Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction

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CONSUMER CLASS ACTIONS WITH A MULTISTATE CLASS: A PROBLEM OF JURISDICTION

The importance of representative suits to consumer protection has long been recognized.¹ Not only is the class action particularly suited to redress the typically small consumer claims arising from an abusive business practice,² but more importantly to deter future consumer exploitation.³ Nevertheless, there are two major obstacles preventing the consumer class action from realizing its potential as a form of social legislation.

First, like any class action, the consumer class action is procedurally complex and time-consuming. Thus, as one commentator noted, because federal courts have been so overwhelmed by problems of management, there was not one nationwide consumer class action litigated to conclusion within five years after the 1966 revision of Federal Rule of Civil Procedure 23 (Rule 23).⁴ Moreover, the methods

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2. The class action was born out of the need for a legal device to redress group wrongs. Consequently, its intended function is to prevent a multiplicity of suits based on the same wrongful act, as well as to provide relief to the group members whose claims are so small that individual legal redress would be impractical. See generally Z. CHAFEE, SOME PROBLEMS OF EQUITY 199-242 (1950). Therefore, when a segment of the consuming public is injured by some deceptive trade practice, a class action is their best hope for recovery since typically their claims will be small. See Eckhardt, Consumer Class Actions, 45 Notre Dame Law. 663 (1970) [hereinafter cited as Eckhardt].

3. “Arguably, the most positive result of class actions is the deterrent effect they have on the harmful practices sometimes employed by manufacturers and retailers of consumers goods . . . Concerned that a class action could be brought, the producer of consumer goods would undoubtedly be more sensitive to possible areas of liability. Indeed, if the consumer action were successful, it is not unrealistic to predict that some defendant producers and manufacturers would be faced with the possibility of going out of business. In addition to the fear of costly litigation, the national manufacturer must also recognize the potential for a tremendous loss in public goodwill if subjected to a consumer action. No company would welcome the adverse publicity that accompanies these suits.” Comment, Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers, 18 U.C.L.A.L. Rev. 1002, 1021-22 (1971) (citations omitted).

4. Id. at 1021. It should be noted that the revision of Rule 23, which governs the conduct of class actions, did much to eliminate the restrictive tripartite classifications of class actions, “true,” “hybrid” and “spurious,” thereby rendering the class action a more accessible device. Also, the courts were given wide discretion in their administration of such actions. See 3B J. Moore, Federal Practice ¶ 23 (2d ed. 1969) [hereinafter cited as Moore].
adopted by one federal district court to facilitate the administration of a large class action were overruled by the Second Circuit Court of Appeals and are now being reviewed by the Supreme Court. Should the Court refuse to uphold the validity of these procedures, use of the class action device on both the federal and state levels will be drastically curtailed.

The second, and perhaps the primary, reason why consumers have been unable to take full advantage of the class action device is that they lack a proper forum. In the typical consumer class action, the claims are relatively small, as well as separate and distinct. Additionally, the members of the class, usually residents of several states, were allegedly injured in their respective states due to some wrongful activity on the part of a manufacturer or retailer doing business nationwide. Consequently, because of the nature of their claims, these consumer classes fail to satisfy the jurisdictional amount requirement of the federal courts. Furthermore, their residential diversity creates an obstacle to meeting requirements of state courts for in personam jurisdiction.

While the question of whether the value of class actions outweigh their administrative difficulties is a valid and serious one, this note proceeds on the premise that until the class action is rendered totally ineffective or until better means of public redress for group wrongs are

5. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), cert. granted, 414 U.S. 908 (1973). This decision represents the culmination of seven years of pre-litigation concerning the administration of an action brought on behalf of millions of odd lot investors.

6. At the risk of oversimplifying the issues in Eisen, the Second Circuit Court of Appeals found improper the proposed "fluid recovery" procedure and the use of a preliminary "mini-hearing" on the merits in order to decide collateral issues such as allocation of notice costs. Id. at 1011-12, 1015-16. The appellate court also held that under certain circumstances, the class representative must defray the costs of notice himself. Id. at 1009. While the Eisen class was uniquely immense and the majority of its members unidentifiable, if the Second Circuit's findings are affirmed, the future of class actions will be seriously threatened. Not only will potential class representatives be reluctant to bring actions, but courts will hesitate to attempt the management of a class along the lines of the seemingly practical Eisen procedures. For further discussion, see McCall, Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues, in this issue.

7. It is assumed for purposes of this article that the class action referred to is a proper one as contemplated by Rule 23(b)(3), where the questions of law or fact common to the members of the class predominate over any questions affecting the individual members.

8. See note 2 supra.

9. The concept of residence, as used throughout this note, is synonymous with that of domicile, the latter being the state where a person has his home. See M. Green, Basic Civil Procedure 17 (1972) [hereinafter cited as Green].

10. See notes 15-27 & accompanying text infra.

11. See notes 73-76 & accompanying text infra.
provided, the class action device is invaluable. Resting on this supposition, the intention of this note is to discuss and to propose a solution to the typical consumer class’ unique jurisdictional problem, lack of a proper forum. The note begins with an analysis of the problem on the federal level. It will be shown that although there are theoretically two possible methods by which a consumer class can satisfy the jurisdictional amount requirement, the Supreme Court has recently taken the final step in virtually closing the doors of federal courts to this type of class. Since the future of multistate consumer class actions therefore depends on their maintenance in state courts, it will be necessary to discuss how a state court can assume jurisdiction over class members residing outside its jurisdictional boundaries and thereby render a binding judgment over the entire class.

An attempt will be made to answer this question by referring to the manner in which state courts submit foreign defendants to their jurisdiction. However, because these methods are not easily adapted to plaintiff consumer classes, this note will conclude with the proposition that, subject to certain practical limitations, due process of law allows a state court to hear a multistate class action without any need to strain traditional jurisdictional principles.

12. Unfortunately, governmental agencies have demonstrated an incapacity to carry the entire burden of consumer protection. Set up to implement the provisions of an act, they are notoriously slow in establishing official standards. See, e.g., Comment, Drug Efficacy and the 1962 Drug Amendments, 60 Geo. L.J. 185 (1971). Also, because most agencies are understaffed and insufficiently funded, they are able to focus their efforts on only a small percentage of the violations coming to their attention. Ford, Federal Rule 23: A Device for Aiding the Small Claimant, 10 B.C. Ind. & Comm. L. Rev. 501, 508 (1969). Moreover, even when an agency attempts to police violations of an act, such action can often be ineffective. See, e.g., Eckhardt, supra note 2, at 667 (FTC actions against the Holland Furnace Co.). For an in depth analysis of the inadequacies of the Federal Trade Commission, the chief governmental consumer advocate, see E. Cox, R. Fellmeth, & J. Schulz, The Nader Report on the FTC (1969).


14. It is not intended to detract from the importance of state consumer class actions where the classes are composed of residents of one state. Undoubtedly, they are effective in deterring unlawful practices, particularly those of local businesses. However, because there will be times when the interests of consumer protection require an adjudication of a multistate action, the jurisdictional problem involved mandates singular treatment since it is not a concern in a purely local class action. See text accompanying notes 73-76 infra.

Furthermore, while the primary focus of this note is on class actions at law, the benefits of relief in equity are not overlooked, particularly with regard to injunctions, specific performance and rescission of contracts. Nevertheless, it should be noted that there are many consumer abuses which may not give rise to actions sounding solely in equity. Moreover, injunctions, serving merely to correct existing wrongs, are often ineffectual in impeding future wrongs. It is therefore essential for consumer classes to be able to resort with some consistency to courts which will grant damages based on their separate and distinct claims.
Federal Consumer Class Actions: Jurisdictional Amount Requirement

“The promise of the federal class action was nipped in the bud by the unfortunate decision in Snyder v. Harris.” In that case, the named class representative claimed $8,740 in damages, although the aggregate amount claimed on behalf of the class was $1,200,000. The Supreme Court held that in a diversity action, class members may not aggregate their separate and distinct claims in order to satisfy the federal jurisdictional amount requirement. Moreover, in the recent case of Zahn v. International Paper Co., following Snyder's rationale, the Court denied maintenance of a class action where, although the named class representatives satisfied the jurisdictional amount requirement, other class members' claims fell below the monetary prerequisite. In both decisions, the Court invoked “the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional amount requirement if his claim [is] to survive a motion to dismiss.” Consequently, in order to maintain a class action based on diversity jurisdiction, not only must the named class representative claim damages in excess of $10,000, but so must each class member. Thus, because most injured consumers seldom have claims exceeding $10,000, Snyder and Zahn effectively deny the consumer class access to the federal forum through diversity jurisdiction, even though the class as a whole may have sustained damages representing millions of dollars.

16. 394 U.S. at 333.
19. Id. at 511.
20. Id. The Zahn Court noted that this rule was rooted in a long series of cases dating from 1832 and construing the statutory phrase, “matter in controversy,” of 28 U.S.C. § 1331 and § 1332 (1970). Id. at 508-09.
21. It is the jurisdictional amount requirement which closes the door, for diversity is easily established in a class action. Diversity is determined by the citizenship of the named class representative and the defendant, and cannot be defeated by class members having the same citizenship as the opposing party. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).
22. A rare exception would be when the damages claimed represent an amount in which the class shares a common and undivided interest, as opposed to damages representing the separate and distinct claims of the class members. See Zahn v. International Paper Co., 94 S. Ct. 505, 508 (1973). Similarly, neither Snyder nor Zahn
Absent recourse through diversity jurisdiction, the consumer class’ alternative route to the federal courts is through federal question jurisdiction.\(^2\) The *Snyder* Court did not explicitly extend its holding to federal question cases. However, in stating that “[a] large part of those matters involving federal questions can be brought, by way of class action or otherwise, without regard to the amount in controversy,”\(^2\) the Court implied that class actions based on federal laws *not* exempted from the jurisdictional amount requirement would be subject to the *Snyder* no-aggregation rule. Accordingly, *Snyder* became a bar to a number of subsequent federal question cases.\(^2\) Finally, in *Zahn*, the Court announced in dictum that a class action invoking federal question jurisdiction is subject to the same jurisdictional amount requirement with respect to separate and distinct claims as one brought under diversity jurisdiction.\(^2\) However, despite this pronouncement, the *Zahn* Court still maintained that the impact of *Snyder* and *Zahn* upon federal question cases would be negligible because “Congress has exempted major areas of federal question jurisdiction from any jurisdictional amount requirements . . . .”\(^2\)

Unfortunately, among the federal statutes which provide for private right of action without reference to the jurisdictional amount requirement, there are very few which are appropriate for consumer litigation.\(^2\) Of note are the Clayton\(^2\) and Truth in Lending\(^2\) Acts, forecloses a diversity class action seeking only injunctive relief, as the amount in controversy of such an action is generally measured as “the value to be protected or the extent of the injury to be prevented.” Marquez v. Hardin, 339 F. Supp. 1364, 1370 (N.D. Cal. 1969).


