

# Foreword

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This Symposium concerns only one civil rule—Rule 23 Class Actions; and is primarily limited to the old spurious class action as renovated in (b) (3). Rule 23 warrants symposium treatment. No other civil rule does.

Why is this? What is there about Rule 23 that causes appraisals ranging from high praise as a great instrument of social justice for the poor and the little man to the other extreme where it is characterized as a weapon of legal blackmail?

The class action rule stood as promulgated in 1937, as one of the original Civil Rules, until 1966 when it was completely revised. The substance of original subdivision (b), which dealt with the shareholder's derivative suit, was carried forward as Rule 23.1; and provisions for class actions by or against representatives of an unincorporated association, which had been treated as true class actions, were carried forward as Rule 23.2. Now, as before, the provisions of these two latter rules are not unduly troublesome. Now, as before, it is primarily the old spurious class suit—the present (b) (3) action—that causes the most difficulty. In 1950, Professor Chafee, a great scholar of equity, had this to say about original Rule 23.

Until a decade ago a representative suit was a rather infrequent

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phenomenon in the law. . . . The situation changed noticeably in 1938, when elaborate provisions about class suits were embodied in the Federal Rules of Civil Procedure. Rule 23 and the full commentary thereon by Mr. James W. Moore in his important treatise apparently directed the attention of many American lawyers to a hitherto unfamiliar procedural device. . . . The result is that class suits come rushing at us from all directions, . . . with no breathing spell in sight. The facts of the older class-suit cases seem very simple in contrast with the enormous complications of these recent litigations, where it is often difficult to see just what was decided. All sorts of new problems arise, among which judges are groping. The situation is so tangled and bewildering that I sometimes wonder whether the world would be any the worse off if the class-suit device had been left buried in the learned obscurity of Calvert on Parties to Suits in Equity.<sup>1</sup>

It takes no great imagination to apply these remarks to the present Rule. To be sure some expletives would have to be added for the suit where the representative purports to represent fantastic numbers of people ranging from hundreds of thousands up to several millions, seeks damages in the trillions—several times the gross national product, and the trial time would be akin to the professional life of the judge or the lawyers.

*Eisen* had these characteristics. With an individual stake of \$70, plaintiff brought a class action under the antitrust and securities law for alleged overcharges of brokerage commissions charged to odd-lot traders over a four-year period. The class consisted of six million persons scattered from Point Barrow to Easter Island and from mid-America round the world and back. Amazing, simply amazing that grown men would think this class manageable. If for no other reason than the cost that plaintiff would have to bear by complying with the mandatory notice requirements of Rule 23 (c) (2), the suit was bound to founder, as indeed it eventually did. That is not to say that an action by one or more sub-classes would be unmanageable, as Justice Douglas points out. It will not do to deny a remedy to the small claimant—the person who is overcharged or defrauded in the amount of \$1 or \$2—and let the defendant who has wronged thousands, even millions, reap a harvest because of procedural inadequacies. Yet those fine sounding words do not tell the whole story. Not all plaintiffs and their lawyers who bring class actions are angels. The problem of providing equal and effective justice via the class action remains with us.

In *Eisen* a jurisdictional amount requirement was not required. It is, however, in general federal question and in diversity cases, and the Supreme Court applied the requirement in *Snyder v. Harris* and *Gas Serv. Co. v. Coburn* as though the plaintiff were

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1. CHAFEE, SOME PROBLEMS OF EQUITY 199 (1950).

bringing an individual rather than a class suit. *Coburn*, for example, was a consumer class suit brought in the federal court on the basis of diversity. Coburn's claim was for only \$7.81 in overcharges, but by aggregating the claims of the class the amount in controversy ran into hundreds of thousands. This was a big suit, but the Supreme Court treated it as one for the local justice of the peace. *Zahn v. International Paper Co.* is even more troublesome. Each claim of the two named plaintiff-representatives exceeded the jurisdictional amount, but the Court held that the claim of each member of the class must satisfy the jurisdictional amount requirement. This goes toward making a diversity class suit untenable. Worse yet, it logically follows that if the claims of the class members are not ancillary for the jurisdictional amount requirement, they are not ancillary for diversity purposes and the citizenship of each member of the class would have to be established.

These deficiencies can be cured by legislation. Elsewhere we have argued for the elimination of the jurisdictional amount in all cases and for the application of minimal diversity.<sup>2</sup> And we believe the arguments are particularly pertinent to the class action.

Enough, though, of random thoughts. The feast follows.

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2. Moore and Wicker, *Federal Jurisdiction: A Proposal to Simplify the System to Meet the Needs of a Complex Society*, 1 FLA. ST. U.L. REV. 1, 11-24 (1973).

