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Federal Rules of Civil Procedure-Class Actions-Antitrust Law-Rebuttable Presumption That Sherman Act Plaintiffs Entitled to Class Certification Under Rule 23

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RECENT DEVELOPMENT

Federal Rules of Civil Procedure—CLASS ACTIONS—ANTITRUST LAW—REBUTTABLE PRESUMPTION THAT SHERMAN ACT PLAINTIFFS ENTITLED TO CLASS CERTIFICATION UNDER RULE 23

Windham v. American Brands, Inc.,
539 F.2d 1016 (4th Cir. 1976)

Since the amendment of Rule 23[1] in 1966,[2] the issue of manageability has emerged as the "main battleground"[3] in unwieldy class action suits. Indeed, resolution of the manageability issue "will often amount to a determination of whether the claim will be litigated at all."[4] Parties seeking class action status must meet the court-imposed burden of establishing that they have fulfilled all

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[1] FED. R. CIV. P. 23 [hereinafter referred to as Rule 23]. Rule 23 controls class action litigation in the federal courts. The subdivisions of the Rule pertinent to this Note are set out in the Appendix to this Note, *infra*.

Rule 23(a) contains four prerequisites joined by the word "and," and Rule 23(b) contains three additional prerequisites connected by the word "or." Therefore, in order for a class action to be maintained, it must satisfy all the requirements enumerated in Rule 23(a) and, in addition, fall into one of the categories of Rule 23(b). Nearly all antitrust class actions are brought under Rule 23(b)(3). *See generally* Annot., 6 A.L.R. Fed. 19 (1971).

[2] The original Rule 23, promulgated in 1938, distinguished three types of class actions by the kind of right the class sought to enforce. These categories were the "true," "hybrid," and "spurious" class actions. In "true" class actions the rights of the class were said to be "joint"; in "hybrid" class actions the rights of the class members were "several," but revolved around "specific property"; in "spurious" class actions the rights were also "several," but involved a common question of law or fact and common relief. Most cases fell into the "spurious" category. *See* Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 630-33 (1965). In practice, this terminology "proved obscure and uncertain." FED. R. CIV. P. 23, Advisory Committee's Note, 39 F.R.D. 98, 98 (1966).

An additional problem with the original rule was that the res judicata effect of a judgment in "spurious" class actions was not binding on absentee members of the class. Since most class actions were "spurious," Rule 23 often failed to achieve the objective of resolving common questions in one suit. This problem has largely been remedied by Rule 23(c), which provides that a judgment in a class action, whether favorable or not, will be binding on all class members who do not request exclusion from the class. *See* Appendix *infra*.

The present Rule 23 went into effect on July 1, 1966. Sup. Ct. Order, 383 U.S. 1031 (1966).

[3] PRACTISING LAW INSTITUTE, CLASS ACTIONS 1975, at 47 (1975) [hereinafter cited as CLASS ACTIONS 1975].

[4] *Id.*

the requirements of Rule 23.[5] Trial judges have been granted broad discretion in determining whether the various provisions of the Rule have been satisfied,[6] and appellate courts have traditionally respected this exercise of discretion.[7] Thus, the recent decision of the Fourth Circuit in *Windham v. American Brands, Inc.*,[8] reversing a district judge's denial of class action certification and holding that "there is almost a rebuttable presumption" that plaintiffs with a "plausible claim" of a Sherman Act[9] violation are entitled to such certification,[10] is a dramatic departure from prior class action law and a significant antitrust milestone.

I

HISTORICAL PERSPECTIVE

A. *Class Actions and the Supreme Court*

Much of the controversy[11] currently surrounding the law of class actions may be attributed to the Supreme Court's failure to provide guidance on many of the issues that repeatedly arise under Rule 23. The Court has intentionally avoided the most troublesome aspects of Rule 23(b)(3),[12] the subdivision of the rule encompassing most large antitrust cases. Nevertheless, the Court's attitude toward

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[5] *See, e.g.*, Senter v. General Motors Corp., 532 F.2d 511, 522 (6th Cir.), *cert. denied*, 97 S. Ct. 182 (1976); Valentino v. Howlett, 528 F.2d 975, 978 (7th Cir. 1976); Carracter v. Morgan, 491 F.2d 458, 459 (4th Cir. 1973); Poindexter v. Teubert, 462 F.2d 1096, 1097 (4th Cir. 1972); Amswiss Int'l Corp. v. Heublein, Inc., 69 F.R.D. 663, 665 (N.D. Ga. 1975); Tolbert v. Western Elec. Co., 56 F.R.D. 108, 113 (N.D. Ga. 1972); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 457 (E.D. Pa. 1968).

[6] *See, e.g.*, King v. Kansas City S. Indus., Inc., 519 F.2d 20, 25 (7th Cir. 1975); Clark v. Watchie, 513 F.2d 994, 1000 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975); Price v. Lucky Stores, Inc., 501 F.2d 1177, 1179 (9th Cir. 1974); Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 793 (10th Cir. 1970).

[7] *See, e.g.*, Clark v. Watchie, 513 F.2d 994, 1000 (9th Cir. 1975); Price v. Lucky Stores, Inc., 501 F.2d 1177, 1179 (9th Cir. 1974); Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336, 344 (10th Cir. 1973); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969).

[8] 539 F.2d 1016 (4th Cir. 1976), *petition for rehearing en banc granted*, No. 75-2315 (4th Cir. Dec. 13, 1976).

[9] 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975).

[10] 539 F.2d at 1021.

[11] One observer has stated: "In the field of federal court practice and procedure there is no subject that recently has been so frequently dissected, analyzed, critiqued, paneled and workshopped as class actions under Federal Rule 23." Hauser, *The Class Action Struggle Continues: The Problems Eisen Ignored*, 44 A.B.A. ANTITRUST L.J. 75, 75 (1975).

[12] *See* text accompanying notes 45-48 *infra*.

class actions—which most perceive as conservative,[13] if not antagonistic—is apparent from its opinions.

Snyder v. Harris[14] was the first major class action case to reach the Supreme Court after amended Rule 23 took effect. The issue in *Snyder* was "whether separate and distinct claims presented by and for various claimants in a class action may be added together to provide the $10,000 jurisdictional amount in controversy"[15] required in diversity cases.[16] Justice Black, writing for the majority, answered this question in the negative and ruled that claims of different individuals can be aggregated only when there is a "joint or common" interest in the subject matter of the suit, and not when the claims are "separate and distinct."[17] He based his conclusion on the traditional interpretation of the statutory phrase "matter in controversy," an interpretation the amended Rule 23 "did not and could not have changed."[18] Commentators have generally regarded *Snyder* as a discouraging prognosis for class action plaintiffs and have criticized Justice Black for reviving the confusing categories of the original Rule 23.[19]

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[13] *See, e.g.*, Matt s & Mitchell, *The Trouble With Zahn: Progeny of Snyder v. Harris Further Cripples Class Actions*, 53 NEB. L. REV. 137 (1974); Schuck & Cohen, *The Consumer Class Action: An Endangered Species*, 12 SAN DIEGO L. REV. 39 (1974); Shenefield, *Annual Survey of Antitrust Developments—Class Actions, Mergers, and Market Definition: A New Trend Toward Neutrality*, 32 WASH. & LEE L. REV. 299, 301-21 (1975); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 46-49 (1974). *But see* Benett, *Eisen v. Carlisle & Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy*, 1974 WIS. L. REV. 801, 803-04.

[14] 394 U.S. 332 (1969). Plaintiff Mrs. Snyder, an Arizona shareholder of a Missouri corporation, brought suit against the company's board of directors on behalf of herself and "all others similarly situated." Mrs. Snyder sought personal damages of only $8,740, but contended that the total value of the claims of all 4,000 shareholders amounted to $1,200,000. The district court held that the claims could not be aggregated and dismissed the case. 268 F. Supp. 701 (E.D. Mo. 1967). The Eighth Circuit affirmed (390 F.2d 204 (8th Cir. 1968) (per curiam)), as did the Supreme Court (394 U.S. 332 (1969)).

[15] 394 U.S. at 333.

[16] 28 U.S.C. § 1332 (1970).