\(^2\) 15 U.S.C. § 12 *et seq.* (1970). “The broad sweep of the antitrust laws forbids anti-competitive consumer abuses such as price fixing, territorial division agreements, and tying agreements, as well as the more generalized wrongs of monopoly and attempts to monopolize . . . . Certainly, for the consumer advocate, the antitrust laws constitute a potent weapon for particularly grave abuses . . . .” Krahmer, *Some Prob-
which are extremely helpful to consumers injured by antitrust violations or deceptive credit practices. Moreover, it should be emphasized that because the Clayton Act provides for treble damages, as well as costs of suit and reasonable attorney fees, a successful class suit under this act would undoubtedly have the desired impact of deterring future offenses.

The federal question actions available to the consumer class can provide relief for only a small portion of the wide variety of consumer abuses. Therefore, as a means of access to the federal forum, federal question jurisdiction is a limited solution to the problems of consumer classes unable to satisfy the jurisdictional amount requirement. However, other solutions which have been proposed to mitigate the effect of Snyder prove to be even less promising.

"Defendant's View" Doctrine for Determining Jurisdictional Amount

The "defendant's view" doctrine is a method of determining the amount in controversy in a lawsuit. Under this doctrine, the amount in controversy is valued as the "pecuniary result to either party which the judgment would directly produce." This doctrine developed concurrently with the "plaintiff's view" doctrine, the traditional test for determining jurisdictional amount. Under the latter, the amount in controversy is measured by the amount which the plaintiff in good faith pleads in his complaint.

It has been urged by one commentator that because it has never been settled which doctrine is applicable in determining jurisdictional amount, the courts are free to choose either doctrine. If a court "chose" to follow the "defendant's view" doctrine in a consumer class action, Snyder would obviously be averted, since the "pecuniary result" would represent the aggregate of the class' claims or, put another way, the total amount the defendant would stand to lose. In Berman v. Narragansett Racing Association, the court of appeals for the first circuit adopted this doctrine as an alternative ground for its decision.

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33. For a complete discussion of both doctrines, see C. Wright, LAW OF FEDERAL COURTS § 124 et seq. (2d ed. 1970).
34. Strausberg, supra note 17, at 104. "[T]he Supreme Court has implicitly adopted each doctrine at two different points in time." Id. However, the latter of the two opinions came fifty years after the first and clearly upheld the "plaintiff's view" doctrine. Id., citing St. Paul Co. v. Red Cab Co., 303 U.S. 283 (1937) (plaintiff's view) and Adam v. Smith, 130 U.S. 167 (1889) (defendant's view).
to maintain a class action, and thereby permitted aggregation of the class members' claims in satisfaction of the jurisdictional amount requirement. The court's first ground for maintaining the action was that the class shared a common and undivided interest in the damages claimed. Thus, since the class members were not found to have separate and distinct claims, aggregation was permissible even under Snyder. Nevertheless, it has been noted that while the "defendant's view" doctrine was unnecessary to the court's holding, "[t]he court went to great lengths to [maintain the class action, and] [i]n so doing... circumvented the purpose of the Snyder no aggregation rule..."

Berman is the only post-Snyder case to use the "defendant's view" doctrine in a class action. Indeed, with the exception of the first circuit, the federal courts have shown little inclination to disregard Snyder's bar against aggregation—even in federal question cases. Moreover, in view of the Zahn Court's recent and emphatic endorsement of Snyder, even if courts actually do have a choice between the "plaintiff's" or "defendant's view" doctrines in determining jurisdictional amount, it is improbable that they will opt for the latter in a typical consumer class action.

Ancillary (Pendent) Jurisdiction

In their respective dissents to Zahn, Justice Brennan and Judge Timbers of the Second Circuit Court of Appeals contended that the issue was not aggregation of class members' claims, but rather ancillary jurisdiction. Actually, both jurists were more likely referring to pendent jurisdiction, a subcategory of ancillary jurisdiction. Under pendent jurisdiction, viewing the matter from the plaintiff's perspective, a federal court may assert jurisdiction over a nonfederal claim which is "pendent" to the jurisdiction-granting claim already before the court. Agreeing that as a means of establishing jurisdiction,

36. Id. at 315.
37. Id. at 315-17. Berman was a class suit against a racetrack for withholding distribution of money to purse winners pursuant to an alleged agreement.
38. See note 22 supra.
39. Strausberg, supra note 17, at 105.
40. See, e.g., Massachusetts State Pharmaceutical Ass'n v. Federal Prescription Service, Inc., 431 F.2d 130, 132 n.1 (8th Cir. 1970) (suggesting application of "defendant's view" doctrine to class actions would directly contravene Snyder); Lonnquist v. J.C. Penney Co., 421 F.2d 597 (10th Cir. 1970) (in an action factually similar to Berman, court found claims of class separate and distinct).
41. See note 25 supra.
42. See note 56 & accompanying text infra.
43. 94 S. Ct. 505, 512 (1973).
44. 469 F.2d 1033, 1036 (1972).
45. GREEN, supra note 9, at 23-25. The test of pendency has been refined in
aggregation is barred when plaintiffs have separate and distinct claims, Justice Brennan added:

[T]he "aggregation" rule has been but one of several ways to establish jurisdiction over additional claims and parties. . . .

Ancillary jurisdiction to adjudicate claims that cannot be fitted within the aggregation rules has long been recognized by this Court . . . .

Justice Brennan then went on to give examples of how the Court has previously sustained the exercise of ancillary jurisdiction over compulsory counterclaims, intervention as a matter of right, cross-claims permitted by Federal Rule of Civil Procedure 13(g), impleaded defendants, and defendants interpleaded under Federal Rule of Civil Procedure 22. Further, the justice emphasized how ancillary jurisdiction has long been sustained in class actions where the nonappearing class members do not meet the rule of complete diversity between parties plaintiff and defendant. Critically questioning the majority's refusal to consider ancillary jurisdiction in cases such as Zahn, where absent class members fail to meet the jurisdictional amount requirement, he concluded:

Particularly in view of the constitutional background on which the statutory diversity requirements are written . . . it is difficult to understand why the practical approach the Court took [in sustaining ancillary jurisdiction over non-diverse absent class members] must be abandoned where the purely statutory "matter in controversy" [jurisdictional amount] requirement is concerned.

Therefore, as the Zahn minority would have it, once the named class representative meets the jurisdictional amount requirement, ancillary jurisdiction could be established over the other members of the class without regard to the size of their claims. Obviously, this would be a workable solution to the jurisdictional problem of the consumer class, provided it had a proper representative who could assert a claim over $10,000.

United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966): "The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then assuming substantiality of the federal issues, there is power in federal courts to hear the whole." A Rule 23(b)(3) action would undoubtedly meet this test, since it must be based on questions of law or fact common to all the members of the class. See note 7 supra. The Gibbs Court further emphasized that it is an exercise of a court's discretion whether to sustain ancillary jurisdiction over the non-federal claim. United Mine Workers v. Gibbs, supra, at 725.

46. 94 S. Ct. at 513-14.
47. Id. at 514.
48. Id. at 515. See note 21 supra.
49. Id. at 516 (citations omitted).
51. Due to the fact that under this theory of jurisdiction, the named representa-
The federal district court for the northern district of Illinois allowed a class action to proceed on the basis just described. In *Lesch v. Chicago & Eastern Illinois Railroad Co.*, a diversity class action, this court held:

> [I]n a spurious class action, if one of the representative parties has a claim in excess of the jurisdictional minimum then federal jurisdiction attaches, and if that party alone can adequately represent the entire class, then there is federal jurisdiction over the entire class action even where members of the class having smaller claims are originally named parties.

It should be noted, however, that *Lesch* was a pre-*Snyder* case. More importantly, *Lesch* appears to run directly contrary to the subsequently expressed mandates of *Zahn*. Yet, the *Zahn* Court did not once mention the propriety or impropriety of ancillary jurisdiction in the context of satisfying the jurisdictional amount requirement in a Rule 23 action, even though the issue was raised by the petitioning class. Thus, by virtue of this omission, technically *Lesch* has not been overruled.

Nevertheless, it is impossible to ignore the Supreme Court’s adamantly refusal to overrule *Snyder* or to change the long-standing construction of “matter in controversy.” Clearly, this extreme posture, coupled with a conspicuous silence on the matter of ancillary jurisdiction, would indicate the jurisdictional amount issue in diversity federal class actions will be governed *solely* by the aggregation rules. Consequently, although the question of whether or not to sustain ancillary jurisdiction in an appropriate action is within the discretion of the federal court, the usefulness of ancillary jurisdiction to a consumer class would depend largely on the nature of the abuse being complained of. For example, in a products liability action, where members of the class have actually sustained physical injuries, it is probable that a class representative could be found to satisfy the jurisdictional amount requirement. However, in a false advertisement action, it is unlikely any individual class member could complain of substantial damages.

52. 279 F. Supp. 908 (N.D. Ill. 1968).
53. *Id.* at 912.
54. *Id.* at 912. “From the outset, Congress has provided that suits between citizens of different States are maintainable in the district courts only if the ‘matter in controversy’ exceeds the statutory minimum, now set at $10,000. 28 U.S.C. § 1332(a).” *Id.* at 507-08 (footnote omitted). In construing the “matter in controversy” in actions where there are several claimants, each with separate and distinct claims, courts have consistently held that each claimant must meet the jurisdictional amount requirement. *Id.* at 508-11.
eral judges, it is highly unlikely any federal court would follow *Lesch* and exercise such discretion in order to maintain a typical consumer class action.

**Overruling Snyder**

It is apparent that apart from the limited number of federal question actions appropriate to consumer litigation, there is no feasible method of circumventing *Snyder* and *Zahn* in order to procure a federal forum for the consumer class. Thus, for the federal judiciary to play a major role in consumer protection, the *Snyder* rule must be overruled by the Supreme Court or changed by Congress.

As previously noted, the Supreme Court is not at all inclined to overrule *Snyder*. At first glance, assuming the need of class actions, the Court's dedication to uphold the *Snyder* rationale seems entirely unreasonable. Obviously, class actions in which each class member can assert a claim over $10,000 do not arise often. Nor is it often that a group of claims are sufficiently interrelated to constitute a common and undivided interest. Thus, the great majority of prospective class litigants, if unable to unite their various claims in state class actions, are forced to pursue their causes individually, either on the federal or state level depending on the size of their claims. Not only is this economically unfeasible for those potential litigants with smaller claims, but it is also productive of a multitude of suits. It was to avoid this very result that the class action device was originally formulated. Hence, *Snyder* greatly undermines the usefulness of Rule 23. Finally, a review of Justice Brennan's dissent in *Zahn* immediately reveals that application of the ancillary jurisdiction doctrine to the jurisdictional amount requirement in class actions would be not only valid, but also totally in line with the Court's development of that doctrine.

