that actual notice be given all identifiable class members. At least 2,250,000 could be identified and they resided in every state of the United States and most foreign countries.

The United States Supreme Court has granted *certiorari* and the case is pending at the time of this writing.\(^\text{106}\) If the Supreme Court affirms the decision on constitutional grounds, it will control the requirement of notice in Illinois class actions.

**Who Pays for the Cost of Notification?**

If notice is held to be a constitutional requisite, the question of who does it and who pays for it arises. This is a much more important question than it would appear at first blush. In *Eisen v. Carlisle & Jacquelin* (*Eisen III*), the court stated:

If identification of any number of members of the class can readily

\(^{103}\) (emphasis supplied) 43 F.R.D. 472, 500 (E.D.N.Y. 1968).
\(^{105}\) Eisen v. Carlisle & Jacquelin, — F.2d —, Nos. 72-1521, 30934 (2d Cir. May 1, 1973).
be made, individual notice to these members must be given and Eisen, the plaintiff, must pay the cost. If this cannot be done, the case must be dismissed as a class action.\textsuperscript{107}

In that case the names and addresses of approximately 2,250,000 class members were available. Members of the class resided in every state of the United States and most foreign countries. The cost of notification would have been enormous. The trial court required the defendant to pay 90% of the cost of notice to selected members of the class. The United States Court of Appeals for the Second Circuit reversed the decision and required actual notice to all identifiable members of the class. Furthermore, the plaintiff was required to pay the cost of notice or obtain a bond to cover the cost of notice.

In short, the plaintiffs were ordered to pay the cost of actual notice to all identifiable members of the class. They were unable to do so and, therefore, the case was dismissed. As noted above, the United States Supreme Court has granted \textit{certiorari}.

Pursuant to \textit{Eisen III} the cost of providing notice to the class could be taxed as a cost after judgment is rendered. In most cases the defendant will be able to afford the cost of notice to the class members. If the suit is won by the plaintiffs, no adjustment will be necessary. However, if defendant prevails, it will have a right to recover the cost of notice as a taxable cost. If the plaintiff is financially unable to pay the cost, the defendant will have a right without a remedy. Therefore, the court may require the plaintiff to pay the cost of notice or post a bond to cover the cost of notice if the defendant is victorious.

As in \textit{Eisen III}, the cost of the bond may be beyond the means of the named representative, and therefore such a requirement will place the class action beyond his reach. It may be argued that such a requirement violates the equal protection clause as an invidious discrimination between rich and poor.

\textit{Necessary Allegations In Class Suits}

In Illinois the general rules of pleading govern class suits. The complaint must contain a plain and concise statement of the cause of action\textsuperscript{108} and should affirmatively allege facts which indicate that the representative party has a right to maintain the class action and that he filed the action on behalf of all members of the class described in the

\begin{footnotesize}
\begin{enumerate}
\item[108.] ILL. REV. STAT. ch. 110, § 33(1) (1971).
\end{enumerate}
\end{footnotesize}
Particular attention should be given to the amount or relief prayed for in the complaint because the action is brought on behalf of all plaintiffs in the class.

The caption should contain the language “John Doe, individually, and on behalf of all other persons similarly situated.” The body of the complaint should include the same allegations.

Other allegations which should be included in the complaint are the following:

1. That no adequate remedy at law exists;
2. That the issues present common questions of law and fact between the named plaintiff and other members of the class;
3. That if individual actions were required to be brought by each class plaintiff, a multiplicity of suits would result, causing a great hardship to the defendant, the parties and the courts;
4. That it is impractical to join all parties;
5. That a common fund exists (in cases requesting a monetary recovery).

Of course, as previously pointed out, the mere designation by the pleader of his cause of action as a class suit does not make it a class suit. The court will examine the facts to ascertain whether it in fact properly constitutes a class suit.110

Preliminary Hearing to Determine Propriety of Class Proceeding

Whether or not orders of the court will bind absentee members of the class should be determined at an early stage of the proceedings. Ordinarily the defendant will file a motion to dismiss the class action, but if defendant does not take such action, the court on its own motion should raise the issue. If the court allows the class action, all future proceedings bind the members of the class. If the court refuses the class action, the named plaintiffs may proceed or may attempt to appeal the order.