[17] 394 U.S. at 336-37.

[18] *Id.* at 338.

[19] *See, e.g.*, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 202-12 (1969); 21 SYRACUSE L. REV. 326 (1969); 24 U. MIAMI L. REV. 173 (1969).

Justice Fortas, dissenting in *Snyder*, complained:

> The artificial, awkward, and unworkable distinctions between "joint," "common," and "several" claims and between "true," "hybrid," and "spurious" class actions which the amendment of Rule 23 sought to terminate is now re-established in federal procedural law. Litigants, lawyers, and federal courts must now continue to be ensnared in their complexities in all cases where one or more of the coplaintiffs have a claim of less than the jurisdictional amount, usually $10,000.

394 U.S. at 343.

Zahn v. International Paper Co.,[20] a class action brought under Rule 23(b)(3), presented the Court with an opportunity to retreat from the restrictive position taken in *Snyder*. In contrast to *Snyder*, the named plaintiffs in *Zahn* satisfied the $10,000 jurisdictional amount for diversity cases; it appeared unlikely, however, that each of the other two hundred members of the class met this requirement.[21] Extending the *Snyder* decision rather than mitigating its harshness, the Court ruled that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.' "[22]

Although the *Zahn* decision restricted the availability of Rule 23(b)(3) certification for suits brought under statutes specifying a minimum amount in controversy, many commentators perceived the decision as a further attempt by the Supreme Court to curtail federal class actions in general.[23] This observation is of particular significance to the antitrust sector, an area of federal jurisdiction that is exempt from a minimum amount in controversy requirement[24] and therefore not directly affected by the *Zahn* decision.[25]

Following closely on *Zahn*'s heels was *Eisen v. Carlisle & Jacquelin*,[26] also a Rule 23(b)(3) case and the Supreme Court's most

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[20] 414 U.S. 291 (1973).

[21] The four named plaintiffs, owners of lakefront property on Lake Champlain, sued the International Paper Company, on behalf of themselves and approximately 200 similarly situated landowners, for $40,000,000. Plaintiffs claimed they suffered damages as a result of the company's pollution of the lake. Zahn v. International Paper Co., 469 F.2d 1033, 1034 (2d Cir. 1972).

[22] 414 U.S. at 301, *quoting* Zahn v. International Paper Co., 469 F.2d 1033, 1035 (2d Cir. 1972).

[23] The decision was called a "crippling blow" to class actions. Mattis & Mitchell, *supra* note 13, at 194. *See also* Shenefield, *supra* note 13; 11 HOUSTON L. REV. 754, 767-69 (1974).

[24] 28 U.S.C. § 1337 (1970) states: "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."

[25] Thus, one commentator stated:

> The importance of [the *Zahn* decision] for the antitrust student is its implications for the antitrust class action. . . . [Various provisions of Rule 23] may be interpreted restrictively or broadly, depending upon the orientation of the court involved. *Zahn* is interesting, therefore, because it demonstrates the Supreme Court's willingness to accede to a denial of federal court access for certain kinds of class actions. In short, the Supreme Court, as currently composed, is not willing to adopt a rule of law simply because claims may not otherwise be adjudicated. . . . Thus, the major significance of the decision lies in what it reflects of the Court's intention to maintain a tighter check on the reach of Rule 23.

Shenefield, *supra* note 13, at 306 (footnotes omitted).

[26] 417 U.S. 156 (1974) (popularly known as *Eisen IV*). For previous case history see note 31 *infra*.

important decision to date in the class action field.[27] The decision in *Eisen* capped an extraordinary string of litigation stretching back to 1966, when plaintiff Morton Eisen filed suit in the Southern District of New York on behalf of himself and all other odd-lot[28] traders on the New York Stock Exchange. He alleged that two brokerage firms controlling ninety-nine percent of the Exchange's odd-lot business had conspired to monopolize odd-lot trading and to charge excessive fees in violation of sections 1 and 2 of the Sherman Act.[29] The district court had proposed a scheme of notice to class members by publication, even though two million of the estimated six million class members could be identified by name and address.[30] The Court of Appeals for the Second Circuit, in the seventh reported opinion in the case,[31] specifically rejected this

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[27] Shortly after *Zahn*, the Supreme Court also decided American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), an antitrust class action. *American Pipe* was a technical decision involving the statute of limitations provisions in Clayton Act §§ 4B and 5(b), 15 U.S.C. § 15b (1970) & § 16(b) (Supp. V 1975). The Court held that institution of a class action suit tolled the statute of limitations for purported class members who made timely motions to intervene under Federal Rule of Civil Procedure 24 after the district court denied class action certification. 414 U.S. at 560-61. Justice Blackmun, concurring, stated that the decision "must not be regarded as encouragement to lawyers . . . to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." *Id.* at 561.

[28] "Odd lots" are units of stock consisting of less than 100 shares. Normal trading units, called "round lots," are multiples of 100 shares. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 559 (2d Cir. 1968).

[29] 15 U.S.C. §§ 1-2 (Supp. V 1975).

[30] Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 265-70 (S.D.N.Y. 1971).

[31] Four district court and three circuit court opinions preceded the Supreme Court's adjudication of the controversy. The following is a brief chronological history of what transpired in the lower courts:

(*1*) Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966) (class action aspect of suit dismissed).

(*2*) Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (popularly known as *Eisen I*) (district court's decision appealable).

(*3*) Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (popularly known as *Eisen II*) (reversed district court dismissal of case as class action).

(*4*) Eisen v. Carlisle & Jacquelin, 50 F.R.D. 471 (S.D.N.Y. 1970) (further hearings necessary to decide notice and manageability issues).

(*5*) Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971) (plan for fluid recovery announced, scheme for notice by publication approved, preliminary hearing on merits ordered to determine who should bear costs of notice).

(*6*) Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565 (S.D.N.Y. 1972) (plaintiff class "more than likely" to prevail on its claim, 90% of notice costs assigned to defendants).

(*7*) Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973) (popularly known as *Eisen III*) (class action dismissed as unmanageable, notice by publication scheme rejected, burden of notice costs on defendants rejected, fluid recovery concept rejected).

The history of the *Eisen* case is well documented in Benett, *supra* note 13. *See also* Note,

proposal.[32] The Second Circuit also ruled that the district judge had no authority to conduct a preliminary hearing on the merits in order to determine who should bear the burden of notice costs;[33] rather, the plaintiff must bear the entire expense.[34] Finally, the court firmly rejected the district judge's proposal of fluid class recovery[35] and ruled that the class action was unmanageable under Rule 23(b)(3)(D).[36]

Managing the Large Class Action: Eisen v. Carlisle & Jacquelin, 87 HARV. L. REV. 426, 428-33 (1973).

[32] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1015 (2d Cir. 1973).

[33] *Id.* at 1015-16.

[34] *Id.* at 1015.

[35] *Id.* at 1018: "We hold the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."

The concept of fluid recovery has most often been advanced where the identity of the injured class members cannot be ascertained, or where the class is "so large and the average individual claim so small that the total cost of distribution would exceed the aggregate amount recovered for each person." CLASS ACTIONS 1975, *supra* note 3, at 57. The theory behind such recovery is that defendants should not be permitted to retain profits accumulated through illegal means. A damage fund is established in an amount equal to the gross damages suffered by the entire class:

> Shares of the damage fund are then distributed to those class members who can prove valid claims; the remainder is made available to the class at large in some manner calculated to benefit the injured consumers and, at the very least, deprive the wrongdoers of the fruits of their wrongdoing.

Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. REV. 477, 477 (1972).

One of the legal arguments against fluid recovery is that some of the benefit may well inure to persons who were not actually injured by the defendant's illegal conduct. The Rules Enabling Act, 28 U.S.C. § 2072 (1970), which authorized the Supreme Court to promulgate federal rules of civil procedure, states that such rules "shall not abridge, enlarge or modify any substantive right." Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), permits treble damage recovery by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." Thus, the argument runs, fluid recovery illegally "enlarges" the substantive right to recover treble damages because some members of the fluid class were never injured. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1014 (2d Cir. 1973). *See generally* Malina, *supra*.

