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Class Actions in Illinois: A Viable Alternative to Federal Rule 23, 8 J. Marshall J. Prac. & Proc. 113 (1974)

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CLASS ACTIONS IN ILLINOIS: A VIABLE ALTERNATIVE TO FEDERAL RULE 23?

A recent decision of the Supreme Court of the United States has focused attention on the state class action procedure as an alternative to a class suit under Rule 23 of the Federal Rules of Civil Procedure. In *Zahn v. International Paper Co.*,[1] the Court severely limited the availability of the federal district courts as a forum for the class action. The Court held that a class action involving "separate and distinct"[2] claims by each member of the class cannot be maintained as a class action unless each member of the class satisfies the jurisdictional amount of $10,000.[3] It is no less than obvious that this ruling effectively bars access to the federal courts of most potential class actions. It is rare indeed for persons to suffer damages of the jurisdictional amount in a sufficient number at the hands of a single defendant to render the class action device available.

The effect of *Zahn* will be to force a considerable proportion of potential class actions—those in which the claims of the members are "separate and distinct" and which do not satisfy the jurisdictional amount—into the state courts. Justice Brennan, in his vigorous dissent, recognized the problem:

> [I]f the State does not provide a Rule 23(b)(3) device, litigation of the claims of class members who either lack the jurisdictional amount or simply prefer to litigate their claims in the state courts . . . will produce a multitude of suits. And the chief influence mitigating that flood—the fact that many of these [plaintiffs'] claims are likely to be worthless because the cost of asserting them on a case-by-case basis will exceed their potential value—will do no judicial system credit.[4]

The *Zahn* plaintiffs were a group of riparian landowners who brought a nuisance action against a single defendant who allegedly polluted their lake. Having been denied access to the federal court because of lack of the requisite jurisdictional amount, what recourse would be left to the *Zahn* class under Illinois law? What remedy can be found in Illinois by any in-

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1. 414 U.S. 291 (1973).
2. *Id.* at 300.
3. 28 U.S.C. § 1332(a) (diversity), § 1331(a) (federal question) (1970). The *Zahn* decision will have no impact, of course, on federal question class actions which are exempted from the jurisdictional amount requirement. *See, e.g.*, 28 U.S.C. §§ 1333 (admiralty), 1334 (bankruptcy), 1337 (commerce and antitrust), 1338 (patents, copyrights, trademarks and unfair competition), 1339 (postal matters), 1340 (internal revenue), 1343 (civil rights) and 1344 (election disputes).
4. Zahn v. International Paper Co., 414 U.S. 291, 308 (1973) (dissenting opinion).

jured group by means of a class action? It is the purpose of this article to answer these questions, but the best that can be done is to explore Illinois decisional law, which does not provide a satisfactory answer for the plaintiff class.

Before delving into the morass which is the law of the Illinois class action, some perspective can be gained by a brief examination of the utility of a class action and of Federal Rule 23.

THE CLASS ACTION—WHO NEEDS IT?

The class action was developed by the English courts of equity as a practical solution to a practical problem. In situations in which a single defendant had, by one act or a series of similar acts, caused injury to a group of persons, and in which it was impossible or impractical to bring all those persons before the court, a method was devised whereby one or a few of the injured parties could bring suit on behalf of all. It was the courts of equity which solved this problem by relaxing the strict common law joinder rules and by allowing a member of the class to represent the group in court.[5] The class action is thus one form of representative suit.[6]

The most consequential departure from the common law resulting from the development of the class action is that a judgment or decree is res judicata as to all members of the class, whether or not they appear or otherwise participate in the conduct of the litigation.[7] To protect the absent members of the class, the equity courts early imposed the requirement that the representatives have common interests with those of the class thus fairly and adequately representing all members.[8] This requirement was later couched in terms of due process.[9] A dissatisfied member of the class can attack a decree on due process grounds by showing that his interests were not fairly and adequately represented.[10]

Class actions have been used in an enormous variety of situa-

5. *See generally* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.02 (2d ed. 1974); 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1751 (1972 ed.). Professor Moore also recognizes two other early situations giving impetus to the development of the class action—situations in which abatement by death would prevent a decree, and situations in which interested persons were not subject to the jurisdiction of the court.