Appealability of an Order Denying Class Suit Treatment

Under traditional analysis an order denying class suit treatment is merely interlocutory and not appealable because it is not final. The representative would either dismiss the suit or proceed on his individual claim to final judgment and then appeal. However, it could be argued

that the order dismissing the class action operates as the dismissal of a claim as to one party. Therefore, treating the class as a different party from the representative, the order is appealable under Illinois Supreme Court Rule 304(a) if the trial court will make an express written finding that there is no just reason for delaying appeal.\textsuperscript{111} Such an order is within the discretion of the trial judge.\textsuperscript{112}

Rule 304(a) provides that if the court enters a \textit{final} order as to one or more but fewer than all the parties and in addition makes an express written finding that there is no just reason for delaying an appeal, the order may be immediately appealed. In the absence of such a finding, any judgment that adjudicates the claims of fewer than all the parties is not appealable.

Another possible authority for an immediate appeal from an order dismissing a class action is Illinois Supreme Court Rule 308(a). Under this rule the trial court must state in writing that the order involves a question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. If the trial court makes this determination, permission to appeal is within the discretion of the appellate court.

Yet another possibility for obtaining an appeal from such an order is to argue that the Illinois courts should adopt the "death knell" doctrine applied by the Second Circuit United States Court of Appeals.\textsuperscript{113} This doctrine is based on the fact that the denial of class treatment in effect strikes the "death knell" of the action since the dollar amount of the named plaintiffs' claim will not justify further proceedings.\textsuperscript{114} There is a division among the federal circuits concerning the "death knell" theory of appealability.\textsuperscript{115} Furthermore, many troublesome problems arise in applying the doctrine, including a determination of the minimum amount in controversy which would sound the "death knell."

Assuming immediate appellate review is not allowed, the named plaintiffs are unlikely to continue with the action if their monetary interest is not sufficient to justify it. Then the propriety of the trial court's ruling on the class action will never be reviewed. As a result

\textsuperscript{111} ILL. REV. STAT. ch. 110A, § 304(a) (1971).
\textsuperscript{112} Statistical Tabulating Corp. v. Hauck, 5 Ill. App. 3d 50, 282 N.E.2d 524 (1972).
\textsuperscript{113} Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966); Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971).
\textsuperscript{114} Note, 39 U. Chi. L. Rev. 403 (1972).
\textsuperscript{115} The Third Circuit U.S. Court of Appeals does not accept the "death knell" doctrine. Hackett v. General Host. Corp., 455 F.2d 618 (3d Cir. 1972).
the class members will be deprived not only of the opportunity to present their claims but of the opportunity to argue to the appellate court that they meet the standards for class actions in Illinois.

Statute of Limitations

The application of the statute of limitations to class actions may raise troublesome problems. Assume that a class action is filed just prior to the expiration of the statute of limitations. After it has expired, the court determines that the class action is improper and that the named plaintiff may only bring the action on his own behalf. X, a member of the class, subsequently files a complaint or attempts to intervene in the original action. The defendant files a motion to dismiss under Section 48 of the Civil Practice Act116 alleging that the claim is barred because it was not commenced within the time allowed by law. This factual situation raises several issues.

Since the action is filed in chancery, statutes of limitations applicable to actions at law are not strictly applied.117 However, limitations fixed by statute usually are followed by chancery as a convenient measure for determining the length of time which ought to operate as a bar where there is a corresponding legal right or remedy.118 Therefore, where a portion of the relief requested is legal, the courts will apply the statute of limitations applicable to the particular legal right. The limitations period for a class action would thus depend upon the underlying theory of the claim. For example, an action for a breach of an oral contract would be five years,119 while a personal injury action is two years.120

In Illinois, the statute dealing with limitations on personal actions is applicable to a suit which is dismissed other than on the merits after the time for commencing the action has expired. The statute provides in pertinent part as follows:

In the actions specified in this Act or any other act or contract where the time for commencing an action is limited, . . . if the plaintiff is nonsuited, or the action is dismissed for want of prosecution then, whether or not the time limitation for bringing such

an action expires during the pendency of such suit, the plaintiff may commence a new action within one year or within the remaining period of limitation, whichever is greater, after the plaintiff is nonsuited or the action is dismissed for want of prosecution.\footnote{121}

The purpose of this section is to promote fair play and provide decisions upon the merits of the controversy.\footnote{122} The word “nonsuit” as employed in the statute, therefore, applies to all involuntary judgments leaving the merits untouched.\footnote{123} Of course, if a new suit is filed, it must be based on the same cause of action.\footnote{124}

Therefore, if a class action is dismissed after the limitations period has expired, a member of the class could arguably file his individual action within one year of the dismissal relying upon the section quoted above. After all, his action was “nonsuited,” the decision was not upon the merits, and the new suit is based on the same cause of action.