The district judge in *Eisen* explained that if the plaintiff could establish the defendant's liability to the class, a fund could then be established equal to the amount of unclaimed damages. The odd-lot differential (a surcharge paid by odd-lot investors) might then be reduced "in an amount determined reasonable by the court until such time as the fund is depleted. . . . In this manner, the class members, assuming they have maintained their odd-lot activity, will reap the benefits of any recovery." Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 265 (S.D.N.Y. 1971). Although the court of appeals in *Eisen III* specifically rejected this solution, the Supreme Court declined to rule on the issue. *See* notes 45-48 and accompanying text *infra*. The legal status of fluid recovery is still in doubt since the Supreme Court vacated the entire opinion of the court of appeals, thereby nullifying its authority. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179 (1974), *vacating* 479 F.2d 1005 (2d Cir. 1973). For a discussion of the arguments concerning fluid recovery, see *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1531-36 (1976).

[36] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1016-18 (2d Cir. 1973).

The Supreme Court agreed with the Second Circuit on several important points. Justice Powell, speaking for six members of the Court,[37] rejected the limited notice proposal of the district court. Strictly interpreting the language of Rule 23(c)(2),[38] the Court held that individual notice had to be sent to each of the over two million class members whose names and addresses could be ascertained through reasonable effort.[39] The Court maintained that the plaintiff had to bear the entire cost of such notice to members of his class;[40] the prohibitively high cost to the plaintiff of such notice was irrelevant since it was an unambiguous requirement of Rule 23.[41] Finally, the Court stated that Rule 23 did not confer upon the district court any authority to conduct a preliminary hearing on the merits to decide whether the suit was maintainable as a class action.[42] The Court then vacated the judgment of the court of appeals and remanded the case with instructions to dismiss the class action as then defined.[43]

Predictably, the Supreme Court's opinion in *Eisen* touched off a storm of criticism. Commentators generally attacked the decision as an "obituary" for class actions under Rule 23, or, at very least, a severe limitation on their effectiveness.[44] But perhaps the most

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[37] Justice Douglas dissented in part and filed an opinion in which Justice Brennan and Justice Marshall concurred. 417 U.S. at 179.

[38] *See* Appendix *infra*.

[39] 417 U.S. at 177.

[40] *Id.*

[41] Justice Powell stated that "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Id.* at 176.

[42] *Id.* at 177-78. The Court stated that such a hearing could result in substantial prejudice to a defendant because it would be unaccompanied by the traditional rules of civil trials. *Id.* at 178.

[43] The Court noted, however, that its dismissal would not prevent Eisen from continuing his efforts by redefining his class under either Rule 23(c)(4) or Rule 15 of the Federal Rules of Civil Procedure. *Id.* at 179 n.16.

[44] For example, it has been observed that:

> *Eisen* is a blow to those, particularly consumer groups, who had hoped to develop a litigation vehicle to handle cases involving large numbers of individuals, each of whom advances a relatively small claim. . . . [T]he practical effect of *Eisen* is to foreclose recovery when damages are too small to warrant individual suits, thereby eliminating perhaps the only mechanism for forcing the corporate price-fixer to disgorge its ill-gotten profit.

The Supreme Court, 1973 Term, *supra* note 13, at 48 (footnote omitted). *See also* Shenefield, *supra* note 13, at 312; [1974] ANTITRUST & TRADE REG. REP. (BNA) No. 665, at AA-1. There were some, however, who took heart in the *Eisen* decision. One commentator expressed the view that

> [u]nderlying all the questions addressed by the Supreme Court in *Eisen* is its tacit assumption that class actions are a proper and important legal vehicle for social change. . . . The Court's declaration that decisions on class actions are appealable

significant aspect of the Supreme Court's decision in *Eisen*—as far as ensuing class action law was concerned—was not its enunciation of strict notice guidelines for Rule 23(b)(3) actions, but its refusal to deal with the fundamental issues of manageability and fluid recovery.[45] The Second Circuit, stating that the question of manageability was "the most important point in the case,"[46] had squarely faced these matters. It had held that fluid recovery was illegal and that the case was therefore unmanageable as a class action.[47] The Supreme Court, however, restricted its comments on these issues to a single footnote:

> [W]e find the notice requirements of Rule 23 to be dispositive of petitioner's attempt to maintain the class action as presently defined. We therefore have no occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and fluid-class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction.[48]

Thus, while the Supreme Court in *Snyder*, *Zahn*, and *Eisen* has established clear and often harsh requirements for class action plaintiffs, its failure to provide guidance on the manageability issue has contributed to a flurry of inconsistent decisions in the district courts and courts of appeals.[49] Such inconsistencies are readily understandable because class action denials are based more often on management difficulties than on any other factor.[50]

> even before a final determination of the merits and its strong suggestions that plaintiff Eisen go back to the district court and pursue his action under the "subclass section" of Rule 23 indicate the Court's general approval of class actions. Nevertheless, because the Court's decision affirms the dismissal of Eisen's class action, the opinion is likely to be remembered more as a setback than an advance for the cause of class actions. The fact that most of the positive points for class action proponents are found in dicta of the opinion adds impetus to this pessimistic view.

Benett, *supra* note 13, at 803-04 (footnotes omitted). *See also Eisen IV: Don't Believe the Headlines*, [1974] ANTITRUST & TRADE REG. REP. (BNA) No. 679, at B-1, urging that "plaintiff's class action attorneys should largely disregard the black headlines warning of the demise of class actions," because *Eisen*'s narrow holding is favorable to both plaintiffs and defendants.

[45] These issues were closely intertwined; even Eisen's attorney admitted that the case, with six million persons in the class, would be unmanageable if fluid recovery were not permitted. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1017 (2d Cir. 1973).

[46] *Id.* at 1012.

[47] *Id.* at 1016-18.

[48] 417 U.S. at 172 n.10.

[49] *Compare* cases cited in note 54 *infra*, *with* cases cited in note 55 *infra*.

[50] *Eisen IV, Class Actions One Year Later*, [1975] ANTITRUST & TRADE REG. REP. (BNA) No. 711, at B-1, B-2.

B. *Lower Court Responses to Rule 23(b)(3)*

Many courts, at least by implication, have treated the issue of manageability as a distinct requirement for granting class action status under Rule 23.[51] Actually, manageability is only one of four nonexclusive factors that Rule 23(b)(3) specifies as pertinent to the required findings of predominance of common questions and superiority to other methods of adjudication.[52] Elevation of manageability to a threshold requirement for class action certification is particularly understandable within the antitrust area, where astronomical damages may be awarded to a massive, and perhaps largely unidentified, class.

Management problems in large antitrust class actions most often arise from the need to calculate damages for individual members of a class. A common method of minimizing the difficulties encountered by such calculations has been to bifurcate the liability and damage issues. Under this "split trial" approach, the court first tries only the issue of liability. If it finds that the defendant has violated the antitrust laws, a trial of the damage issues will follow. If the defendant is not found liable, the court need not become ensnarled in the damage problem at all.[53]

A substantial number of courts have approved this method of handling large antitrust class actions.[54] These courts maintain that individual questions remaining after the common questions have been resolved do not necessarily destroy the usefulness of the class action suit. Other courts, however, have rejected the concept of a bifurcated trial and have denied class action certification where

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[51] *See, e.g.*, Kline v. Coldwell, Banker & Co., 508 F.2d 226, 235-36 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1016-18 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 431-33 (W.D. Mo. 1973).

[52] *See* Appendix *infra*.

[53] *See generally* CLASS ACTIONS 1975, *supra* note 3, at 49-55.

[54] *See, e.g., In re* Master Key Antitrust Litigation, [1975] TRADE CAS. (CCH) ¶ 60,377 (D. Conn.), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975); Link v. Mercedes-Benz of N. America Inc., [1975] TRADE CAS. (CCH) ¶ 60,534 (E.D. Pa. 1975); Herrmann v. Atlantic Richfield Co., 65 F.R.D. 585 (W.D. Pa. 1974); Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65 (E.D.N.Y. 1974); City of New York v. General Motors Corp., 60 F.R.D. 393 (S.D.N.Y. 1973), *appeal dismissed*, 501 F.2d 639 (2d Cir. 1974); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971); LoCicero v. Humble Oil & Ref. Co., 52 F.R.D. 28 (E.D. La. 1971).