6. A representative suit, as distinguished from a class suit, is any situation in which a person may be bound by an adjudication when appearing before the court only through a representative.

7. *See* Hansberry v. Lee, 311 U.S. 32 (1940), Newberry Library v. Board of Education, 387 Ill. 85, 55 N.E.2d 147 (1944).

8. 3B J. MOORE, FEDERAL PRACTICE ¶ 23.02 (2d ed. 1974), citing Leigh v. Thomas, 2 Ves. Sr. 312 (1751), Adair v. New River Co., 11 Ves. Jr. 429 (1805).

9. *See* Hansberry v. Lee, 311 U.S. 32 (1940).

10. Oppenheimer v. Cassidy, 345 Ill. App. 212, 102 N.E.2d 678 (1951).

tions,[11] so that any attempted categorization is tenuous at best. However, most writers agree that the three types specified by the original Rule 23 represented the basic pattern.[12] Subdivision 23(a)(1) was generally known as the "true" class action, 23(a)(2) as the "hybrid" class action, and 23(a)(3) as the "spurious" class action. It was the common question, or spurious, class action with which the Court in *Zahn* was concerned and in which each member of the class must satisfy the jurisdictional amount. The *Zahn* ruling does not involve the true or hybrid class action, in which the claims of the members of the class may be aggregated to satisfy the jurisdictional amount.[13] Thus, it is only the common question class action which now in instances of diversity where the jurisdictional amount is lacking must be litigated in the state courts.[14]

The question of who needs the class action, after some reflection on the practical problem the device solves, becomes a simple mathematical exercise. Whenever the amount of the individual claims are too small to justify the expense of individual litigation, the class action is needed. If it is not available in the particular situation in which its use is desirable, the result is a wrong with no adequate remedy.

THE COMMON QUESTION CLASS ACTION UNDER REVISED RULE 23[15]

In its present form, Rule 23 is the most complete and sophisticated solution yet devised to the class action problem. The tri-

11. *See generally* Fox, *Representative Actions and Proceedings*, 1954 ILL. L.F. 94.

12. FED. R. CIV. P. 23, prior to the 1966 amendment, provided:
(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

13. Zahn v. International Paper Co., 414 U.S. 291, 294 (1973), citing Troy Bank v. Whitehead & Co., 222 U.S. 39 (1911).

14. The jurisdictional amount requirement does not apply to federal question suits exempted by statute. Note 3 *supra*.

15. FED. R. CIV. P. 23:
(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
(b) **Class Actions Maintainable.** An action may be maintained as

partite categorization of the original rule has been replaced with a two-step set of requirements for the maintainability of a class action.[16] Subdivision (a) states the basic prerequisites much as contained in the original rule—numerosity, common questions of law or fact, and the qualifications of the representatives. Subdivision (b) states three alternative requirements, one of which must be met in addition to the requirements of subdivision (a). Subdivision (b)(1) authorizes use of the class action in situations in which individual actions would create a risk of varying adjudications for the party opposing the class,[17] or the risk of non-liti-

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a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.** . . .
(d) **Orders in Conduct of Actions.** . . .
(e) **Dismissal or Compromise.** . . .

16. Notes of Advisory Committee on Rules, FED. R. CIV. P. 23, U.S.C.A., 295-96:
In practice the terms 'joint', 'common', etc. which were used as the basis of the Rule 23 classification proved obscure and uncertain. . . . Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. . . . The 'spurious' action envisaged by original Rule 23 was in any event an anomaly because, although denominated a 'class' action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. . . .
The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

17. The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be

gating members of the class being practically concluded by judgment.[18] Subdivision (b)(2) sanctions use of the class action where the relief sought is injunction or declaratory judgment.