However, the defendant could argue that class members who had no knowledge of the class suit cannot claim they vicariously filed suit and were nonsuited. He could argue that they are barred because the purpose of the statute is to protect those plaintiffs who actually filed suit and were deprived of a trial on the merits. The absentee members did not know of the suit, and if it had not been filed, they would have been barred by the limitations period. They should thus be barred as though no suit in their interest had ever been filed.

Those members of the class who had notice of the claim within the limitations period would argue that they reasonably relied upon the filing of the class action to protect their rights, intending to be bound by the results in such action.\footnote{125}

No Illinois case directly in point has been found, but a recent federal case dealt with this issue.\footnote{126} There, the court indicated it would allow members of the class an opportunity to present proof of reliance upon the pendency of the purported class action sufficient to toll the statute of limitations. This would be allowed if the reason for the negative determination arose because of “housekeeping” considerations. How-

\footnote{121} ILL. REV. STAT. ch. 83, § 24a (1971).
\footnote{123} 25 I.L.P. Limitations § 121 at p. 300 (1956); Sachs v. Ohio Nat. Life Ins. Co., 131 F.2d 134 (7th Cir. 1942).
\footnote{124} Gibbs v. Chicago Title and Trust Co., 79 Ill. App. 22 (1898); Buttermann v. Steiner, 343 F.2d 519 (7th Cir. 1965).
ever, if the reason stated by the court for refusal of the class action was that common questions did not predominate over individual questions, no member of the class would be allowed to file a subsequent action.

In my opinion the reason given by the court in denying the class action is not relevant to a determination of whether or not to allow claims after the statute of limitations has expired. It only creates an additional complication in the administration of class actions. For example, what would happen if the court gave a number of different reasons, or none at all, for denial of the class action? The statute should be tolled during the pendency of the class action for those members who relied upon the filing of the class action. To rule otherwise might be a denial of due process of law.

**Suits by Class Members While Class Action Is Pending**

In Illinois there is precedent to dismiss\(^{127}\) or enjoin\(^{128}\) a private suit by an unnamed member while the class action is pending. The purpose of this rule is to protect the defendant and the judicial system from a multiplicity of suits. However, the rule is not applicable to intervention.

**Intervention by Class Members**

Class members may file a petition to intervene as complainants at any time before the cause is finally determined.\(^{129}\) Section 26.1(1)(b) of the Illinois Civil Practice Act allows intervention as a matter of right “when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by a judgment, decree or order in the action.” However, an unnamed member of the class will have to argue that the representative is not adequately protecting his interests, because the representative has a different or adverse interest. Of course, such an argument would be an attack on the propriety of the class action since a class action judgment without adequate representation is subject to collateral attack.\(^{130}\)

In *Fiorito v. Jones*, the Illinois Supreme Court affirmed a lower court ruling which refused a petition by an unnamed member of the class to intervene under Section 26.1(1)(b) because the petitioner

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\(^{129}\) Lee v. City of Casey, 269 Ill. 604, 109 N.E. 1062 (1915).


\(^{131}\) 19 Ill. 2d 15, 256 N.E.2d 833 (1970).
could not show that the representation was inadequate. In most cases petitioners will not be able to meet this burden and the petition will be denied. If they do meet the burden the class action may be dismissed.

Section 26.1(1)(c) of the Illinois Civil Practice Act allows intervention as a matter of right when the applicant will be adversely affected by a distribution or other disposition of property subject to the control of the court.\(^{132}\)

A class member could argue that he has a "right" to intervene under that section if the court has a "common fund" subject to its control and the class member could be adversely affected by a distribution of the property. However, the defendant could reply that the intervenor is already an unnamed party and the attorney for the class represents him. In my opinion the court will not allow intervention under this section.

Section 26.1(2)(b) provides that an applicant may in the discretion of the court be permitted to intervene when an applicant's claim and the main action have a question of law or fact in common. Of course, if the class action is allowed, the applicant must have a question of fact and law in common with the claim made by the representative. However, the court is not likely to grant the petition because it would add to the complexity and create additional problems in management of the class, which in all likelihood is already difficult.