In *Humble Oil* the court summarized the benefits of bifurcation: "Separation of the damages issue promises convenience, potential economy, clearer jury understanding of the issues, less embracive closing arguments, a shorter jury charge at each stage of the trial." 52 F.R.D. at 30-31.

individual damage questions were involved.[55] These decisions usually have asserted that the abundance of individual damage questions either makes the case unmanageable under Rule 23(b)(3)(D) or indicates that common questions of law or fact do not predominate.

Whether the individual issues in a given class action are so extensive as to render the case too cumbersome for the court is a matter that rests in the discretion of the trial judge. The cases show few threads of consistency. It is possible, however, to isolate a number of factors that courts consider in determining whether a bifurcated trial can save an unwieldy class action. Among these are the size of the class,[56] the average amount of recovery expected,[57] the manner in which the damages will have to be calculated,[58]

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[55] *See, e.g.*, Shumate & Co. v. National Ass'n of Sec. Dealers, 509 F.2d 147 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975); Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974); Plekowski v. Ralston Purina Co., 68 F.R.D. 443 (M.D. Ga. 1975); *In re* Transit Co. Tire Antitrust Litigation, 67 F.R.D. 59 (W.D. Mo. 1975); Smith v. Denny's Restaurants, Inc., 62 F.R.D. 459 (N.D. Cal. 1974); Bogosian v. Gulf Oil Corp., 62 F.R.D. 124 (E.D. Pa. 1973); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D. Mo. 1973); Yanai v. Frito Lay, Inc., 61 F.R.D. 349 (N.D. Ohio 1973); Hettinger v. Glass Specialty Co., 59 F.R.D. 286 (N.D. Ill. 1973); Abercrombie v. Lums, Inc., 345 F. Supp. 387 (S.D. Fla. 1972), *aff'd on other grounds*, 531 F.2d 775 (5th Cir. 1976); Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549 (S.D.N.Y. 1972).

[56] *See, e.g., In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974) (class action denied where class might number 40,000,000); Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549 (S.D.N.Y. 1972) (class action dismissed where plaintiff class numbered 500,000 to 1,500,000). Class size is not a dispositive factor, however. In Link v. Mercedes-Benz of N. America Inc., [1975] TRADE CAS. (CCH) ¶ 60,534 (E.D. Pa. 1975), the court certified a class of 300,000 plaintiffs and ordered a separate trial on the damage issues. By way of contrast, in Yanai v. Frito Lay, Inc., 61 F.R.D. 349 (N.D. Ohio 1973), class action status was denied on the ground that there were too many individual questions where 73 distributors alleged Sherman Act violations by a manufacturer.

[57] *See, e.g., In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974) (class action denied where average claim was about $2); Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549 (S.D.N.Y. 1972) (class action dismissed where average amount of recovery would be about $1). The cost of notice in such cases can easily exceed the expected recovery. *In re* Hotel Tel. Charges, 500 F.2d at 91.

[58] Courts are more prone to grant class action status where there is a simple method of calculating damages. For example, in Partain v. First Nat'l Bank, 59 F.R.D. 56 (M.D. Ala. 1973), the court granted class action status to a group of 20,000 plaintiffs who alleged that the bank had charged usurious interest rates on BankAmericard accounts. In response to the defendant's contention that the case involved too many individual damage questions, the court stressed that the damages could be easily calculated on the basis of information in the bank's records. *Id.* at 59.

Similarly, in Link v. Mercedes-Benz of N. America Inc., [1975] TRADE CAS. (CCH) ¶ 60,534 (E.D. Pa. 1975), where class action status was granted to 300,000 plaintiffs alleging price-fixing on repair work and replacement parts for cars, the court suggested that

whether causation as well as amount of damage must be proved,[59] and whether some type of fluid recovery will be permitted.[60] Although it is difficult to note any clear trends, certain circuits have exhibited greater receptivity to class actions than others.[61]

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plaintiffs might be able to use "statistical computations and computer analysis to simplify the proof of damages." *Id.* at ¶ 67,358.

[59] *Compare* Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir.), *cert. denied*, 97 S. Ct. 74 (1976), *with In re* Master Key Antitrust Litigation, [1975] TRADE CAS. (CCH) ¶ 60,377 (D. Conn.), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975). *Ungar* involved a suit against a franchisor by doughnut franchisees alleging illegal tie-in sales in violation of the Sherman Act. The district court had granted class certification. 68 F.R.D. 65 (E.D. Pa. 1975). However, the Third Circuit reversed, holding that proof of the franchisor's general policy of persuading franchisees to accept burdensome economic ties could not substitute for proof of individual harm by each plaintiff. 531 F.2d at 1225-26. Since individual proof was necessary, common questions did not predominate, and the class action had to be dismissed. *Id.* at 1225-27. In *Master Key*, an antitrust suit alleging price-fixing on building hardware, the court said:

> If the plaintiffs introduce proof (or if it may be stipulated) at the liability stage that they bought master key systems and that the defendants engaged in a pervasive nationwide course of action that had the effect of stabilizing prices at supracompetitive levels, the jury may conclude that the defendants' conduct caused injury to each plaintiff.

[1975] TRADE CAS. (CCH) ¶ 60,377 at 66,638 n.3.

[60] The possibility of fluid recovery militates against dismissing an action, since the need for computation of individual damages can be largely eliminated. *See, e.g., In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

[61] The Tenth Circuit, for example, has generally looked approvingly upon class actions. *See, e.g.*, Penn v. San Juan Hosp., Inc., 528 F.2d 1181 (10th Cir. 1975) (civil rights); Gold Strike Stamp Co. v. Christensen, 436 F.2d 791 (10th Cir. 1970) (antitrust); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) (securities). *But see* Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230 (10th Cir. 1975) (Truth in Lending Act). In Gold Strike Stamp Co. v. Christensen, 436 F.2d 791 (10th Cir. 1970), the court said: "[W]here the question of basic liability can be established readily by common issues, then it is apparent that the case is appropriate for class action." *Id.* at 796. In Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), the Tenth Circuit expressed a similarly benign attitude:

> It cannot he denied that the resolution of the class action issue in suits of this type places an onerous burden on the trial court. But if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.

Id. at 99.

The Seventh Circuit also seems generally sympathetic toward class actions. *See, e.g.*, Crockett v. Green, 534 F.2d 715 (7th Cir. 1976) (civil rights); King v. Kansas City S. Indus., Inc., 519 F.2d 20 (7th Cir. 1975) (securities) (class certification denied, but policy of Rule 23 is to favor maintenance of class actions); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974) (Truth in Lending Act). In the *Haynes* case, the Seventh Circuit reversed the district court's denial of class action certification and stated:

> On balance, class actions might very well be superior to individual suits, because while the former would compel correction of disclosure errors and full collection of damages, the latter would result only in correction of errors, for collec-

Nevertheless, courts have consistently held that the burden of satisfying the requirements of Rule 23 falls on those seeking class action status.[62] In terms of manageability, this means that the party seeking to bring a class action must convince the trial judge that the case can proceed without placing undue strain on the judicial system.

II

Windham v. American Brands, Inc.: POLICY, NOT PRECEDENT

On July 29, 1974, six South Carolina growers of flue-cured tobacco[63] filed suit in federal district court, charging violations of

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> tion damages would be sharply restricted by the short statute of limitations . . . , the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually.

503 F.2d at 1164-65.

The Ninth Circuit, on the other hand, has been antagonistic toward class action suits, emphatically reversing a number of district court class certifications. Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (antitrust); *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974) (antitrust). *But see* Williams v. Sinclair, 529 F.2d 1383 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 2651 (1976) (securities); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975) (securities). Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), involved an antitrust suit against the Los Angeles Realty Board and 32 real estate brokers by sellers of real estate, alleging a conspiracy to fix brokerage commissions. A concurring opinion in the court's denial of class action certification said:

> I do not say that the Rule 23(b)(3) class action is always unethical and improperly coercive. Doubtless there are circumstances in which it is the only viable means of obtaining relief for classes of truly and actively aggrieved plaintiffs. But courts should not be in the business of encouraging the creation of lawsuits like this one.