Yet, upon closer scrutiny, the Supreme Court's continued adherence to *Snyder* may not appear so unreasonable. It is clear that the Court believes that the above mentioned inequities are outweighed by the inescapable conclusion that to dispense with the *Snyder* rule would open the federal courts to an entirely new body of litigation, namely large and complex diversity class actions based exclusively on state law. This inevitability and the resultant burden it would place on the federal courts were instrumental factors in the *Snyder* Court's ruling. Although the Court declined to reiterate this policy considera-

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57. See note 45 *supra*.
58. See notes 28-30 & accompanying text *supra*.
59. See note 56 & accompanying text *supra*.
60. See note 2 *supra*.
61. See notes 46-49 & accompanying text *supra*.
62. 394 U.S. at 339-41.
tion in Zahn, there is little doubt it was influential to that decision as well.63 Even if the Supreme Court were not completely convinced that this last consideration outweighed the value of federal diversity class actions, it would have to consider the potential reaction of the federal judiciary to an onslaught of diversity class actions. If a federal judge were faced with such a burdensome increase in his caseload, it is not unreasonable to assume he might exercise the broad discretion granted him by Rule 23 and drastically curtail the use of the class action device. Rather than have the courts chip away at Rule 23 piecemeal, the court chose to relieve them of that task with Snyder.

Thus, it is evident that the Supreme Court has no intention of relaxing or altering the Snyder doctrine in the future and that if such change is to come, it must be from Congress.64 However it is equally doubtful that legislative rejection of Snyder will be forthcoming. Only one month after Snyder was decided, Senator Tydings introduced a bill entitled Class Action Jurisdiction Act (CAJA).65 It was designed, in part, to overcome Snyder by dispensing with the jurisdictional amount requirement in all consumer class actions based on alleged violations of consumer rights affecting interstate commerce.66 CAJA set off a chain of proposed bills, all similarly motivated to aid the consumer class by alleviating the jurisdictional problem, yet each differing in its approach.67 Significantly, none of these bills survived the legis-

63. Justice Brennan, in his dissent, remarks that it was indeed the Court's "apparent purpose" to refrain from overburdening the federal judiciary. 94 S. Ct. at 514.
67. First, CAJA and its companion bill were refined and amended by S. 3092, 91st Cong., 1st Sess. (1969) and H.R. 14585, 91st Cong., 1st Sess. (1969), which went to the respective Commerce Committees of each body. See note 65 supra. Also introduced in the Commerce Committees were the Administration bills, S. 3201, 91st Cong., 1st Sess. (1969) and H.R. 14931, 91st Cong., 1st Sess. (1969), adding a requisite "triggering device" under which the Attorney General and Federal Trade Commission must obtain a cease and desist order in the district court before a consumer may bring action. The Administration's House bill was ultimately amended to include, among other provisions, a jurisdictional amount requirement over $25,000, which could represent the aggregate of the class' claims providing each member's loss exceeded $10.00. H.R. 14931, 91st Cong., 1st Sess. §§ 301(d), 302(b)(1) (1969). The House bill finally recommended in the 91st Congress retained this requirement, but provided that the Federal Trade Commission would make general rules, violations of which could give rise to private consumer class actions, in lieu of the "triggering device." H.R. 14931, 91st Cong., 1st Sess. § 302 (Comm. Print Showing H.R. 14931 as Ordered Reported by Subcomm. June 2, 1970).

Of additional interest is Charles Alan Wright's response to the Congressional con-
lative session,\textsuperscript{68} and to date no bill which would effectively dispense with the Snyder rule, at least as it affects consumer class actions, has been enacted.\textsuperscript{69}

There are many reasons why Congress has not reached agreement on suitable legislation in this area. No doubt, the legislature is influenced by the same considerations as the Supreme Court—the overloading of the federal dockets and the bench's reaction. However, perhaps the most significant stumbling block is the difficulty in achieving a practical balance between the federal and state substantive law to be incorporated in the proposed legislation. Most of the proposals would have allowed federal class suits based on violations of any state statutory or decisional laws, as well as on violations of federal laws.\textsuperscript{70} There is no question of Congress' power to adopt state law as federal law.\textsuperscript{71} But its failure to do so in the area of consumer actions reflects Congressional reluctance to incorporate into federal legislation such an expansive field of law which has heretofore been within the domain of state interest.

Thus, an analysis of consumer class treatment on the federal level inevitably leads to a question of policy: are the federal courts, under diversity jurisdiction, the preferable forum for consumer class actions based on state law? Through their continued support of the Snyder doctrine, the federal judiciary and legislature have answered in the

\textsuperscript{68} The proposed bills cited in the preceding note were "revived" in altered form in the next Congress by the following bills, which also expired with session: S. 984, 92d Cong., 1st Sess. (1971) and S. 1222, 92d Cong., 1st Sess. (1971), allowing consumers private judicial action subject to their respective provisions, without regard to jurisdictional amount; S. 1378, 92d Cong., 1st Sess. (1971) and companion bill H.R. 5630, 92d Cong., 1st Sess. (1971), retaining the requirement that a class' aggregate claim must exceed $25,000. For a complete discussion of these bills, see Newberg, \textit{Federal Consumer Class Action Legislation: Making the System Work}, 9 HARV. J. LEGIS. 217 (1972) [hereinafter cited as Newberg].


\textsuperscript{71} See Eckhardt, \textit{supra} note 2, at 675-76.
negative. Consequently, if the great majority of consumer classes are to find a forum, it must be the state courts.\textsuperscript{72}

**State Consumer Actions: In Personam Jurisdiction**

Where subject matter jurisdiction was the consumer class' roadblock to the federal forum, the question of the power to exercise that jurisdiction over the parties is the obstacle to overcome in the state courts.\textsuperscript{73} In order for a person to be bound by a state court's judgment affecting his legal rights, he must be subject to the adjudicating court's jurisdiction. Remembering that the type of consumer class under discussion is multistate in character, the question then becomes how does a state court assume jurisdiction and render a binding judgment in a consumer class action when there are members of the class residing outside its jurisdictional boundaries.\textsuperscript{74} With the exception of two unique circumstances which will be mentioned later,\textsuperscript{75} this has not yet been done by any state court.

Ordinarily, there is no in personam jurisdiction problem with parties plaintiff. They voluntarily submit to the jurisdiction of a court when they file their complaints. However, this cannot be said of a plaintiff class, for it is only the class representative who comes before the court. Furthermore, the representative's act of filing cannot reasonably imply the class' consent to the court's jurisdiction, since, at the commencement of a class suit, most class members are totally unaware that the representative intends to involve them in the pending litigation. Of course, this is true even in suits brought on behalf of a class composed entirely of residents of the forum state. Nevertheless, in such "local" actions, if a court, after a review of the pleadings, is satisfied that the facts alleged indicate the propriety of a class action, it will allow the suit to proceed toward litigation. It is extremely doubtful, however, even under the argument later posed by this article, that any state court would summarily acknowledge jurisdiction in a multistate class action upon the mere filing of proper pleadings.

It is therefore apparent that the multistate consumer class action presents a novel issue in terms of in personam jurisdiction. However, an action involving nonresident plaintiff class members raises essenti-

\textsuperscript{72} The Snyder Court itself said, referring specifically to class actions: "Suits involving issues of state law and brought on the basis of diversity of citizenship can often be most appropriately tried in state courts." 394 U.S. at 341.

\textsuperscript{73} The class action contemplated by this note would undoubtedly meet the jurisdictional amount requirement of any state court.

\textsuperscript{74} Naturally, assuming the requisites of a class action were met, a state court would have the power to bind those class members who are residents of the forum state. However, this question contemplates a binding judgment over the entire class, residents and nonresidents alike.

\textsuperscript{75} See notes 80 and 98-104 & accompanying text infra.
ally the same jurisdictional problem as one involving a nonresident defendant. In both situations, unless a court can validly exercise jurisdiction over the foreign parties, it will dismiss an action which seeks to determine their legal rights. Yet, while multistate class actions are novel, state courts have long been confronted with actions brought against nonresident defendants. Consequently, out of these cases have developed jurisdictional principles which allow courts to obtain personal jurisdiction over a foreign defendant or, in the alternative, to obtain jurisdiction over the property of a foreign defendant, and in both cases to render a judgment that will bind him. It may therefore be initially instructive to determine if any of these principles can be applied to nonresident consumer class members.

Minimum Contacts Theory

The most common method of acquiring in personam jurisdiction over a defendant absent from the forum state is based on the minimum contacts theory. The theory operates when the foreign defendant has had sufficient contact with the forum state that would justify subjecting him to its jurisdiction. An obvious application of the minimum contacts theory is when a court assumes jurisdiction over a nonresident defendant who has allegedly committed a wrongful act within the forum state. The two possible circumstances where this dimension of the theory could be applied to a nonresident consumer class member both require the latter's presence in the forum state in connection with the events giving rise to the class action. First, in an action where the foreign consumer is damaged in the forum state by the alleged wrongful activity, he has had sufficient contact with that state on which to base in personam jurisdiction. Secondly, if, for

76. It is important here to understand that a class action does indeed attempt to affect the legal rights of a plaintiff class member, just as any action attempts to impose legal liabilities on a defendant. Put very simply, if a group of persons have been injured in the eyes of the law by a single act or activity, they will each have a valid cause of action which may be brought individually by any one of them. Yet, when one of these persons seeks to bring an action on behalf of the entire group, he is taking the matter out of the individuals' hands. Therefore, assuming the class proceeds properly to a final decree, whatever the outcome, the class members no longer have a legal right to bring their own actions, since under the principle of res judicata the matter will have been settled. See Green, supra note 9, at 212-13.

77. The minimum contacts theory began with International Shoe Co. v. Washington, 326 U.S. 310 (1945), where the court announced: "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Id. at 316.

78. Id.


example, in a products liability action, each foreign consumer actually purchased the allegedly defective product in the forum state, the necessary contact would be established even though the consumer may discover the defect or be physically injured by the product once outside the forum state. However, neither of these situations would arise often enough to qualify this aspect of the minimum contacts theory as a significant solution to the present problem.

A more liberal aspect of the theory is presented when the non-resident defendant, without having been in the forum state, is party to a transaction with the resident plaintiff and the transaction is the subject matter of the litigation. This aspect of the minimum contacts theory was established by *McGee v. International Life Insurance Co.*

In that case, the defendant had issued and mailed an insurance policy to the plaintiff, a California resident, and the two parties continued an exchange of premium notices and payments through the mail. The Supreme Court upheld this extremely *de minimis* contact by the defendant insurance company with the forum state, California, as sufficient to justify in personam jurisdiction.

The findings of *McGee* may be useful where a class alleges injuries in connection with installment contracts, or less formal sequential payments, for the purchase of goods from the defendant company, a resident of the forum state. Like an insurance contract, an installment contract calls for a continuous flow of correspondence and money payments between the parties to the contract throughout the duration of the contract. Applying *McGee*, a court could justifiably conclude that transactions pursuant to such contracts are as extensive, if not more so, than those which occurred between McGee and the insurance company.