If the court allows intervention, whether discretionary or as a matter of right, the court may determine that the applicant shall be bound by prior orders and shall not interfere with the control of the litigation.\(^{133}\) In many cases, of course, such an order is advisable to avoid undue delay and to maintain orderly discovery and trial.

**Motion to Dismiss and Summary Judgment**

The Illinois law governing a motion to dismiss for failure to state a cause of action\(^ {134}\) and motion for summary judgment\(^ {135}\) is applicable to a class action. Where the named plaintiffs have no individual cause of action any attempted class action must fail.

The defendant is likely to use a motion to dismiss or motion for summary judgment to dispose of the suit at an early stage without a trial. Indeed these procedural devices are the answer to the critics who

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\(^{135}\) ILL. REV. STAT. ch. 110, § 57 (1971).
contend class actions encourage a frivolous claim to be filed against a large wealthy corporate defendant in hope that the named plaintiffs can obtain a settlement because of the enormous risk exposure. If the defendant cannot sustain the motion to dismiss nor the summary judgment, sympathy for the defendant is eroded because the court has found that the complaint states a cause of action and that there is a genuine issue of material fact to be tried.

In addition, a defendant may file a motion to dismiss on the ground that plaintiff lacks the capacity to maintain a class suit. The alleged lack of legal capacity must be determined from the face of the pleadings and affidavits filed under Section 48 of the Civil Practice Act.

**Discovery**

Class members having submitted to the jurisdiction of the court can be required to submit to discovery, which may involve a good deal of work by class members. Therefore, the timing and extent of discovery from absent class members may be a contested issue in the case. If the discovery is justified and not complied with, the sanctions may be severe. In *Brennan v. Midwestern United Life Insurance Co.*, the court dismissed claims of members of the class who refused to produce requested documents and to answer interrogatories.

Illinois Supreme Court Rule 219(c) would appear to be applicable to absent class members and to allow dismissal of the action for non-compliance with any discovery order. However, counsel for the defendant should be required to show that the information is required for preparation for trial and that the discovery devices are not used to take unfair advantage of absent class members. Subjecting absent class members to discovery has been considered improper by some federal courts.

**Pre-Trial Procedure**

The trial will consist of numerous problems, including the procedure

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139. 450 F.2d 999 (7th Cir. 1971).
140. *See also* Note, 21 J. PUB. LAW 189 (1972); Annot., 13 A.L.R. Fed. 255 (1972); *Note, 40 Fordham L. Rev. 969* (1972).
Illinois Class Actions

for joint determination of common questions of law and fact followed by individual hearings as to the damages of each class member. Such a procedure may be worked out in the pre-trial conferences between court and counsel. The pre-trial conference in a class action should simplify the issues of law and fact before the court and provide a procedure for separate determination of liability and damages. The court may notify absent class members of the results of the pre-trial conference and require them to accept the procedure determined in the pre-trial conference or to opt out of the class and maintain their own action.

Settlement

Section 52.1 of the Illinois Civil Practice Act provides that a class action shall not be "compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct." This is the only statutory provision directly relating to Illinois class actions. It was adopted to insure judicial control over class action settlements and to prevent collusion between the named plaintiffs and defendant. Prior to the adoption of Section 52.1, plaintiffs could force the large corporate defendant into a settlement with only the named plaintiffs. The case would be dismissed and that would be the end of it. No court approval was required.

Under current procedure the court should require the parties to disclose such matters as the total dollar amount of the settlement, the allocation of the settlement among different classes or sub-classes, the plan of distribution to class members and attorney's fees and expenses.

The defendant will seek to avoid notice to the class of a settlement or compromise with only the named plaintiffs. Any notice will encourage unnamed class members to file an action on behalf of the class or an individual action.

The Federal Rules of Civil Procedure require notice to all class members of any proposed dismissal or compromise, even if there is a voluntary dismissal or a local court rule permitting dismissal for

143. ILL. REV. STAT. ch. 110A, § 218 (1971).
144. ILL. REV. STAT. ch. 110, § 52.1 (1971).
145. FED. R. CIV. P. 23(e) provides that: "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."
lack of prosecution. The purpose is to assure that notice is given to any person whose rights would be affected by a dismissal or compromise. Therefore, notice is not required when the dismissal is involuntary because an involuntary dismissal presumably cannot involve collusion or benefit the plaintiffs at the expense of the remaining class members.