Id. at 238-39. In *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974), the court rejected the contention of the plaintiffs' attorneys that the suit would serve to punish and deter antitrust violations: "[T]he Congressional scheme does not contemplate that private attorneys are to act as prosecutors to force antitrust violators to disgorge their illegal profits in the general interest of society at large." *Id.* at 92. The fact that the case would not be litigated except as a class action which would be profitable for attorneys did not disturb the court: "[T]hat decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere." *Id.*, *quoting* Hackett v. General Host Corp., 455 F.2d 618, 626 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

[62] *See* cases cited in note 5 *supra*.

[63] Flue-cured tobacco is grown in South Carolina, Alabama, Florida, Georgia, North Carolina, and Virginia. It is sold by auction at independent warehouses. At the time the case arose, there were 36 warehouses in 11 geographic markets in South Carolina. From two to seven warehouses conducted auctions in each market. The quality of tobacco is affected by such variables as suitability of the soil, weather, method of picking and curing, sand content, degree of ripeness, spoilage, and disease. The government has a system of 161 grades which it uses in connection with a price support program. In addition, each

the Sherman Act[64] by fifteen defendant tobacco companies[65] and the Secretary of Agriculture.[66] The plaintiffs sought to maintain the action on behalf of a class of approximately 20,000 South Carolina tobacco producers[67] who had sold flue-cured tobacco in the state between 1970 and 1974. In the first count of their complaint, the plaintiffs contended that the defendants had fixed prices on flue-cured tobacco in violation of section 1 of the Sherman Act.[68] The second count, alleging a violation of section 2 of the Sherman Act,[69] charged that the defendants had attempted to monopolize the warehouse auction market for flue-cured tobacco by parallel and collusive bidding and percentage purchase agreements.[70] The third count alleged a conspiracy among the defendants to arbitrarily restrict the amount of flue-cured tobacco that could be sold per day or per week in auction warehouses.[71] The class of plaintiff growers sought damages of $335,811,390.[72]

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tobacco company has its own grading system. Windham v. American Brands, Inc., 68 F.R.D. 641, 647-48, 652-53 (D.S.C. 1975), *rev'd*, 539 F.2d 1016, 1018-19 (4th Cir. 1976).

[64] 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975).

[65] In addition to American Brands, Inc., the tobacco companies named as defendants were: R.J. Reynolds Tobacco Co., Phillip Morris Inc., The Austin Tobacco Co., Inc., Mullins Leaf Tobacco Co., Inc., Brown & Williamson Tobacco Corp., Export Leaf Tobacco Co., Dibrell Brothers Inc., C.W. Walters Co., Inc., Gallaher Ltd., Imperial Group Ltd., J.P. Taylor Co., Inc., Universal Leaf Tobacco Co., Inc., Liggett & Myers, Inc., and Loew's Theatres, Inc. (Lorillard). Brief of Company Defendants-Appellees at 66-69, Windham v. American Brands, Inc., 539 F.2d 1016 (4th Cir. 1976), *petition for rehearing en banc granted*, No. 75-2315 (4th Cir. Dec. 13, 1976).

[66] Earl Butz, then Secretary of Agriculture, was named as a defendant because he had records of the names, addresses, and sales of members of the plaintiff class and had authority under The Tobacco Inspection Act, 7 U.S.C. §§ 511-511q (1970), to regulate tobacco warehouses. The plaintiffs also charged that he at least acquiesced in the illegal conduct alleged in the complaint. [1974] ANTITRUST & TRADE REG. REP. (BNA) No. 676, at A-7.

[67] There were four different types of "producers" under the pertinent statutory definition: owners, landlords, tenants, and sharecroppers. 7 C.F.R. § 719.2(s) (1976).

[68] 68 F.R.D. at 644-45. 15 U.S.C. § 1 (Supp. V 1975) (amending 15 U.S.C. § 1 (1970 & Supp. IV 1974)) provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

The plaintiffs claimed that they should have received 10¢ more per pound than the defendants had paid them during the years of alleged misconduct. 68 F.R.D. at 654.

[69] 15 U.S.C. § 2 (Supp. V 1975) (amending 15 U.S.C. § 2 (1970)) provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."

[70] 68 F.R.D. at 644-45.

[71] *Id.* at 645.

[72] *Id.* at 659. The plaintiffs sought $166,405,695 in treble damages for each of the first two counts and $3,000,000 in treble damages for the third count. [1974] ANTITRUST & TRADE REG. REP. (BNA) No. 676, at A-7.

The plaintiffs moved for class action certification under Rule 23(a) and (b)(3).[73] After extensive discovery on this issue, Judge Chapman of the District of South Carolina issued an order denying the plaintiffs' motion.[74] He initially found that the plaintiffs met the four requirements of Rule 23(a).[75] Turning his attention to Rule 23(b)(3), however, he found that the plaintiffs satisfied neither the requirement that common questions of law or fact predominate over questions affecting only individual class members, nor the requirement that a class action be superior to other available methods of adjudication. He rested his decision largely on the belief that the case would be "totally unmanageable" as a class action due to the many individual questions regarding incidence and amount of damage.[76] In reaching this conclusion, Judge Chapman stressed that the case involved 4 different types of farmers, 36 different warehouses, 11 different geographic markets, 161 different grades of tobacco, and a myriad of separate auction transactions which had occurred during the four-year period in issue. Rejecting the concept of fluid recovery,[77] he noted that the plaintiffs "offered no workable formula or method to aid in the computation and distribution of damages,"[78] and predicted that, if allowed to proceed as a class action, the case would "degenerate into innumerable individual lawsuits."[79] Judge Chapman briefly considered bifurcating the issues of liability and damages,[80] but concluded that splitting the trial would cause much duplication of evidence, "further frustrat[ing] Rule 23's objective of judicial economy."[81] Concluding that the court might well be faced with

[73] *See* Appendix *infra*.

[74] Windham v. American Brands, Inc., 68 F.R.D. 641 (D.S.C. 1975).

[75] *Id.* at 648-51. The typicality and representation requirements of Rule 23(a)(3) and (4), however, did present a debatable question for the court. This was largely because some tobacco farmers may have benefited from the tie-bidding charged in the complaint. Nevertheless, the court resolved the issue in favor of the plaintiffs. *Id.* at 649-51.

[76] *Id.* at 655.

[77] *Id.* at 657. Judge Chapman's treatment of the fluid recovery issue underscores the need for some definitive guidance in this area. Although the Second Circuit clearly outlawed such recovery in *Eisen III*, the entire decision was vacated by the Supreme Court, which specifically declined to decide the fluid recovery issue. *See* note 35 and accompanying text *supra*. Thus, the present status of fluid recovery is unclear. Judge Chapman, however, addressing himself to cases cited by the plaintiffs as supporting fluid recovery, stated that the concept "has been rejected by subsequent opinions, the reasoning of which this Court adopts." 68 F.R.D. at 657. He later stated that the use of fluid recovery "would result in an unfair trial." *Id.* at 658.

[78] 68 F.R.D. at 655. *See* note 58 *supra*.

[79] 68 F.R.D. at 655.

[80] *Id.* at 655, 659-60.

[81] *Id.* at 655.

"the possibility of being required to consider or even make a finding on every pile of tobacco sold in South Carolina for the four years"[82] in issue, the judge denied the plaintiffs' motion for class action status and certified his order for review by the Fourth Circuit.[83]

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[82] *Id.* at 656. Judge Chapman estimated the potential drain on judicial resources as follows:

> Assuming that it would take an average of one hour per class member to analyze his sales records for over four years and his possible relationship with other producers, it would take 20,000 hours, or 10 years of judicial time, assuming that the case was given undivided attention for 40 hours per week and 50 weeks per year.

Id. at 658 n.9.

[83] Since the defendants sought prompt review of the district court's order and the Fourth Circuit readily accepted the certification for appeal, the appealability of the class action denial was not an issue in *Windham*. *See* Brief of Company Defendants-Appellees at 27 n.***, Windham v. American Brands, Inc., 539 F.2d 1016 (4th Cir. 1976); Windham v. American Brands, Inc., 539 F.2d 1016, 1020 (4th Cir. 1976). However, considerable inconsistencies have developed among the circuits on this particular issue.