However, it is not the quantitative nature of the contact alone which is important. In *Hanson v. Denckla*, the Supreme Court held that transactions pursuant to such contracts are as extensive, if not more so, than those which occurred between McGee and the insurance company.

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724 (1967) (class action by a taxicab customer on behalf of himself and all other similarly situated, including nonresidents of California, to recover excessive charges by the company for use of its cabs in southern California over a four year period).

81. Although there are no cases involving this particular set of circumstances, the trend toward expansion of in personam jurisdiction indicates that jurisdiction based on such contact would "not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). *See* GREEN, *supra* note 9, at 23-47.

82. 355 U.S. 220 (1957).
83. *Id.* at 221-22.
84. *Id.* at 223.
85. This particular type of controversy is not uncommon subject matter for class action. *See*, *e.g.*, Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971) (class action seeking rescission of installment contracts for fraudulent misrepresentation).
that the lower court’s exercise of in personam jurisdiction over the nonresident defendant was invalid, even though the latter’s contacts with the forum state were similar to\textsuperscript{87} and perhaps quantitatively as great as\textsuperscript{88} those of the defendant in \textit{McGee}. “The crucial distinction between [\textit{McGee} and \textit{Hanson}] seems to be that in \textit{McGee} the contacts . . . were initiated by the [nonresident] defendant, whereas in \textit{Hanson} they were not.”\textsuperscript{89} Thus, the \textit{Hanson} Court stated:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. \textsuperscript{90} The application of that rule will vary with the quality and nature of the defendant’s activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.

It would therefore appear that \textit{Hanson} limits application of the minimum contacts theory of \textit{McGee} to situations where the nonresident defendant \textit{initiated} the contact with the forum state.

In the context of the class action under discussion, this qualification would bar inclusion of any nonresident class member who had not initiated the transaction with the resident defendant sales company.\textsuperscript{91} It is reasonable to conceive of situations where the consumer is indeed the first to pursue a transaction with an out-of-state retailer, discounting the latter’s general advertisement program. Nevertheless, it is questionable whether under these circumstances it could be said that the consumer purposefully availed himself of the privilege of conducting activities within the retailer’s state and thereby invoked the benefits and protection of that state’s laws. It would be a nice point to argue should the exact situation arise, but, again, this approach of acquiring jurisdiction over a multistate class only touches upon one particular type of consumer abuse and one very restrictive group of permissible nonresident class members.

\textbf{Quasi In Rem Jurisdiction}

Another means by which a state court may bind a nonresident defendant by its judgment is to exercise in rem jurisdiction over the defendant’s property. A proceeding in rem can be maintained with-

\begin{itemize}
  \item \textsuperscript{87} In \textit{Hanson}, the testatrix, who had been a resident of the forum state, Florida, and had executed the trust which was the subject matter of the litigation, had considerable correspondence with the defendant trustee, resident of Delaware.
  \item \textsuperscript{88} \textit{GREEN}, supra note 9, at 32.
  \item \textsuperscript{89} \textit{Id.}
  \item \textsuperscript{90} 357 U.S. at 253.
  \item \textsuperscript{91} In a situation where a company is accused of widespread misconduct in connection with installment contracts, it is not unlikely that the company actively solicited its customers’ business, perhaps through a fraudulent sales scheme.
\end{itemize}
out obtaining personal jurisdiction over the defendant because it is the defendant’s property, and not the defendant himself, which is subject to the court’s jurisdiction. It is essential, however, that this property, the res, be present within the territorial boundaries of the court.

If the action is a true in rem proceeding, the judgment is binding on all the world as to the particular property. More common, however, is an action quasi in rem which merely seeks to determine the status of some property as between the named parties and whose judgment binds only those who were party to and received notice of the action, whatever their states of residency. Thus, theoretically, in a class action quasi in rem, if the class were well defined and its members received notice of the action, the class, including any non-residents of the forum state, would be bound by the judgment.

There have been quasi in rem class actions which included non-resident class members, some of whom were later found to be bound by the class action decisions. These actions involved as the res, insurance funds, and their holdings were found to be determinative of issues concerning the same funds in subsequent actions. In these latter actions, known as the common fund cases, the respective courts found that the various plaintiffs were members of the classes, and therefore bound by the judgments of the prior actions, despite the fact that the prior actions were conducted in states other than those of the plaintiffs’ residencies. Though none of the courts in the original

92. Of course, in rem jurisdiction does not exist solely for the purpose of maintaining an action despite the absence of a defendant. In rem jurisdiction is established any time a judgment is sought to fix the status of property, personal or real. In personam jurisdiction, on the other hand, is necessary when a suit seeks to establish the parties’ rights and duties as between themselves. See Green, supra note 9, at 26-43.

93. Id. at 36.
94. Id. at 36-37.
95. Id. at 37.
96. As will be noted later, all Rule 23(b)(3)-type actions require some form of notice to the class members. See text accompanying notes 142-151 infra. However, there may be some question of whether provisions for notifying class members would meet the requirements for actual or constructive notice in in rem proceedings. Keeping in mind that the latter requirement is to insure notice to the party whose property is being affected, while notice to class members is to inform them that a suit has been filed on their behalf and they may be excluded if so desired, the strict notice requirements of class action law would most likely suffice in an in rem class action.

97. This assumes that all other requisites for the maintenance of a class action are met.


99. For example, in the leading common fund case, Hartford Life Insurance Co. v. Ibs, 237 U.S. 662 (1915), a Minnesota resident insured by Hartford was held bound by a prior Connecticut court judgment against a class of Connecticut policyholders who challenged Hartford’s right to increase premiums.
class suits discussed the binding effects of their judgments on the non-resident class members, the question was necessarily raised in the subsequent actions in the context of giving full faith and credit to the prior decisions of other state courts. Most of the common fund decisions stressed that the original forums had an overriding interest in determining the status of insurance funds maintained and administered in their respective states. It was further pointed out that such an interest allowed those forums to exercise extended jurisdictional power. However, a different justification for extraterritorial jurisdiction was urged in one of the later common fund cases. Rather than relying on the common fund aspects of the controversy, that case emphasized the nature of an insurance company dispute as it affects public interests.

The precedential value of the common fund cases to consumer classes is questionable. On the one hand, these cases suggest that if a class were seeking to establish its rights in a res imbued with the characteristics of a common fund and located within the forum state, a decision as to those rights would be binding on the entire class. Yet, on the other hand, unless there appears to be a special interest involved in the action, the forum state lacks any justification for extending its jurisdiction. As will be noted later, regardless of whether the action is in personam or quasi in rem, when a court exercises jurisdiction beyond traditional limitations, it has usually found special interests compelling it to do so. It will also be shown that consumer class actions may involve any number of interests which would justify extraterritorial jurisdiction. Therefore, the significant distinction between the class actions which were determinative of the common fund decisions and typical consumer class actions is that the latter generally do not seek to establish a class' shared and undivided claim to a specific source of funds. On the contrary, the claims of a consumer class, while based on common questions of law and fact, are usually separate and distinct and can be satisfied by any of the defendant's assets. Consequently, in order for a consumer class to take advantage of the

102. See, e.g., id. at 672.
103. Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal. 2d 307, 74 P.2d 761 (1937), aff'd sub nom. Neblett v. Carpenter, 305 U.S. 297 (1938) (action determining the right of the California Insurance Commissioner to liquidate and rehabilitate the party insurance company, which was insolvent and on the brink of bankruptcy, against the wishes of the plaintiff class of policyholders).
104. Id. at 329, 74 P.2d at 774-75.
105. See notes 199-202 & accompanying text infra.
106. See text accompanying notes 203-206 infra.
107. See note 7 & accompanying text supra.
jurisdictional benefits of a quasi in rem action, it must first bring into
the litigation a res, an asset belonging to the defendant, with the al-
legation that pursuant to a finding of the defendant's liability and li-
quidation of his asset, the class is entitled to recover from the pro-
cceeds the amount of its total claim.

This approach, called prejudgment attachment and commonly used in proceedings against nonresident defendants,\textsuperscript{108} has found a unique application in the New York courts under \textit{Seider v. Roth},\textsuperscript{109} which may answer the consumer class' need for a res. In \textit{Seider}, the New York Court of Appeals sanctioned a novel method of obtaining a res in an attempt to establish a convenient procedure by which a New York resident can avail himself of a local forum when he has been injured by the tortious conduct of a nonresident outside New York.\textsuperscript{110} Briefly, the \textit{Seider} procedure may be analyzed as follows: (1) Unable to proceed personally against the nonresident tortfeasor, the New York resident may nevertheless bring suit in a New York court to determine the nonresident's liability on the basis of quasi in rem jurisdiction. (2) Such jurisdiction can be established if the nonresident defendant is insured by a liability insurer doing business in New York, for the plaintiff may attach the insurer's contractual obligation to defend and indemnify the defendant.\textsuperscript{111} (3) Whatever the extent of his injuries, the plaintiff cannot recover damages in excess of the face value of the defendant's liability policy,\textsuperscript{112} since in a quasi in rem proceeding, judgment is limited to the value of the property attached.\textsuperscript{113}

The most significant element of \textit{Seider}'s reasoning is that an in-
surer's obligation to defend and indemnify an insured against whom a tort action has been brought is property within the meaning of an attachment statute.\textsuperscript{114} Arguably, assuming that the insurer was subject to the court's jurisdiction, the \textit{Seider} rule could be used whenever the alleged tortfeasor is insured from tort liability. Thus, for example,

\footnotesize{\textsuperscript{108} Green, \textit{supra} note 9, at 37.  
\textsuperscript{110} \textit{See} Minichiello \textit{v. Rosenberg}, 410 F.2d 106, 108-10 (2d Cir. 1968) (upholding the constitutionality of the procedure sanctioned by the New York Court of Appeals in \textit{Seider}).  
\textsuperscript{112} Although this point was not explicitly brought out in \textit{Seider}, it was stated by the federal court which construed the \textit{Seider} procedure in Minichiello \textit{v. Rosenberg}, 410 F.2d 106, 111-12 (2d Cir. 1968).  
\textsuperscript{114} \textit{Seider v. Roth}, 17 N.Y.2d 111, 113-14, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101-02 (1966). One of \textit{Seider}'s most adamant critics pointed out that "[t]he root question is, is either the obligation to defend or to indemnify property within the meaning of New York's attachment statute?" N.Y. Civ. Prac. § 5201 (McKinney Supp. 1972).}
in a multistate class action where the class members allegedly suffered injuries due to a defective product negligently manufactured by the defendant, the class representative could attach the defendant-manufacturer's right to defense and indemnification under its product liability insurance policy. The class would then share a common and undivided interest in the proceeds of that policy, and under quasi in rem jurisdiction, each member could be bound by any decision affecting the status of that policy.115

Although this unique expansion of quasi in rem jurisdiction would be useful as a means of establishing jurisdiction for multistate consumer class actions, it is necessary to consider whether the Seider rule can be so transposed from its original context. If one of the purposes for maintaining a multistate consumer class action is to provide small claimants a more convenient and feasible method of redress than they might otherwise have, then this purpose is not at all out of line with the rationale supporting the Seider decision.116 However, the Seider court was motivated solely by its interest in providing relief to New York residents. Indeed, it has been emphatically announced that only New York residents can take advantage of the Seider procedure.117 This pronouncement is essentially based on the conclusion that in a Seider-type action brought in a New York court by a nonresident plaintiff against a nonresident defendant for an injury occurring outside New York, a court's "refusal to exercise jurisdiction would be a permissible application of [the doctrine of] forum non conveniens."118 Thus, there is a question of whether or not this doctrine would be applicable to a multistate class action wherein the named representative and a substantial portion of the class are New York residents and the nonresident members lack any other practical method of redress. Furthermore, it is important to note that the Seider rule, allowing attachment of liability insurance obligations, has not been applied to any factual situation which did not closely parallel the original Seider action.119 Therefore, even though it is conceivable that the rule could be extracted from Seider for use in any attachment proceeding brought against a tortfeasor, it is extremely questionable whether the New York courts would sanction its use in a multistate consumer class action.