Should notice be waived if a settlement occurs before there is a determination that a suit is maintainable as a class action? The matter has not been decided in Illinois, but it has in the federal courts. *Philadelphia Electric Co. v. Anaconda American Brass Co.* held that a case brought as a class action is a class action from the outset. It may not be dismissed or compromised without notice to class members. This rule prevents a strike suit to obtain a settlement from the defendant prior to determination of whether or not it is a proper class action.

If a settlement or compromise is entered into, the parties should follow the provisions of Section 52.1 of the Illinois Civil Practice Act. A written motion should be presented to the court. Generally the compromise or settlement will be bilateral, with all parties appearing, obviating the necessity of notice of the hearing. The order must provide for approval of the court and either provide for notice of the settlement to the class or for waiver of such notice. Furthermore, if notice is waived, the order should provide the reasons for waiver. A mere statement of waiver “for good cause shown” may not be enough.

Illinois is one of the only states to allow a court to excuse notice to the absent class members. Since the vast majority of class actions are disposed of prior to trial by voluntary or involuntary dismissal, the procedural regulation of dismissals is essential to the proper functioning of the class action. In my opinion Section 52.1 should be amended to require notice under all circumstances, including involuntary dismissals.

**Trial**

The traditional view is that suits involving class actions are equitable, and therefore, there is no right to a jury trial. However, the Second Circuit United States Court of Appeals recently held that the mer-
ger of law and equity allowed the issue of the right to sue in a derivative action to be decided in equity without a jury, and the substantive elements of the claim itself to be decided by a jury.\textsuperscript{150} The United States Supreme Court has indicated by dicta that class action plaintiffs may obtain a jury trial on legal issues.\textsuperscript{151} This reasoning should be applied in Illinois.

Section 63 of the Illinois Civil Practice Act grants a court discretion to allow legal issues to be tried by a jury even though the case is pending in equity.\textsuperscript{152} Under Illinois Supreme Court Rule 232(b) if a court determines that the legal and equitable issues are severable, the legal issue must be tried by a jury if a jury has been properly demanded.\textsuperscript{153} Therefore, if a plaintiff's attorney desires a jury, he should file a jury demand with the complaint. If he does not, a jury will be waived.

The bifurcated trial which may result in the separation of the issues of liability and damages may lead to challenge. Of course, there is no constitutional restriction against trying different issues to the jury at separate times. Furthermore, it is not constitutionally required that all of the issues be presented to the same jury.

Who controls the litigation? If one or more parties have intervened, the question of which attorney shall have control of the litigation, including the handling of evidence, objections, cross-examination, and motions must be decided by the court prior to the trial.

\textit{Effect of Judgment}

Provided that the necessary requisites for a class action have been met, an absent class member is bound by the result of the case,\textsuperscript{154} even if the absent class member later attempts to raise new grounds not considered in the earlier case.\textsuperscript{155} Of course, if there is a conflict of interest between the representative and members of the class, the action is subject to collateral attack.\textsuperscript{156} However, it is not enough to allege that some members of the class wish to assert their rights while others do not. For example, one or more taxpayers of a community, suing on behalf of all, may challenge the validity of a public expenditure. A good many of the taxpayers may prefer that their rights

\textsuperscript{150} Farmers Co-operative Oil Co. v. Socony-Vacuum Oil Co., 43 F. Supp. 735 (N.D. Iowa), \textit{modified}, 133 F.2d 101 (8th Cir. 1942).
\textsuperscript{152} ILL. REV. STAT. ch. 110, § 63 (1971).
\textsuperscript{153} ILL. REV. STAT. ch. 110A, § 232(b) (1971).
\textsuperscript{154} Fisher v. Capesius, 369 Ill. 598, 17 N.E.2d 563 (1938).
\textsuperscript{155} Schmidt v. Modern Woodmen of America, 261 Ill. App. 276 (1931).
not be enforced because of their interest in having the expenditure made. Yet no one doubts the propriety of bringing such a suit as a class action. 157

**Attorney's Fees**

The court in Illinois has the power to grant and determine the amount of the attorney's fees. Factors which courts consider in awarding attorney's fees to successful plaintiffs in contingent representative litigation include: the fee contract between the representatives and attorneys; the economic benefit created for the class; the time, labor and skill required; the intricacy, novelty and complexity of the issues; the skill and resourcefulness of opposing counsel; the risks inherent in contingent fee; and the benefits accruing to the public. 158

Representative fees in Illinois class actions have been large. Some examples are as follows: in *Ives v. City of Chicago*, 159 a taxpayers' class action, the fund created was $811,950.00, fees allowed $249,957.62; in *Hofing v. Willis*, 160 a right to inherit case, the fund was $145,875.00, fees allowed $48,625.00; in *Moseid v. McDonough*, 161 a library fee case, the fund was $679,135.00, fees allowed were $195,000.00.