Appeals of orders denying class action certification are usually sought under 28 U.S.C. § 1291 (1970), as a "final decision," or under 28 U.S.C. § 1292(b) (1970), as an exercise of discretion by the district judge and the court of appeals. Such orders can also be treated—as was done in *Windham*—as a "final judgment" against the absent class members under Rule 54(b) of the Federal Rules of Civil Procedure. Generally, denials of class action certification are not "final" and are therefore not appealable unless the denial would, in all practicality, terminate the action. This so-called "death knell" doctrine, under which the denial of certification would sound the death knell for the action if not reviewed, was first propounded by the Second Circuit in cases in which the named plaintiffs' claims were too insignificant to make the suit worth litigating. Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). The Third and Seventh Circuits, however, have repudiated the "death knell" doctrine. Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 522 F.2d 1235 (7th Cir. 1975); King v. Kansas City S. Indus., Inc., 479 F.2d 1259 (7th Cir. 1973). The Ninth Circuit has recently applied the doctrine conservatively, holding that the presence of a single viable claim makes the denial of a class action certification unappealable. Share v. Air Properties G. Inc., 538 F.2d 279 (9th Cir. 1976).

The Supreme Court's opinion in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), made it clear that grants of class action certification may also be appealable as final orders within the meaning of 28 U.S.C. § 1291 (1970). The holding was a narrow one, however, as the Court ruled that the order granting class action status had to meet two requirements: first, that it not be "tentative, informal, or incomplete," and second, that it concern a collateral matter rather than the merits of the action. This latter requirement is known as the "collateral order" doctrine. 417 U.S. at 169-72. The Second Circuit has recently employed a three-pronged test for the appealability of class action grants. Appeal will be allowed only when the following factors are *all* present: (*1*) the class action determination is fundamental to the further conduct of the case; (*2*) review of the order is separable from the merits of the action; and (*3*) the order is likely to cause irreparable harm to the defendant in terms of time and money spent in defending a huge class action. *In re* Master Key Antitrust Litigation, 528 F.2d 5, 10 (2d Cir. 1975); Parkinson v. April Indus., Inc., 520 F.2d 650, 656 (2d Cir. 1975). The Tenth Circuit has held that an order granting class action status is not a reviewable final decision within the meaning of 28 U.S.C. § 1291

In a brief decision marked by boldness, if not strong precedent, the Fourth Circuit reversed.[84] Judge Wyzanski, writing for a two-man majority,[85] concluded that the district judge had abused his discretion by not allowing the plaintiffs to maintain a class action on the issue of whether the defendants had violated the Sherman Act.[86]

Judge Wyzanski noted that the court was required to "defer to the District Judge's exercise of discretion, unless we are convinced that he was plainly wrong."[87] Mindful of this rule, he approved the district judge's conclusion that the plaintiffs satisfied the requirements of Rule 23(a).[88] However, the district judge's application of Rule 23(b)(3) was improper:

> [B]ecause of plaintiffs' counsel and the District Court's use of the unnecessarily comprehensive term "liability," there was not in the lower court a sufficiently sharp distinction drawn between issues as to the alleged violations of the anti-trust laws, and issues as to causation. Had this line of differentiation been emphasized, the District Court would probably have seen the cross-light which is beamed from Section 5 of the Clayton Act . . . .[89]

(1970). Hellerstein v. Mr. Steak, Inc., 531 F.2d 470 (10th Cir.), *cert. denied*, 97 S. Ct. 75 (1976). *See generally* CLASS ACTIONS 1975, *supra* note 3, at 99-103; Annot., 17 A.L.R. Fed. 933 (1973).

[84] 539 F.2d 1016 (4th Cir. 1976), *reversing* 68 F.R.D. 641 (D.S.C. 1975).

[85] Judge Wyzanski, Senior District Judge of the District of Massachusetts, was sitting by designation. Judge Craven joined him in the majority (539 F.2d at 1017), and Judge Bryan dissented (*id.* at 1022). Judge Wyzanski may have been selected to sit on the *Windham* panel because of his familiarity with Rule 23. *See, e.g.*, 24 F.R.D. 326 (1964) (Judge Wyzanski was a member of the Advisory Committee on Civil Rules).

Among Fourth Circuit judges *Windham* shows a 1-1 split of opinion. Thus the decision should not necessarily be interpreted as an accurate indicator of Fourth Circuit sentiment, particularly because a majority of the judges voted for a rehearing en banc. Windham v. American Brands, Inc., No. 75-2315 (4th Cir. Dec. 13, 1976) (petition for rehearing en banc). Moreover, in Ballard v. Blue Shield of S.W. Va., Inc., No. 75-1982 (4th Cir. Oct. 19, 1976), in which the Fourth Circuit vacated an order denying class certification, *Windham* was not cited. *See* note 113 *infra*.

[86] 539 F.2d at 1021-22.

[87] *Id.* at 1020.

[88] *Id.*

[89] *Id.* In criticizing the district court's failure to draw a distinction between antitrust violations and causation, Judge Wyzanski argued that the issue of "liability" centered on whether the defendants engaged in a conspiracy; on remand, questions of causation concerning individual class members could be held to a minimum. Thus "there was no substantial evidence which indicated that the trial of such issues of alleged violation would be noticeably prolonged even if there were 20,000 plaintiffs instead of 6." *Id.* at 1022. This view is in marked contrast to the district judge's perception of the "liability" issue: "[T]he determination of the question of liability would involve a vast amount of evidence not related to the class as a whole and it would require factual determinations as to literally

The Fourth Circuit accorded particular significance to section 5 of the Clayton Act, which makes judgment against a defendant in a government antitrust suit prima facie evidence against that defendant in a subsequent suit by another party.[90] This provision, said the court,

> indicates a general policy of aiding those who are injured by violations of the anti-trust laws in ways which show Congressional sympathy for the usually small enterprise against the ordinarily large malefactor. As is sometimes said, there is beyond the law of the statute the equity of the statute . . . .[91]

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thousands of the purported class members." 68 F.R.D. at 654. This difference of opinion exists in other case law. *See* note 59 *supra*.

[90] Clayton Act § 5(a), 15 U.S.C. § 16(a) (Supp. V 1975), provides in pertinent part:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . .

The defendants were not impressed with the court's argument: "This cross light has not heretofore illuminated the opinion of any federal judge." Defendants' Petition for Rehearing and Suggestion for Rehearing En Banc at 8 n.*, Windham v. American Brands, Inc., 539 F.2d 1016 (4th Cir. 1976).

[91] 539 F.2d at 1021. Judge Wyzanski accurately portrayed the policy considerations underlying section 5 of the Clayton Act. Enacted in 1890 (Act of July 2, 1890, ch. 647, 26 Stat. 209), the Sherman Act, 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975), was the first federal antitrust statute. The government subsequently brought a number of suits under the Sherman Act, but private follow-up suits were rare, presumably due to the great expense of such litigation. *See* Comment, *The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial*, 43 U. CHI. L. REV. 338, 341 (1976); Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 YALE L.J. 541, 548-49 (1976). In an effort to remedy this sluggish trend in private antitrust enforcement, Congress enacted § 5 of the Clayton Act in 1914. Act of Oct. 15, 1914, Pub. L. No. 212, ch. 323, § 5, 38 Stat. 731.