Subdivision (b)(3) is the common question class action. The (b)(3) class action is distinguished from the original "spurious" class action because all members of the (b)(3) class are bound by final judgment. Under the original Rule 23, non-party members of the class were bound only if they chose to intervene.[19]

The (b)(3) class action is maintainable only if the court finds that common questions predominate over individual questions and that the class action is superior to other methods of adjudication such as test or model actions, consolidation or joint discovery.[20] Thus, even though the requirements for the maintainability of the common question class action are made explicit, the court retains a considerable degree of discretion in the determination of whether to allow its use.

Subdivision (b)(3) further directs the court to consider the factors there enumerated as A through D in determining whether common questions predominate and whether the class action is superior to other methods of litigation. Individual members of the class may have substantial interest in controlling their own litigation as where, for example, a few members have suffered extensive damage as compared to the other members of the class. Some members may have commenced litigation and wish to continue because of expenses incurred or good prospects of success. It may prove desirable as a matter of pubic policy to allow the litigation to proceed in the forums in which it would normally be brought rather than to concentrate it in one court. Finally, members of the class may be so numerous or widely dispersed that management of the action becomes impracticable.

Since its adoption in 1966, revised Rule 23 has been the object of much controversy in the legal community. Professor Moore has this to say:

> The (b)(3) class suit can be gargantuan in character; and little more, functionally, than a suit by a lawyer with claim solicitation under the imprimatur of the court. But some distinguished jurors see a (b)(3) class suit, at least in certain areas of security fraud and antitrust, as performing a 'prophylactic'

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called upon to act in inconsistent ways.
LOUISELL & HAZARD, PLEADING AND PROCEDURE: STATE AND FEDERAL 719 (1962).

18. For example, the members of the class would be practically concluded by judgment in a shareholder's action for declaration of a dividend. *See* Knapp v. Banker's Securities Corp., 17 F.R.D. 245 (E.D. Pa. 1954).

19. Note 16 *supra.*

20. Notes of Advisory Committee on Rules, FED. R. CIV. P. 23, U.S.C.A 299.

> function and having a 'theraputic' effect. There is great force behind such views. Yet we question whether the federal courts should become collection agencies; and some (b)(3) suits will cast them in that role.[21]

Zahn has precluded the possibility of the federal courts being used as "collection agencies", at least in diversity cases.[22]

Whether one agrees or disagrees that the class action is subject to too much abuse to justify its existence in our legal system, one cannot deny that the result of *Zahn* is to shift the focus of the argument from the federal to the state level. Does Illinois provide a class action device to serve as a viable alternative to Rule 23?

The Class Action in Illinois

The law on class actions in Illinois is decisional rather than statutory, with the exception of one section of the Civil Practice Act governing the compromise and dismissal of class actions.[23] Certainly case law is not inherently less clear simply because it has not been the object of legislative consideration. In the area of class actions in Illinois, however, one is apt to find the task of synthesizing and abstracting reliable legal precedent somewhat less than satisfying.

What follows is limited to the law as to what claims can be maintained as class actions. It is worthy of note, however, that Illinois decisional law is deficient, as compared to Rule 23, because of a lack of procedural guidelines concerning notice or conduct of the proceedings.[24]

The confusion in the law of class actions in Illinois is not the result of a dearth of consistent rules stated by the courts—on the contrary, the rules of law are stated time and time again in identical language. It is the application of these rules to the facts in inconsistent ways which results in confusion. *Moseid v. McDonough*[25] contains a marvelously concise statement of the rules, but an analysis of the rules in light of the facts and holdings of other cases shows that the rules alone are as useless as Midas' touch.

The court in *Moseid* stated the Illinois law on the maintainability of class actions as follows:

> [T]he test to be applied is the existence of a community of interest in the subject matter and a community of interest in the remedy among all who make up the purported class. Factors to

21. 3B J. Moore, Federal Practice ¶23.02-1, at 23-124 (2d ed. 1974).
22. Note 14 *supra*.
23. Ill. Rev. Stat. ch. 110, § 52.1 (1973).
24. Fed. R. Civ. P. 23(c) (d).
25. 103 Ill. App. 2d 23, 243 N.E.2d 394 (1968).

be considered in applying this test are: whether the claims of all members of the class share a common question of law or fact, such as the existence of a common fund from which relief can be given; whether the causes of action of the members of the class arise from the same transaction; whether one party can adequately represent the rights and interests of all other members of the purported class; whether the number of possible class members renders separate litigation impossible or impractical; and whether there exists a purely equitable cause of action.[26]

Framed in this manner, the *sine qua non* for the maintainability of a class action in Illinois is a community of interest in the subject matter and the remedy among all members of the class. The five "factors" are listed by the court as indications of whether a community of interest exists. Each of the "factors", however, are likely to be applied by the courts as requirements rather than as community of interest indicia.