After a settlement or a judgment in favor of the plaintiffs, notification must be sent to all of the members of the class. After receiving notice the members of the class can appear, establish their right to be included in the class, and prove up their damages. If the class is ordered to pay the attorney's fees, members of the class can object to the amount of the fees at that time.

**Who Pays the Fees**

The general rule in Illinois and other states is that the named party in an ordinary action, whether winner or loser, pays for the services of his own counsel, unless a statute or contract provides otherwise. 162 One of the exceptions to the general rule arises in class or representative suits where persons other than the named parties may be ordered to pay a portion of the fees.

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159. 30 Ill. 2d 282, 198 N.E.2d 518 (1964).
There are three potential sources of payment for the attorneys of the class:

1. The named representatives of the class;
2. The entire class that benefits from the judgment; and
3. The losing opponent of the class.

An attorney representing a class is entitled to recover from those with whom he has a valid contract, in accordance with the particular contract's terms. However, the named representatives are generally ruled out as a source of recovery for meaningful attorney's fees because class litigation is generally of long duration and great complexity and attorney's fees are likely to exceed the monetary recovery of the representatives. Furthermore, it would be unjust to allow other members of the class to accept the benefit of the representatives' attorney without sharing the burden of his fees.

The named representatives may bear all or a portion of attorney's fees where the litigation is unsuccessful or the remedy sought—an injunction or declaratory judgment—does not yield money damages. Clients and attorneys should recognize these possibilities and provide for them in a written retainer contract. Of course, many of the written fee contracts would be based upon a contingent fee except where the remedy sought is not monetary.

The court, in the exercise of its historic equity jurisdiction, may direct fees to be paid from the fund created for the benefit of the class. This is the most common source of attorney's fees. However, if the common fund is used for payment of attorney's fees, the amount of the plaintiff's recovery will be reduced. Furthermore, in many cases defendants are motivated to protract litigation in the hope that the representative parties will realize that after payment of attorney's fees based upon time and expense, the members of the class will receive a very small recovery.

Although attorney's fees are not ordinarily recoverable as costs from an adversary defendant in a class action, courts have allowed recovery of attorney's fees from losing defendants in class actions in exceptional circumstances where defendants are engaged in wilful and persistent bad faith tactics.  

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165. Bell v. School Board of Powhatan County, 321 F.2d 494 (4th Cir. 1963); Dyer
If the opponent of the successful class action is required to pay all or a portion of the attorney's fees, in the sound discretion of the court, the temptation to "outlast" the plaintiff and his attorney would be gone. In Illinois the court does have the discretion to tax attorney's fees to the defendant in an appropriate case.

Section 41 of the Illinois Civil Practice Act allows a party to recover reasonable expenses and attorney's fees if denials are made without reasonable cause and not in good faith and are found to be untrue.\textsuperscript{166} This section should discourage defendants from protracting litigation by making bad faith denials in their pleadings.

Of course, as a part of the settlement the parties may agree that the opponent of the class action will pay the plaintiff's attorney's fees. In the recent case of \textit{Gowdy v. Commonwealth Edison Company},\textsuperscript{167} the proposed settlement notice indicated that the parties agreed that the defendant would pay the plaintiff's fees. The amount was to be determined by the court.

**CONCLUSION**

Several conclusions can be drawn from this review of the body of law governing Illinois class actions. First, the Illinois courts have restrictively interpreted class actions at a time when the need for class actions is increasing. Second, the Illinois legislature or the Supreme Court should adopt a rule to govern this matter. Third, there are alternatives to the class action which should be considered.

Implicit in the foregoing discussion of class actions is the realization that the Illinois courts have found themselves in a dilemma created by the procedural device of class actions. On the one hand the need for class actions is recognized, but on the other hand the complexity of constitutional and procedural problems makes some class actions unmanageable.