A debate has evolved regarding the status and utility of § 5(a) in light of developments in the common law of collateral estoppel. The scope of collateral estoppel has traditionally been limited by the doctrine of mutuality of estoppel, which provides that a party to an action can use a prior judgment against the other party only if both parties were bound by the prior judgment. RESTATEMENT OF JUDGMENTS § 93 (1942). However, many courts have now abandoned this rule. *See, e.g.*, Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942). "Defensive" collateral estoppel may now be used against a plaintiff by a defendant who was not a party to the first action. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971). Also, some courts have permitted "offensive" collateral estoppel—*i.e.*, the use of an estoppel by a plaintiff not a party to the first action against a prior defendant who had lost in that action. *See, e.g.*, Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

If the doctrine of offensive collateral estoppel were available to a private antitrust plaintiff in a suit against a defendant who had lost in a prior suit by the government, the defendant would be precluded from relitigating the issues that were earlier decided against him. Section 5(a) of the Clayton Act, however, provides that the prior judgment against the defendant is only prima facie evidence, rebuttable by the defendant. 15 U.S.C. § 16(a)

The court stated that it did not mean to imply that all Sherman Act plaintiffs should be permitted to maintain a class action if they meet the requirements of Rule 23(a): "What we do say is that there is almost a rebuttable presumption that such a class action should be allowed where there is a plausible claim of violation of the Sherman Act."[92]

The Fourth Circuit then urged a bifurcated trial on remand,[93] the district court to first resolve the issue of whether the defendants conspired in violation of the antitrust laws. Should the plaintiffs succeed in proving such violations, the district court could then decide whether the causation and damage issues "shall be disposed of by separate trials for each plaintiff, or whether there shall be one mass trial or several trials with plaintiffs grouped in sub-classes which meet the standards of Rule 23(b)(3)."[94] The court noted "some support" for its holding in the case law, but conceded that its judgment rested principally on the public policy underlying the antitrust laws.[95]

(Supp. V 1975); *see* note 90 *supra*. The intriguing question that arises, therefore, is whether the "prima facie presumption [of Section 5(a)] preempts developments in the common law of collateral estoppel." Note, *supra* at 546. If it does preempt the common law (*see, e.g.*, Purex Corp. v. Procter & Gamble Co., 308 F. Supp. 584 (C.D. Cal. 1970), *aff'd on other grounds*, 453 F.2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972)), then a strong argument can be made that § 5(a) "has come to be a detriment to the very parties it was designed to benefit." Comment, *supra* at 340.

[92] 539 F.2d at 1021. For further discussion of the policy-centered analysis employed by Judge Wyzanski, see note 105 *infra*.

[93] *Id.* at 1022.

[94] *Id.*

[95] *Id.* Judge Wyzanski cited three cases in support of his opinion, but admitted that none of them was "precisely apposite." *Id.* These cases were: West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971); and Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971).

The *Pfizer* case involved antitrust class actions brought by several classes of plaintiffs alleging price-fixing in sales of antibiotics by drug companies. The decision dealt with court approval of a compromise settlement, not with the issue of manageability. The Second Circuit, approving a $100 million fluid recovery, pointed out that "the only practical way that individual consumers could recover in the circumstances of this case is through the device of class representation . . . ." West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1090 (2d Cir. 1971).

The *Antibiotic Antitrust* opinion involved motions for class action certification by seven states that wished to be excluded from the settlement approved in *Pfizer*. Although finding class action status appropriate, the court contemplated that "[d]amages would be awarded on a class-wide basis, if and when liability was established . . . ." *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 283 (S.D.N.Y. 1971). The court was particularly disturbed by the thought of defendants who "may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their

III

IMPLICATIONS OF THE *Windham* RULE

Observers of federal practice have called the Rule 23(b)(3) action "the most complicated and controversial portion" of the current Rule.[96] The Fourth Circuit's decision in *Windham v. American Brands, Inc.* will undoubtedly exacerbate this controversy and may expand the ranks of those who believe that the Rule is once again "ripe for revision."[97]

A pivotal element of the decision is the Fourth Circuit's new per se rule. The court stated that there is "almost a rebuttable presumption" that Sherman Act plaintiffs are entitled to class action certification as long as their claims are "plausible."[98] Although the scope of such a rule is not clear, few antitrust allegations are so preposterous as to remove them from the "plausible" category. Even plaintiffs with only a slight chance of prevailing on the merits will fare well under the *Windham* standard, for the Supreme Court has ruled that inquiry into the merits of a case is inappropriate when a trial judge is ruling on a motion for class action certification.[99] Since a trial judge is not permitted to inquire into the merits of a class action at the certification stage, he apparently

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ill-gotten gains . . . ." *Id.* at 282-83. The court also stressed that a Rule 23 class action was the only means by which the plaintiffs could prosecute their claims. *Id.* at 289.

In the *Eisen* decision cited by Judge Wyzanski, the district court granted class action certification to the plaintiff and alluded to "the strong public policy behind the antitrust laws in general, and the fundamental role of the private, treble-damage action in enforcing those laws in particular." Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 270 (S.D.N.Y. 1971). The court also stated that "[t]he private class action is the only means of providing for repayment of any alleged illegal profits." *Id.* This decision, however, was reversed by the Second Circuit, which held that the case was unmanageable. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973). *See* notes 25-44 and accompanying text *supra*.

As the *Windham* defendants pointed out, however, these three cases all involved fluid recovery, which considerably eases the management problems encountered in damage distribution. Defendants' Petition for Rehearing and Suggestion for Rehearing En Banc at 5 n.*, Windham v. American Brands, Inc., 539 F.2d 1016 (4th Cir. 1976). Furthermore, these cases merely espouse some of the general policies behind consumer class actions; none of them establishes an expansive new rule as did *Windham*.

[96] PRACTISING LAW INSTITUTE, CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 488 (1975).

[97] *Id.* at 491.

[98] 539 F.2d at 1021.

[99] The Supreme Court has endorsed language from Miller v. Mackey Int'l, 452 F.2d 424 (5th Cir. 1971): "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, hut rather whether the requirements of Rule 23 are met." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974), *quoting Miller*, 452 F.2d at 427.

must certify any class action suit that is plausibly *pleaded*, even though the claim may have little factual support. It is therefore difficult to conceive of an antitrust class action so implausible that it would fall outside Judge Wyzanski's new rule. Moreover, by basing certifiability partly on the apparent merit of an antitrust claim, the *Windham* rule may directly conflict with the Supreme Court's holding in *Eisen* that inquiry into the merits is inappropriate. Thus the Supreme Court's holding in *Eisen* makes the "plausible claim" test easier to meet, but the test itself may be contrary to the Court's ruling.

The new rule also fails to indicate the type of evidence an antitrust defendant must produce in order to successfully rebut the presumption of certifiability. An examination of the circumstances in the *Windham* case—with 36 warehouses, 11 markets, 161 grades of tobacco, and 20,000 farmers—raises considerable doubt as to whether any set of facts could render an antitrust class action "unmanageable." A realistic view of the court's holding, therefore, reveals a rule that may substantially conform to the defendants' interpretation of the decision: that "virtually automatic class action certification of the conspiracy issue" is required in all private antitrust cases "solely on the basis of the allegation in the complaint that an antitrust violation did occur."[100]

Courts—including the Fourth Circuit—have traditionally placed upon the party seeking class action status the burden of showing full compliance with the requirements of Rule 23.[101] Under the rebuttable presumption rule of *Windham*, however, those accused of antitrust violations have the burden of showing that class action status should *not* be granted. Thus the decision clearly represents an extraordinary boon to antitrust class action plaintiffs.

Although one can only speculate as to the Fourth Circuit's motivation in formulating such a sweeping new rule of law,[102] it is likely that the compelling policy considerations underlying class actions played a major role. These considerations include the desire to provide a forum in which small claimants can recover for large antitrust violations, and to prevent corporate wrongdoers from retaining profits illegally extracted from consumers. The pri-

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[100] Defendants' Petition for Rehearing and Suggestion for Rehearing En Banc at 2, Windham v. American Brands, Inc., 539 F.2d 1016 (4th Cir. 1976).

[101] *See* cases cited in note 5 *supra*.

[102] *See* note 95 and accompanying text *supra*. Although no case has gone as far as *Windham*'s rebuttable presumption rule, a number of decisions have exhibited considerable receptivity to class actions. *See* note 61 *supra*.

vate class action may be the only vehicle for reaching these ends. Indeed, to dismiss such large class actions on grounds of unmanageability may "encourage corporations to commit grand acts of fraud instead of small ones."[103] Yet the *Windham* decision, although constituting a major breakthrough in furthering these policies, also raises troublesome questions regarding the stated objectives of Rule 23.