115. See text accompanying note 95 supra.
116. See note 110 & accompanying text supra.
117. Minichiello v. Rosenberg, 410 F.2d 106, 120 (2d Cir. 1968) (concurring opinion on rehearing en banc).
118. Id. at 110 n.6. "Under the doctrine of forum non conveniens, "a court may, in its discretion, refuse to entertain a case even though jurisdictional and venue requirements have been met, if it feels there is no legitimate reason for the case to be brought in that court." GREEN, supra note 9, at 54.
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which shares only one thing in common with the typical Seider action—a need to invoke the benefits of quasi in rem jurisdiction.

The possibility of adopting the Seider procedure in a multistate consumer class action outside New York is even more questionable. A considerable amount of criticism has been leveled against this procedure. Indeed, with the exception of a recent California lower court's decision, every federal or state court outside New York which has considered the question has refused to find attachable property in an insurer's obligation to the insured party. In view of the widespread and notorious unpopularity of Seider, the conclusion is inescapable that if consumer classes desire the benefit of this case, they must seek it exclusively in a New York, or possibly California, forum. It is doubtful that either state would welcome an influx of consumer-tort class actions resulting from a liberalization of the Seider rule.

Finally, even if a multistate consumer class could bring a res into an action, under Seider for example, there are other aspects of a quasi in rem proceeding which should be considered apart from the binding nature of its judgment. As suggested earlier, the possible recovery of damages to the class would be limited by the value of the res, notwithstanding the total actual damages incurred by the class. Thus, the greater the total claim, the less the chance it would be satisfied by the property attached. Should the class win but recover less than the amount claimed, the class would not be barred from seeking the difference in another action. Nor would the class be precluded from proceeding directly against the defendant in a second action if the class were to lose the initial one. But in neither event could the class again proceed against the particular property which was the subject matter of the original action. Consequently, the class would


123. See note 113 & accompanying text supra.


125. Id.

126. Id.
once again be faced with the problems posed by in personam jurisdic-
tion. Moreover, the same problems would arise if the defendant
appeared generally, for the action would then become a personal
one.127

**Jurisdictional Standards of a Class Action**

From the preceding discussion it is apparent that the minimum
contacts theory and quasi in rem attachment proceedings are not easily
adapted to the consumer class problem.128 This is not at all surprising
since these theories were developed as jurisdictional principles in ac-
tions involving nonresident defendants, not plaintiff class members. In-
deep, the foregoing analysis effectively emphasizes the earlier observa-
tion that the multistate class action presents a unique challenge to the
concept of in personam jurisdiction. However, when viewed in the
light of the very nature of representative suits, that challenge is not
overwhelming.

A class action must necessarily proceed in the absence of almost
every class member. Therefore, ultimately, the residential makeup
of a class is unimportant. What is important is that the rights of the
absent members be justly protected and that the members be given
an opportunity to be heard if they so desire.129 These are the essen-
tial requirements of due process, and they must be satisfied in any
class action by every court, state or federal, regardless of the residences
of the absent class members. Therefore, whereas the essential ele-
ment necessary to establish jurisdiction over a nonresident defendant
is some tangible connection between him and the forum state,130 the
element necessary to the exercise of jurisdiction over plaintiff classes
is procedural due process.

That there is indeed a difference between the jurisdictional
standards governing class actions and those governing all other actions
was emphasized long ago by the Supreme Court in the often cited
case of *Hansberry v. Lee*.131 In that case, the Court noted, to the

127. Id.

128. For a discussion of other methods by which courts acquire jurisdiction over
nonresident defendants, but which are inapplicable to the multi-state consumer class sit-
uation, see Green, *supra* note 9, at 26-30.

129. It will be shown that these are constitutional guarantees provided by judicially
developed rules assuring adequate representation by the class representative and proper
notice. See notes 131-151 & accompanying text *infra*.

130. "It is indeed necessary to due process that steps should be taken calculated
to give the defendant notice and an opportunity to be heard; but something more . . .
is necessary. The judgment is valid only when the state has some power, some control
over the defendant." A. Scott, *Fundamentals of Procedure in Actions at Law*
37-38 (1922).

131. 311 U.S. 32 (1940).
general rule that only persons subject to a court's jurisdiction are bound by its judgment, there is a recognized exception for suits of a representative character. While the Court conceded that the extent of that exception had not been "precisely defined by judicial opinion," it went on to suggest that if a class were adequately represented, its interest would thereby be protected and the court could proceed to a final decree. These pronouncements, although pure dicta, forecast what was to be an essential requisite of due process as to absent class members, to wit, adequate representation.

After Federal Rule of Civil Procedure 23 was amended in 1966, the federal courts found that adequacy of representation was a crucial consideration since the new rule allowed a judgment to bind all members of the class unless a member affirmatively "opted out" of the litigation at its commencement. Consequently, there arose various guidelines governing the determination of the quality of representation in a class suit: (1) "The representative party must be interested enough to be a forceful advocate and his chosen attorney must be qualified, experienced and generally able to conduct the litigation." (2) "The representative party must have interests which are compatible with and not antagonistic to those whom he would represent." (3) The class representative must be able to show he suffered injuries similar to those of the other class members. (4) The number of representatives as compared to the size of the entire class is not crucial to the question of whether or not the representative(s) will adequately protect the class' interests. Thus, while fair and adequate representation is a prerequisite to any action

132. *Id.* at 41.
133. *Id.*
134. *Id.* at 41-42 (dictum).
135. *E.g.,* Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). The leading case to emphasize the importance of adequate representation is Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968): "Under the new rule . . . as in the case of the old 'true' class action, members of the class not before the court are bound unless they affirmatively exercise their option to be excluded from the action. They may find themselves bound even though they were not actually aware of the proceeding. In such circumstances, the contention that adequate representation is lacking becomes weighty and 'the interests of the affected persons must be carefully scrutinized to assure due process of the law for the absent members.'" *Id.* at 493 (citation omitted).
138. *Id.* *See also* Alameda Oil Co. v. Ideal Basic Indus., Inc., 326 F. Supp. 98, 103 (D. Colo. 1971).
139. *See* Mintz v. Mathers Fund, Inc., 463 F.2d 495, 499 (7th Cir. 1972). This rule is derived directly from Rule 23(a)(3).
brought under Rule 23, the courts, in response to the binding effect of these actions, have fashioned this requirement into a jurisdictional standard of due process.

Similarly, the courts have attached particular significance to Rule 23's requirement of notice in 23(b)(3) actions due to the finality accorded them. Notice to those whose legal relations are to be affected by a pending action has always been a fundamental requirement of due process. And, as the Supreme Court suggested in Mullane v. Central Hanover Bank & Trust Co., this elementary notion applies even where the interested parties are so numerous that the task of notification is a complex one. In fact, it is Mullane's constitutional standard for notice that is incorporated into Rule 23: "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." More importantly, the federal courts view their power to bind a class only as broad as the extent to which notice can reasonably be expected to reach absent class members. Consequently, whether a court is

141. Rule 23(a)(4).
142. Rule 23(c)(2). It should be remembered that the class action which is the subject matter of this comment is that defined by Rule 23(b)(3). See note 7 & accompanying text supra.
143. It is initially important to note the basic and obvious importance of notice in an action which can bind an absent party who has not affirmatively requested exclusion. For a person to decide intelligently whether to participate in an action as a represented party or to "opt out," he must necessarily receive some form of notice designed to inform him of: (1) the nature of the action wherein he has been described as a class member; (2) his right to request exclusion from the action before a specific date; (3) the possibility of appearing in the action through his own counsel; and (4) the fact that he will be bound by the judgment, whether favorable or not, unless he affirmatively exercises the options available to him. The guidelines enumerated in Rule 23 (c)(2)(A)-(C) insure that a potential class member will be so advised.
145. See id. Although Mullane is of precedential value to any type of judicial proceeding which requires notice, courts sitting in class actions have frequently referred to this decision by way of emphasizing the individual interest sought to be protected by the due process requirement of the 14th Amendment. E.g., Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-65 (2d Cir. 1968); Cusick v. N.V. Nederlandsche Combinatie Voor Chem. Indus., 317 F. Supp. 1022, 1024 (E.D. Pa. 1970). This emphasis is particularly persuasive since the original Mullane proceeding, although not a class action, was equally representative in nature. The action was a judicial settlement of the defendant's trust accounts and was instituted by a special guardian appointed to protect the interests of the numerous trust beneficiaries.
146. Rule 23(c)(2). What constitutes adequate notice under Rule 23 is in strict conformity with Mullane's dictate that "the means employed must be such as one desiring of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315.
deciding if it can allow a class action to proceed or considering the res judicata effect of a prior class action, the issue of notice is critical.\textsuperscript{148}

Thus, when a federal court is initially satisfied that the due process requirements of adequate representation and notice can be met, it may properly exercise jurisdiction over the entire class.\textsuperscript{149} This is true whether or not there are class members outside of the court's normal jurisdictional boundaries.\textsuperscript{150} Yet, even though all state courts must, and do, afford these same constitutional guarantees in their conduct of class actions, none have heretofore invoked the right to expand their jurisdiction over nonresident class members.\textsuperscript{151} It is nevertheless the suggestion of this note that by adhering to the same jurisdictional standards of due process required on the federal level, state courts can exercise jurisdiction over a class action regardless of the citizenship of the class members.

This proposal is neither improbable nor radical when placed in its proper perspective. It would therefore be initially worthwhile to focus on the sound reasoning underlying the California Supreme

148. For an example of a case in which the court dismissed the class action, seeking to be qualified as a Rule 23(b)(1) or (b)(2) action, on the ground \textit{inter alia} that no notice could be devised to reach more than a small portion of an extremely large class, and that even if there were an effective way to reach a majority of the class, the costs of administering such notice would be prohibitive, see Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir.), \textit{cert. granted}, 414 U.S. 908 (1973). In Pasquier v. Tarr, 318 F. Supp. 1350 (E.D. La. 1970), a party claimed to be a member of a class in a prior class action and thereby entitled to the benefit of its judgment despite the fact that he received no notice of the action during the entire litigation. The court refused to recognize the res judicata effect of the prior judgment on this particular party, holding that to dispense with notice, even in actions contemplated by Rule 23(b)(1) or (b)(2), is a violation of due process. \textit{Id.} at 1352-54.