The courts and most legislatures recognize the need for the resolution of multiple-party controversies in one lawsuit. The class suit eliminates repetitious litigation and provides small claimants with a superior method for obtaining redress. Thus, the class action serves the goal of achieving judicial economy and justice. As our society has increased in size and become more sophisticated in its business relationships, consumer and conservation groups also have become aware of the

\textsuperscript{166} ILL. REV. STAT. ch. 110, § 41 (1971).
\textsuperscript{167} No. 70 CH 3254 (Cir. Ct. Cook Cty. 1970).

availability of the class action. As a result of this awareness, class actions are becoming more common in Illinois and other jurisdictions.

The Illinois courts must adopt a less restrictive view toward the use of class actions. The need for a forum to handle class actions is evident as a result of the Snyder and Zahn decisions which have closed the federal courts to most class actions based on state created rights.

However, courts and attorneys have had difficulty handling the problems created by class actions which have been reviewed in this article. In some cases the problems have been so severe that the courts have decided to term the class action unmanageable and dismiss it. These problems are particularly evident in Illinois where class actions are decided on a case-by-case basis, and one Illinois court has indicated that the law is confusing.

The failure of Illinois to adopt a statute or Supreme Court Rule to govern class actions is subject to criticism; prior judicial opinions do not answer the many unique problems of class actions facing modern-day attorneys. Therefore, Illinois courts and attorneys are particularly in need of some definitive guidelines. Since Illinois has codified its major rules of procedure in the Civil Practice Act, it is a mystery why it has not so codified the rules concerning class actions. Failure to draft a statute or Supreme Court Rule results in the continued injustice of allowing rights to be violated without making available an effective remedy. The uncertainty of present Illinois law and the possible abuse of the class action procedure is thereby condoned.

The Illinois legislature or Supreme Court should act in this area, drawing upon the experience of Federal Rule 23 and statutes of other state jurisdictions. Perhaps Illinois should formulate alternatives to multiple party litigation, such as joinder, intervention, consolidation and use of the test case. However, those particular devices have been considered by other courts and found unacceptable.

There are further alternatives to class actions which should be ex-

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168. ILL. REV. STAT. ch. 110, § 1 et seq. (1971).
170. ILL. REV. STAT. ch. 110, § 1 et seq. (1971).
171. There are four basic treatments of class actions: (1) the common law (Illinois); (2) the 1948 Field Code (New York and California); (3) the 1938 Federal Rules of Civil Procedure (Michigan); (4) the 1966 revision of the Federal Rules of Civil Procedure (e.g., Arizona). See Comment, 4 J. MARSHALL J. PRAC. AND PROCED. 218 (1971). For a survey of the variations in each state jurisdiction see Starrs, The Consumer Class Action—Part II: Considerations of Procedure, 49 BOSTON U. L. REV. 407 (1969).
plor ed. For example, Judge Medina's opinion in Eisen III contained dicta of some significance:

The procedure involved in applying for prospective injunctive relief is relatively simple and inexpensive, social and economic reforms may be implemented and an end put to illegal practices with far more benefit to the community than that derived from minimal or token payments to individual members of a class. Attorney fees in such cases should also provide adequate incentive to counsel for the representative or representatives of the class.173

This statement was derived from a comment by Chief Judge Friendly criticizing present class action procedure:

Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims. The important thing is to stop the evil conduct. For this an injunction is the appropriate remedy, and an attorney who obtains one should be properly compensated by the defendant, although not in the astronomical terms fixed when there is a multi-million dollar settlement. If it be said that this still leaves the defendant with the fruits of past wrong-doing, consideration might be given to civil fines, payable to the government, sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or, what is more likely, produce blackmail settlements. This is a matter that needs urgent attention.174

Hopefully, the foregoing discussion of class actions will direct the efforts of the Illinois legislature and the Illinois Supreme Court toward constructive reform of the law governing class actions or the development of acceptable alternatives to class actions as we presently know them.

Author’s note:

The United States Supreme Court affirmed the decision of the Second Circuit Court of Appeals in Zahn v. International Paper Company, 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973). In a six to three decision written by Mr. Justice White, the Court, in effect, held that each individual plaintiff's claim in a Rule 23(b)(3) class action must satisfy the $10,000 jurisdictional requirement. Any plaintiff, named or unnamed, whose claim does not do so will be dismissed from the case. The Zahn decision will increase pressure on the state courts to provide forums for recovery in multiple party claims. See text accompanying notes 73 through 76, supra.