The Advisory Committee's Note on Rule 23(b)(3) states that this subdivision "encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated . . . ."[104] The importance of manageability in achieving such judicial frugality is obvious. Nevertheless, there are a number of indications in *Windham* that the Fourth Circuit was willing to subordinate these considerations to its desire to reach a particular result.[105] For ex-

[103] Grad v. Memorex Corp., 61 F.R.D. 88, 103 (N.D. Cal. 1973).

[104] FED. R. CIV. P. 23, Advisory Committee's Note, 39 F.R.D. 98, 102-03 (1966).

[105] The Fourth Circuit's policy-oriented decision may have been based on a sophisticated cost-benefit analysis. Commentators have recently recommended such an analytical framework as a means of resolving Rule 23(b)(3) issues. *See Developments in the Law—Class Actions*, *supra* note 35, at 1498-1516. *See generally* Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975). Under this approach, courts would confine their manageability inquiry to a determination of whether any benefits would be conferred on class members and would assume a more positive role in reconciling class action procedure with a given cause of action. *Developments in the Law—Class Actions*, *supra* note 35, at 1500-01, 1503-04. With the manageability issue relegated to a minor role, traditional manageability questions would be merged into a broader "predomination analysis" (*id.* at 1504-16), centering on the relationship between class action procedure, substantive law, and the policies underlying the specific cause of action. This substantive approach is required, according to the commentators, since courts, in order to determiue whether common questions predominate, must "first determine which elements of a cause may in fact be litigated in common and which elements will require separate showings by each class member." *Id.* at 1506. Within this broader framework, courts would inquire into the traditional manageability issue of the effects on a class action suit of questions which can be litigated only on an individual basis. *Id.* at 1511. Factors that courts might consider under a predomination inquiry would include the cost in judicial time in litigating one lengthy and complex class action, the benefits in compensation and deterrence accruing to society as a whole from many smaller causes of action that might be successfully litigated but for the class action, the monetary compensation accruing to each class member if the action were successful, the deterrent effect of the class action, and possible conflicts of interest within the class. *See* Dam, *supra* at 48-61.

This approach, however, may be of limited utility. Under a predomination inquiry, courts are forced to weigh incommensurables and can only guess at a result. Trial judges are ill-equipped to decide whether more benefits will accrue to society as a whole from a large class action or a series of smaller lawsuits. Such a determination is a purely prospective judgment based on an estimation of the issues that may ultimately be vindicated at trial. This judgment may be further complicated by the fact that judges will be able to rely only on the pleadings, which may not adequately develop all the issues that will eventually be litigated. *See* note 99 and accompanying text *supra*.

ample, Judge Wyzanski never disputed any of the findings of fact that led the lower court to conclude that *Windham* would be unmanageable as a class action.[106] To the contrary, he seemed well aware that the serious management problems contemplated by Rule 23(b)(3)(D) could arise: "Managerial difficulties are always present in big anti-trust cases. But the case at bar, by including a class of 20,000, will not present unusual complexities *at least so long as only issues of violation are before the tribunal.*"[107] Moreover, Judge Wyzanski acknowledged the possibility that separate trials on the damage issue might be required for *each* plaintiff,[108] and he never challenged the lower court's estimate that such a procedure would take ten years.[109] In sum, the court never seriously argued that the case as a whole was sufficiently manageable under Rule 23(b)(3)(D). It recognized that bifurcation of the liability and damage issues would only postpone inevitable difficulties.[110] By implicitly acknowledging the existence of these problems, and yet ordering that the class be certified, the Fourth Circuit created an antitrust exception to the requirements of Rule 23.

Windham's immediate impact will be on Fourth Circuit district court judges, who will no longer enjoy their once unfettered discretion to determine whether cases may proceed as class actions. Fact-finding that would normally lead a district court to conclude that a

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Whether Judge Wyzanski employed such an approach in *Windham* is unclear. If he did, it is unfortunate that he failed to enumerate the factors which entered into his analysis; instead, he apparently relied solely on the policies underlying § 5(a) of the Clayton Act.

[106] Judge Bryan dissented on this point, stating that "[w]ith its factual recital unquestioned, for me the District Judge's decision is not enfeebled by an *abuse* of discretion." 539 F.2d at 1022 (emphasis in original).

[107] 539 F.2d at 1022 (emphasis added).

[108] *Id.*

[109] *See* note 82 *supra*.

[110] The ordering of a bifurcated trial under such circumstances has been severely criticized. *See* PRACTISING LAW INSTITUTE, CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 491-94 (1975). Professor Milton Handler, speaking of the burdens imposed on courts by large class actions, has stated:

> [S]ince the seventh amendment guarantees defendants a constitutional right to a jury trial with respect to each damage claim asserted, at some point there will have to be either a massive trial lasting for years or a multitude of mini-trials with a new jury having to be empaneled in each instance unless trial by jury is waived. True, the facts may permit the court to sever the issue of liability and thus postpone discovery and trial on damages; but if the case is to be litigated, this problem will have to be faced eventually and the load the court will have to carry will not be reduced by the delay.

Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 7-8 (1971) (footnote omitted).

large class action is unmanageable will no longer be dispositive in the antitrust field. Rather, under the new rebuttable presumption rule, the court will have to certify the class at least for trial of the liability issue and address the management problems later. District judges will also be forced to be more innovative in formulating methods of proof and distribution of damages. Although different procedures have already been tried,[111] it is questionable whether any of them will save much time. In addition, courts within the Fourth Circuit may take a closer look at the possibility of fluid recovery, despite its questionable legal status.[112]

It is unclear whether the decision will have any significant impact outside the Fourth Circuit.[113] Conceivably, the case represents a first step toward a new, liberal approach to Rule 23. However, no such general trend is presently discernible.[114] Should *Windham* reach the Supreme Court, affirmance appears unlikely. The Court's prior decisions dealing with class actions reveal little willingness to adopt an expansive new rule in this area.[115] For the present, however, the Fourth Circuit will be a desirable haven for class action antitrust plaintiffs.

CONCLUSION

Undaunted by a lack of precedent, the Fourth Circuit, in *Windham v. American Brands, Inc.*, has held that there is "almost a rebuttable presumption" that plaintiffs with a "plausible claim" of a

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[111] Among those are the increased use of masters, the use of different juries for the liability and damage issues, and "test cases" for liability and damages. *See* CLASS ACTIONS 1975, *supra* note 3, at 54-57.

[112] *See* note 35 *supra*.

[113] Even within the Fourth Circuit, *Windham*'s impact is questionable. *See* Ballard v. Blue Shield of S.W. Va., Inc., No. 75-1982 (4th Cir. Oct. 19, 1976). Decided three months after *Windham*, the case was an antitrust suit brought by six West Virginia chiropractors alleging Sherman Act violations in the sale of health insurance. The district court had denied the plaintiffs' motion for class certification, but the Fourth Circuit vacated the order, stating that the district court had failed to adequately explain its ruling. The Fourth Circuit did not mention *Windham*.

[114] Indeed, one observer has stated:

> [A]s the years have gone by since 1966, experience with the class action device has led to a widespread change in judicial attitudes. It is a safe generalization that the tendency of the courts today (including the Supreme Court in *Eisen*) is to take a closer and more careful look at the issues and available facts before allowing a case to proceed as a class action. This is particularly true in the antitrust sector where the problems of administering a case frequently are awesome, even in a more or less conventional single-plaintiff suit.

Hauser, *supra* note 11, at 76.

[115] *See* text accompanying notes 11-50 *supra*.

Sherman Act violation are entitled to class action certification under Federal Rule of Civil Procedure 23. This holding, supported by the public policy underlying the antitrust laws, is a windfall for class action plaintiffs, who have traditionally been saddled with the burden of showing that they have satisfied all the requirements of the Rule. Although furthering some of the important policy considerations behind class actions in general, the decision nevertheless loses sight of Rule 23's objective of judicial economy. In excusing antitrust plaintiffs from meeting a meaningful standard of manageability, the court has essentially created an antitrust exception to Rule 23. Although the decision will make the Fourth Circuit an attractive forum for class action antitrust plaintiffs, its further impact is still very much in doubt.

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APPENDIX

The subdivisions of FED. R. CIV. P. 23 that are pertinent to this Note are:

(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 interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, 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 he 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 bim 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.

. . . .

(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.