149. There is a split of authority on the question of whether notice is at all necessary in Rule 23(b)(1) and (b)(2) actions. However, in Rule 23(b)(3) actions, while some courts find adequate representation more essential than notice, it is uniformly agreed that notice is nevertheless indispensible. \textit{See Miller, Problems of Giving Notice in Class Actions}, 58 F.R.D. 313, 313-17 (1973) [hereinafter cited as Miller].

150. While the residential characteristics of a class are seldom discussed by a federal court, it is reasonable to assume from the various factual circumstances giving rise to federal class actions, that the court's jurisdiction over an entire class is not affected by the fact that some members reside outside the state in which the court sits. \textit{See, e.g.}, Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); City of Philadelphia v. Morton Salt Co., 248 F. Supp. 506 (E.D. Pa. 1965). Furthermore, even before the 1966 amendment to Rule 23, the First Circuit Court of Appeals held that "in a proper class suit the fact that all members of the class are not within the jurisdiction of the court where the suit is tried does not exempt foreign members from the judgment." Advertising Speciality Nat'l Ass'n v. Federal Trade Comm'n, 238 F.2d 108, 120 (1st Cir. 1956).

151. However, note the two exceptions where the class members had "minimum contact" with the forum state and where there is a common fund, discussed in notes 80 and 98-104 & accompanying text \textit{supra}. 

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Court's decision of *Atkinson v. Superior Court.*\(^\text{152}\) In the original action, a class of musicians, attacking the validity of a collective bargaining agreement between their employers and the union, as well as certain trust agreements related thereto, sought to enjoin the diversion of funds earned by them to the nonresident trustee. Although the trustee was personally served in New York, he failed to appear in California to defend the action. The trial court held that the trustee was an indispensable party, as his claim to the monies in question conflicted with those of the class. Consequently, the court found that it did not have the power to grant the motion for injunction without personal jurisdiction over the trustee. On appeal, the California Court issued a writ of mandate compelling the lower court to assume jurisdiction over the petitioners' application for a preliminary injunction. It held that under the relevant statutory provisions, the action was quasi in rem and, therefore, personal service upon the trustee at his place of residence was sufficient to empower the court to adjudicate his rights under the contracts involved.\(^\text{153}\) This holding was based on the finding that the employers' obligation to make the payments in question was a chose in action and, as such, personal property within the meaning of the statutory provisions.\(^\text{154}\)

What was significant in *Atkinson*, however, was not the ultimate holding, but rather the manner in which the court justified the exercise of quasi in rem jurisdiction. Noting the absence of a settled rule governing the situs of an intangible, Justice Traynor proceeded to find a solution in the principles governing personal jurisdiction, specifically the due process requirement of fairness.\(^\text{155}\) He concluded that fairness to all the parties demanded that the conflicting claims be subject to a final adjudication.\(^\text{156}\) With this decision the court took another step toward blurring the distinction traditionally drawn between in personam and in rem jurisdiction and thereby further expanded the modern rules governing personal jurisdiction.\(^\text{157}\)

Drawing upon *Atkinson*, when a jurisdictional problem concerning a nonresident party is raised, a court is obliged to consider and weigh the equities involved. Jurisdictional rules are not rigid standards demanding blind conformity.\(^\text{158}\) Rather, they are principles which are malleable within the parameters of due process and should be applied as fairness dictates. The truth of this fact has been proven by the


\(^{153}\) *Id.*

\(^{154}\) *Id.* at 342, 316 P.2d at 963.

\(^{155}\) *Id.* at 345-47, 316 P.2d at 964-66.

\(^{156}\) *Id.* at 347, 316 P.2d at 966.

\(^{157}\) See GREEN, *supra* note 9, at 45 n.160.

series of decisions in which the Supreme Court significantly expanded the older and more restrictive limitations of in personam jurisdiction. These cases required the Court to consider the various bases on which the respective state courts had exercised jurisdiction over defendants outside their territorial boundaries. In each case, after satisfying itself that provisions had been made which were reasonably calculated to give the defendant actual notice of the proceeding and an opportunity to be heard, the Court balanced the equities involved to determine if the state court's jurisdiction theory had satisfied the "traditional notions of fair play and substantial justice" implicit in due process.

Accordingly, if a state court, confronted by a multistate class, mechanically refused to exercise jurisdiction beyond its territorial boundaries, such a refusal would be an abrogation of its duty as an administrator of justice. Indeed, before it made any decision as to the extent of its jurisdictional powers, it would be incumbent upon this court to consider first if it would be best for all parties concerned to bring the immediate controversy to a final determination, and if so, whether the absent class members could be adequately represented and notified.

A final glimpse at Atkinson may further serve to emphasize the feasibility of the solution herein proposed. As previously noted, the Atkinson court sought to avoid multiple litigation of the parties' conflicting claims which would have subjected the defendant to possible double liability. Justice Traynor remarked that it was the dou-

159. The traditional limitations of in personam jurisdiction require that the defendant be present within the forum state and that he be served with process while there. See Green, supra note 9, at 26. However, the courts found it necessary to expand these limitations in order to adjudicate the increasingly frequent controversies involving defendants beyond their jurisdictional boundaries. Thus, in the early case of Hess v. Pawloski, 274 U.S. 352 (1927), the Supreme Court upheld Massachusetts' non-resident motorist statute, which provided the registrar of motor vehicles as their agent for service of process in actions arising out of accidents within Massachusetts involving said nonresident. Five years later, the Court ruled that citizenship was a sufficient basis for in personam jurisdiction and permitted service abroad, provided there was a specific act of Congress authorizing such service and requiring notice to the absent defendant. Blackmer v. United States, 284 U.S. 421 (1932). Building on Blackmer, the Court in Milliken v. Meyer, 311 U.S. 457 (1940) held that domicile was a sufficient basis for in personam jurisdiction in the state courts, again provided that there was a statute authorizing out-of-state service and requiring that the due process requirements of notice were met. Establishment of the minimum contacts theory in International Shoe Co. v. Washington, 326 U.S. 310 (1945) was the next major expansion of in personam jurisdiction. See notes 77-78 & accompanying text supra. This theory itself was expanded in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) and McGee v. International Life Ins. Co., 335 U.S. 220 (1957). See text accompanying notes 82-84 supra.

160. See cases cited note 159 supra.

161. See note 156 & accompanying text supra.
ble liability incurred by the defendant in *New York Life Insurance Co. v. Dunlevy*¹⁶² that had prompted the passage of federal interpleader legislation.¹⁶³ Under the federal rules of interpleader, once service of process is made upon a rival claimant, no matter where he may reside, personal jurisdiction attaches, and the court may proceed to adjudicate the conflicting claims.¹⁶⁴ Justice Traynor then went on to suggest that had the lower court chosen to apply interstate interpleader jurisdiction as exercised by federal courts in order to subject the absent trustee to its jurisdiction, it would be doubtful that the United States Supreme Court would overrule such use of federal procedure on the state level.¹⁶⁵ Before concluding that this decision was not required of the court, Justice Traynor emphasized the following point: "A remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead."¹⁶⁶ Admittedly, this pronouncement is dictum and no more directly dispositive of the class action problem than *Atkinson*’s formal holdings. However, in the attempt to borrow the reasoning of *Atkinson* merely as a means of bringing into focus the validity of the proposed solution to the class action problem, the forceful logic of this statement cannot easily be brushed aside. It is therefore submitted that if a federal court can constitutionally exercise extraterritorial jurisdiction over a class in a Rule 23 action, so can a state court in a similar action, particularly when fairness to the parties so demands.

### Practical Limitations of the Proposed Solution

While state courts theoretically have the power to hear a multi-state class action, under what circumstances realistically will they be able and willing to exercise this power? The answer, as it applies to consumer class actions, depends on four variables: (1) the states’ class action law and their respective postures toward class actions; (2) the nature of the controversy and the relief sought; (3) the interest

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¹⁶³. 49 Cal. 2d at 347-48, 316 P.2d at 966. "In [Dunlevy], there were rival claimants to the cash surrender value of a policy. The company brought an interpleader action in Pennsylvania, paying the amount into court, and asking the court to decide to whom it was owed. One of the claimants lived in Pennsylvania, the other in California. The court found for the Pennsylvania claimant. In a later suit in California by the other claimant, the court found for her. On appeal to the Supreme Court it held that the Pennsylvania court had no jurisdiction to pass on the rights of the California claimant. In other words, there was no in rem jurisdiction. . . . The result was that the company had to pay twice." *Green*, *supra* note 9, at 42.
¹⁶⁵. 49 Cal. 2d at 348, 316 P.2d at 966 (dictum).
¹⁶⁶. *Id.*
of a court to hear the action; and (4) the size of the class. There is an optimum of each of these variables which must exist before a multistate consumer class can expect to be accepted in a state court.

State Class Action Provisions

The degree to which a state court can respond to the needs of consumer classes is directly proportionate to the type of class action rules existing in each state, as well as the attitude of each state toward the class action device. While it is beyond the scope of this article to present a detailed analysis of the status of the class action on the state level, a brief statistical summary would be of value. This summary is based on an excellent and prodigious article published in 1969 which represents the most recent available analysis of class action law on a state-by-state basis.

There are seven states which have a common law (non-statutory) variety of class action. It appears to be the present position of five of these states to limit class suits to relief in equity, although a legal cause may be joined if sufficiently collateral. Moreover, there is some indication that class actions might be permissible only in such instances where joinder is compulsory. This would mean that in order for the class action to proceed, the court must find that the absent class members were indispensable to the action. However, the common law jurisdictions have not yet expressly adopted this disadvantageous restriction. On the whole, it is apparent that no matter how favorable their attitudes toward class actions in general, these seven states provide less than adequate forums for the typical consumer class, whose claims cannot always be satisfied in equity, and whose members are not usually indispensable to the maintenance of the action.

The 1848 Field Code class action has served as a model for sixteen states’ class action provisions. These statutes are clearly distinguishable from those of other jurisdictions by the generality of their terms. A typical example is California’s statute:

167. Starrs, supra note 1.
168. Id. at 425, listing Illinois, Massachusetts, Mississippi, New Hampshire, Tennessee, Vermont, Virginia.
169. Id. at 427.
170. Id. at 427-28.
171. Compulsory joinder requires a finding that the interests of the absent parties would be impaired or impeded, or that the defendant would be subject to a risk of multiple liability if the action was not allowed. See Fed. R. Civ. P. 19(a).
173. See note 14 supra.
174. Starrs, supra note 1, at 433-34, listing Alabama, Arkansas, California, Connecticut, Florida, Indiana, Maryland, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Wisconsin.
[A]nd when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.\textsuperscript{175}

The Field Code provisions are markedly different from the other states' provisions in that they rely solely on the two requirements of numerous parties and common questions of law or fact.\textsuperscript{176} While this latter requirement has led to a dispute in a few states over the application of the compulsory joinder standard to class actions, a trend away from this impediment has recently surfaced.\textsuperscript{177} Finally, due to the lack of express guidelines governing class proceedings, a substantial number of these jurisdictions have judicially adopted the class action rules developed by the federal courts to meet the requirements of Rule 23.\textsuperscript{178} Thus, in these forums, the broad scope of the class action device offers an attractive invitation to consumer class litigation. Indeed, there are several among the Field Code forums that have been particularly receptive to consumer class actions, for example California\textsuperscript{179} and Wisconsin.\textsuperscript{180} However, the attitude of the New York Court of Appeals toward consumer class actions, which has recently been described as "general skepticism, bordering on hostility,"\textsuperscript{181} partially reduces the optimism generated by the foregoing treatment of the Field Code statutes.

The next category consists of class action rules patterned after the 1938 Federal Rule 23, which exist in somewhat varying form in twenty-six jurisdictions.\textsuperscript{182} Unfortunately, there is little similarity be-

\textsuperscript{175} CAL. CODE CIV. PROC. § 382 (West 1973).

\textsuperscript{176} Compare id. with ME. R. CIV. P. 23 (1964).

\textsuperscript{177} Starrs, supra note 1, at 434-36.

\textsuperscript{178} \textit{E.g.}, Carlson v. Superior Court, 33 Cal. App. 3d 640, 109 Cal. Rptr. 240 (1973) (class members given opportunity to opt out); State \textit{ex rel}. Trice v. Barnett, 194 So. 2d 452, 454 (La. App. 1966) (citing criteria for adequate representation); Miles v. New Jersey Motors, 32 Ohio App. 2d 350, 291 N.E.2d 758 (1972) (class action must meet all prerequisites of Rule 23).


\textsuperscript{180} Starrs, supra note 1, at 462-63.

\textsuperscript{181} McCall, supra note 179, at 147, discussing Hall \textit{v. Coburn Corp.}, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970). The \textit{Hall} court dismissed the action, following a line of New York cases barring class actions brought by persons whose causes of action arose out of distinct transactions, even though the transactions in question were similar and there was a single defendant. For a brief critical analysis of \textit{Hall}, see Eckhardt, supra note 2, at 664-66.

\textsuperscript{182} Starrs, supra note 1, at 469, listing Alabama, Alaska, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, West Virginia, and Wyoming. Note that Alabama, New Mexico, and North Carolina have provisions modeled after both the Field Code and the 1938 Rule 23. See note 174 supra. In ten of the above listed
tween the 1938 Rule and the present Rule 23. The law of these states is mired in the confusing tripartite classification of class actions which arose in equity and were subsequently fostered by judicial construction of the 1938 Rule. 183 Under the law of most of these states, the type of relief sought, and, hence, the ultimate success of maintaining the action, depends a great deal upon whether the action is classified as “true,” “hybrid” or “spurious.” 184 Since it is often difficult to characterize class actions in this manner, one court may apply one classification to a particular action, and another court may apply a contrary classification to virtually the same type of action. Consequently, there have been diverse and often contradictory decisions, not only between the different states, but also within a single forum. 185 It is reasonable to say that the consumer advocate is denied the comfort of any uniformity of law governing class actions in these particular forums. Furthermore, under the 1938 Rule 23, the spurious class action lacks the binding effect on absentees accorded the present-day Rule 23(b)(3) action. 186 Thus, the conclusiveness of spurious class actions in the states under discussion has long been a subject of debate. 187

However, despite the problems raised by the 1938 Rule, the burdens placed on the consumer class are more troublesome than overwhelming. Recent statutory provisions giving a number of these jurisdictions wide discretion in the administration of class actions are gradually eroding the nonbinding effect of the spurious suit, since they allow the issuance of preliminary judicial orders protecting the rights of absentees. 188 More importantly, because there is a trend among the states which adopted the 1938 Federal Rules to revise their procedures in conformity with the 1966 federal amendments, there is reason to hope that these states “will similarly liberalize their class statutes through amendment or judicial interpretation along the lines of the 1966 revision of Rule 23.” 189

As a final category, there are at least three states which have adopted the current Rule 23. 190 However, in these states there have not

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183. See generally Moore, supra note 4, at §§ 23.08-.10.
184. See Starrs, supra note 1, at 463-67. For a discussion of the old tripartite classification of class actions, see generally Moore, supra note 4.
185. Id.
186. See Fed. R. Civ. P. 23(c)(3). The Rule 23(b)(3) action is the vestige of the spurious class action. Moore, supra note 4.
187. See Starrs, supra note 1, at 467-70. Typically, the issue is whether class members who do not affirmatively exclude themselves from an action will be bound by a judgment unfavorable to the class.
188. Id. at 468-69.
189. McCall, supra note 179, at 144.
190. Starrs, supra note 1, at 491, listing Arizona, Minnesota, Washington. Also,
been a sufficient number of decisions reported from which to determine the respective courts' interpretation of their class action rules. Upon eventual judicial review, it is doubtful that Rule 23 actions will receive any less favorable treatment in these states than it has received on the federal level. On the contrary, unencumbered by the Snyder aggregation bar which exists on the federal level, Rule 23(b)(3) actions in these forums may very well become important means of redressing group wrongs, including consumer abuses.

Nature of the Class Action Controversy and the Relief Sought

Not only are each state's class action provisions important to the maintenance of a multistate consumer class action, but so are its statutes which are applicable to consumer controversies. Naturally, product liability class actions sounding in tort or actions based on fraud, misrepresentation, or breach of contract will all find bases in common law principles. However, it is sometimes difficult to adapt the requirements of proof for such controversies to class action litigation. For instance, some courts have dismissed actions complaining of deceptive sales practices on the grounds that this type of suit requires individual proof of reliance by each class member on the allegedly fraudulent representations of the defendant and such proof is virtually impossible without bringing each class member into court.192

With such problems inherent in a class action based on the common law, a consumer class action is greatly expedited when there exists special legislation on which to base the suit. In recent years, the states have enacted numerous statutes which are designed to prevent consumer exploitation and which provide for private redress in the courts.193 For example, almost forty percent of the states have passed some form of comprehensive consumer fraud legislation.194 Although only seven of these states have expressly provided for private litigation, there is some indication that the other states will imply from their respective statutory provisions that private consumers have standing to sue.195 Unfortunately, the remaining states, which have not enacted some type of blanket consumer legislation, have approached con-

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at the writing of the Starrs article, New Jersey had proposed the adoption of the present Rule 23. Id.

191. See notes 15-27 & accompanying text supra.


193. McCall, supra note 179, at 136.

194. Id. at 141.

195. Id. at 141-42.
consumer problems in a piecemeal fashion.\textsuperscript{196} Therefore, there is considerable variation in consumer laws in these latter jurisdictions.

Finally, it should be remembered that some states have limited class actions to equitable relief, with the possibility of joining collateral legal causes.\textsuperscript{197} And, as previously noted, equity is not always an appropriate remedy for consumer wrongs.\textsuperscript{198} Clearly, legislators must soon respond to consumer demands for appropriate and comprehensive legislation. However, until they do, success in maintaining a multistate consumer class action in any one state can depend entirely on the law available on which to base the action and the type of relief requested.

**Interest of the Court to Hear the Action**

Generally, when a state court exercises its jurisdiction beyond the traditional limits, it has been compelled to do so by a special interest(s) involved in the litigation. The interest may represent that of the government and/or the citizens of the state in which the court sits.\textsuperscript{199} And at other times, the court's primary concern is protection of an individual's interest.\textsuperscript{200} Thus, for example, in *Hess v. Pawloski*,\textsuperscript{201} the Supreme Court approved the Massachusetts Supreme Court's holding that, under that state's nonresident motorist statute, a nonresident defendant can be required to defend an action in Massachusetts arising out of an in-state automobile accident between himself and a resident. This decision was based on the finding that the state's interest, in promoting care on the part of all who used its highways, outweighed any inconvenience a nonresident motorist might suffer in having to come to Massachusetts to defend an action.\textsuperscript{202}

It is therefore reasonable to conclude that before a court would agree to maintain a multistate consumer class action, it would have to find that there were interests which deserved protection and which justified an exercise of jurisdiction over the nonresident class mem-


\textsuperscript{197} See note 169 & accompanying text supra.

\textsuperscript{198} See note 14 & accompanying text supra.


\textsuperscript{201} 274 U.S. 352 (1927).

\textsuperscript{202} Id. at 356.
bers. To predict all the possible interests that may be involved in such an action would indeed be difficult, since the interests would obviously vary with the particular facts of each case. However, there are some which immediately suggest themselves. For example, as an office of the state in which it sits, a court always has an interest in protecting the rights of the citizens of that state. Thus, if a majority of the members of a multistate class were residents of the forum state, a court might be inclined to hear the whole action. On the other hand, it should be noted that a court, having the power to dismiss parties over which it recognizes no jurisdiction, presumably can dismiss the claims of the nonresidents, while retaining those of the local class members.

Unlike its responsibility towards residents, a court does not have a preexisting duty to protect the rights of citizens of another state. However, once a nonresident becomes party to an action before the court, that duty does arise. Therefore, in a multistate class action, the question will be whether a court could better protect the rights of nonresident members by hearing their claims or by "sending them back" to their respective state courts. If the nonresident portion of a class were viewed on a state-by-state basis and the number of class members from each of the foreign states were relatively small, fairness might dictate that they be allowed to remain in the action.\(^{203}\) The rationale for this supposition rests on one of the basic purposes of the class action device, to expedite the disposition of otherwise unredressable grievances.\(^{204}\) In the hypothetical class action just posed, should a court refuse to include the foreign class members, it is possible their grievances may go unheard. If their claims were indeed small, they would not warrant the costs of individual litigation. Moreover, there may be an insufficient number of members in any one of the states represented to effectively organize another class action. On the other hand, there is the possibility that the interest of a foreign class member would best be served by the laws of his own state. For example, there may arise a conflict between the law of the nonresident's state and the law of the forum, the resolution of which would result in a more favorable treatment of the foreign class member in the courts of his own state.

The defendant in a multistate class action may also provide a court with sufficient reason to proceed to a final adjudication of the entire controversy. In a consumer class action, there is always the possibility that a defendant may be subjected to numerous subsequent

\(^{203}\) This proposition calls for an application of the same doctrine of "fairness to all parties" which was employed by the Atkinson court. See notes 155-160 & accompanying text supra.

\(^{204}\) See note 2 supra.
actions should the court dismiss the claims of the foreign class members. This, coupled with a court's commitment to judicial economy, may be a convincing reason for the court to hear the whole action. Furthermore, if the defendant were incorporated or had its principal place of business in the forum state, its citizenship in that state would perhaps compound the court's interest in protecting it from possible vexatious litigation. The defendant's position may be viewed from even another perspective. Should the court refuse to hear the entire action and should it appear that the foreign class members could not reasonably pursue their claims on their own, the defendant may never be required to answer totally for his alleged misconduct.

Finally, the nature of the action might be such that public interest would demand its immediate and final resolution. This is often the case in actions involving public fiduciaries, such as insurance companies.\textsuperscript{205} Likewise, as previously indicated, in upholding various statutes which promote safety on the highways, courts have taken notice of the public's need for protection from inherently dangerous activities.\textsuperscript{206} Thus, perhaps a court may find a similar need to protect the general public if, for example, the defendant were alleged to have wilfully dispersed a defective product of fairly common use.

While hardly exhaustive of the topic, the foregoing hypotheticals are illustrative of the fact that in multistate class actions, there may be any number of interests which will require the court's attention. Thus, drawing upon the \textit{Atkinson} rationale, a "mechanical" application of traditional jurisdictional rules is precluded.\textsuperscript{207} On the contrary, when faced by the novel jurisdictional problem of a multistate class action, state courts will find it necessary to balance the equities involved before reaching a decision, just as they have done in the past in situations involving nonresident defendants.\textsuperscript{208} Moreover, while it is clear that a court must discern a need for exercising jurisdiction over the entire class, that need does not have to be of such overriding proportions that it would rarely arise. Rather, the test that the court must ultimately apply, after finding interests deserving of its protection, is whether maintenance of the action would in any way offend the "traditional notions of fair play and substantial justice" implicit in due process.\textsuperscript{209}

\textbf{Size of the Class}

Actions have been maintained where class numbers ranged from...
hundreds\textsuperscript{210} to thousands.\textsuperscript{211} Generally, the larger the class, the more likely the membership becomes open-ended, in that the number of members can only be approximated. Likewise, as the class size becomes greater, the possibility of identifying the individual members is greatly reduced. However, unless increased membership results in a completely amorphous class, neither of these factors is reason to dismiss an action. What is essential to existence of a class is that its descriptive boundaries be precisely drawn.\textsuperscript{212} This requires that the class representative specify the exact nature of the alleged misconduct and resultant injuries, as well as the facts from which the class can be ascertained. These facts would necessarily include the approximate dates and places of the misconduct and the approximate number and location of the class members. When a class is adequately defined, a subsequent judgment will bind all members coming within the class’ description.\textsuperscript{213}

There is no doubt that even an extremely large class is sufficiently capable of precise definition.\textsuperscript{214} However, as class size increases, the feasibility of actually notifying the class members of the pending litigation decreases. Under the theory proposed in this note the due process requirement of notice reasonably calculated to reach the absent class members, is crucial to a court’s exercise of jurisdiction over nonresidents in a class.\textsuperscript{215} What constitutes reasonable notice can only be determined on a case by case basis.

When individual class numbers can be identified, a court will require that they be sent personal notice by mail.\textsuperscript{216} A typical procedure for identifying potential class members is for the court to require the class representative to submit a proposed list of persons to whom notice should be sent.\textsuperscript{217} However, there are occasions when the defendant can more readily supply this information. Oftentimes, the defendant may be aware of the identities of potential class members due

\textsuperscript{210} See, e.g., Alameda Oil Co. v. Ideal Basic Indus., Inc., 326 F. Supp. 98 (D. Colo. 1971); Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).
\textsuperscript{212} Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) (if the existence of an ascertainable class is shown, no need exists to identify the individual members in order to bind all members by the judgment).
\textsuperscript{213} Moore, supra note 4, at ¶ 23.11.
\textsuperscript{215} See text accompanying notes 142-151 supra.
to the previous contact he has had with them which has given rise to the suit. If this is the case, he may be obliged to compile the list of those to receive notice.\textsuperscript{218} For example, a defendant retailer, accused of having sold defective or fraudulently advertised goods to the members of a consumer class, may have in his possession records of those sales. If these records contained the names of his past customers, they would be used by the court for the purposes of notification.

Nonetheless, the fact that even a substantial number of the class are incapable of identification is not fatal to a class action.\textsuperscript{219} Indeed, in \textit{Mullane v. Central Hanover Bank \\& Trust Co.},\textsuperscript{220} the Supreme Court noted that "[p]ersonal service has not in all circumstances been regarded as indispensible to the process due to residents [of the forum state], and it has more often been held unnecessary as to nonresidents."\textsuperscript{221} Thus, when class members cannot be identified through reasonable effort, resort to publication of notice in appropriate newspapers is constitutionally permissible.\textsuperscript{222} Furthermore, in view of the scope of communication achieved by radio and television, there is reason to believe that courts may find these media more effective for this particular form of notification.\textsuperscript{223}

In its concern to deal fairly with the rights of the foreign class members, a court confronted by a multistate class may be influenced by the number of unidentifiable class members to a greater extent than is constitutionally necessary. Consequently, where it may allow notice by publication for the benefit of unidentifiable resident class members, it may be more reluctant to supervise the same type of notice in order to reach unidentifiable class members residing in any number of places outside the forum state. Indeed, there would be a point at which notice to the thousands of potential class members scattered among the several states could not reasonably be accomplished. Thus, the state court is faced with another crucial balancing of equities before it can decide to what extent, if any, it will exercise jurisdiction over a multistate class. The greater the identifiable membership, the better the possibility of protecting their individual interests. Accordingly, the court may decide to hear the whole action. As a class becomes larger, it be-

\textsuperscript{219} See note 212 \textit{supra}.
\textsuperscript{220} 339 U.S. 306 (1950).
\textsuperscript{221} \textit{Id.} at 314.
\textsuperscript{222} \textit{Id.} at 317-18.
\textsuperscript{223} In some of the recent suits concerning antibiotics, where little response was received after settlement notices were published in the major newspapers across the country, the lawyers were allowed to broadcast public service announcements regarding the settlement on radio and television. \textit{Miller}, \textit{supra} note 149, at 321.
comes more likely that a court would dismiss the nonresidents' claims and recommend subclasses be formed along state lines. Naturally, within these two extremes is the third possibility of partial dismissal as to certain portions of the nonresident membership.

Before concluding the topic of class size, it is necessary to consider briefly its effect on other issues raised by class actions. A decision to dismiss a class action is often based on the finding that the litigation would be too unmanageable. Dismissal for this reason could be due to any one or a combination of problems, such as the difficulties in allocating the costs and administrative duties of notice, the feasibility of distributing recoveries to individual class members, and the overburdening of court resources. Naturally, these problems will become more acute with increase in the class size and greater geographic dispersal of class members.

It would be naive to contend that administration of a multistate consumer class action would not be a complex and difficult procedure. Yet, whatever dimensions such an action adds to the already complex nature of the class suit, they do not warrant a summary dismissal of the action. Indeed, as in any class action, a court would be obliged to evaluate carefully the feasibility of adopting workable procedures to meet the peculiarities of the action. There is always the ingenuity of counsel to aid the court in this regard, as well as the availability of modern computer techniques and the mass media. In addition, the court would need to determine whether or not the administrative costs of the suit would justify its continuance in view of the pecuniary benefit the class hopes to gain. Therefore, only after such an evaluation is conducted could a court render a fair determination on the issue of manageability.

In upholding consumer class actions by seven states based on antitrust violations arising from sales of antibiotics, the federal district court

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224. One commentator has insisted that dismissal of all foreign class members' claims is, indeed, the only alternative a state court has when confronted with a multistate class action (regardless of its size). He goes on to suggest, however, that under the principles of res judicata and collateral estoppel, class actions against the same defendant for the same alleged injuries brought on a state-by-state basis would have the same deterrent effect upon future consumer abuses as would a multi-state action in a single forum. Comment, Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers, 18 U.C.L.A.L. REV. 1002 (1971).


226. See generally Newberg, supra note 68, at 227-34.


for the southern district of New York remarked in reference to the problems of manageability:

It is obvious . . . that the only manner in which the plaintiff class can ever prosecute their claims is by a Rule 23 class action and the court cannot simply close the doors on these litigants because their actions present novel and difficult questions.229

Hopefully, this same approach to the issue of manageability will prevail in the state forums when circumstances dictate the maintenance of a multistate class action.

Conclusion

It is clear that if the class action device is to achieve a greater degree of viability, it will have to be on the state level.230 Furthermore, once it is recognized that this device is particularly suited to curb consumer abuses,231 it is unreasonable to confine its use to local grievances. There will undoubtedly be numerous occasions when the interests of the consuming public would best be served by allowing multistate actions to proceed in a single forum. It has been suggested herein that such an approach is possible when adequate representation and reasonable notice can be provided for the protection of the absent class members. However, the unique issues raised by a multistate consumer class action cannot always be resolved in favor of its maintenance. Hence, this proposed solution to the typical consumer class' jurisdictional problem is applicable only on a limited basis.

A wider acceptance of multistate consumer class actions in the state courts necessarily depends on the progressive attitudes of the makers and administrators of law. It remains the unfortunate fact that despite the nation's current awareness of the need to protect the consumer, he is still the constant victim of overcharges, usurious interest rates, defective products and deceptive advertising.232 Certainly, state governments cannot long avoid the public's demand for more effective consumer legislation.

Similarly, the fact that class actions are extremely appealing from the standpoint of justice cannot be ignored. It is to be hoped that


230. See text accompanying notes 15-72 supra.

231. See note 3 supra.

232. See generally R. Charell, How I Turn Ordinary Complaints into Thousands of Dollars: The Diary of a Tough Consumer (1973). In a recent interview, Mr. Charell, an attorney and television executive, stated: "The nation is filled with consumer atrocity stories. We've become a country of bad goods and incredibly bad service. Now the customer is often treated as the enemy." San Francisco Examiner, Jan. 27, 1974, "Sunday Scene," at 6, cols. 3-5.
the states which presently have rather restrictive class action procedures will adopt more liberal rules. Moreover, every state which intends to provide its citizens with this device will have to confront the problems of manageability.\textsuperscript{233} There are those in the legal community, judges, practitioners and professors alike, who knowledgably insist that these problems are not insurmountable.\textsuperscript{234} Therefore, lacking a more effective means of dealing with mass-produced wrongs, the state judiciaries and legislatures must make a combined and concerted effort to fashion the class action into a workable procedure, one which is consistently available to groups who seek its benefits. With such effort, state courts will be better able to exercise their constitutional power and assume jurisdiction over multistate consumer class actions when circumstances so require.

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\textsuperscript{233} The Los Angeles Superior Court has already attempted to deal with this problem. Judge David Thomas has prepared a manual which embodies "pragmatic procedural devices . . . to simplify the potentially complex (class) litigation while at the same time protecting the rights of all the parties." \textit{Los Angeles Daily Journal}, \textit{Manual for the Conduct of Pretrial Hearings on Class Action Issues} 5 (April 3, 1973), \textit{citing} Vasquez v. Superior Court, 4 Cal. 3d 800, 820, 484 P.2d 964, 977, 94 Cal. Rptr. 796, 809 (1971).


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