Community of Interest

The elusive "community of interest" refers to the relative similarity of the legal interests of the members of the class. Simply stated, the requirement is that all members of the class have, to some degree, identical interests. Community of interest in the subject matter means identity of cause of action, and has been described as either identity of rights[27] or identity of issues.[28] Community of interest in the remedy means essentially that all members of the class must seek identical redress. The relief sought may be injunction,[29] declaratory judgment,[30] accounting,[31] impression of a constructive trust,[32] restitution[33] or other relief in which all members of the class share jointly or proportionately. Recovery of money damages, as will be discussed below,[34] seems a highly doubtful remedy.

The problem is: to what degree must the members of the class be identical as to their interests? Recall that the solution

26. *Id.* at 27-28, 243 N.E.2d at 396.
27. *See, e.g.*, Smyth v. Kaspar American State Bank, 9 Ill. 2d 27, 136 N.E.2d 796 (1956); Peoples Store v. McKibbin, 379 Ill. 148, 39 N.E.2d 995 (1942); Moseid v. McDonough, 103 Ill. App. 2d 23, 243 N.E.2d 394 (1968).
28. *See, e.g.*, Dee-El Garage v. Korzen, 53 Ill. 2d 1, 289 N.E.2d 431 (1972); Newberry Library v. Board of Education, 387 Ill. 85, 55 N.E.2d 147 (1944).
29. *See, e.g.*, Harrison Sheet Steel Co. v. Lyons, 15 Ill. 2d 532, 155 N.E. 2d 595 (1959).
30. *See, e.g.*, Kuehn v. Bismarck Hotel Co., 52 Ill. App. 2d 321, 202 N.E.2d 52 (1964).
31. *See, e.g.*, Flanagan v. City of Chicago, 311 Ill. App. 135, 35 N.E.2d 545 (1941).
32. *See, e.g.*, Schick-Johnson Co. v. Malan Construction Co., 49 Ill. App. 2d 277, 200 N.E.2d 76 (1964).
33. *See, e.g.*, Guilfoil v. Arthur, 158 Ill. 600, 41 N.E. 1009 (1895).
34. The requirements of a common fund and an equitable cause of action appear to severely restrict the recovery of money damages.

of Rule 23(b)(3) to this problem is that the court must make a preliminary determination that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members".[35] Rule 23 thus expressly allows the class action to be used in situations in which members of the class have divergent interests. The federal court has considerable discretion in allowing a class action to proceed regardless of those divergent interests where they are outweighed by the desirability of litigating common issues in a single action.

Illinois provides no such guidance for the court. As a result, Illinois courts have been more restrictive than the federal courts in allowing the class action to proceed because of a lack of community of interest. For example, use of the class action has generally been denied when individual members of the class have dealt with the defendant in individual transactions on the basis that separate proofs may be necessary.[36]

The Common Fund

The *Moseid* court indicates that one way to satisfy the requirement of community of interest is the existence of a common fund from which recovery is sought.[37] It is apparent that there is a community of interest in the subject matter and the remedy if a defendant has possession of an identifiable fund from which each member of the class has an identical right to recover. It does not follow, however, that the existence of a common fund must be a prerequisite to the maintenance of every class action in which the remedy sought is the recovery of money. Unfortunately, some Illinois courts have considered the common fund to be such a prerequisite.

The common fund was first mentioned in *Peoples Store v. McKibbin*,[38] a suit by taxpayers of the same occupation against the Illinois Director of Finance to enjoin the collection of taxes on sales to exempt vendees under the Retailers Occupation Tax.[39] The plaintiffs attempted to bring suit as a class action representing all taxpayers of the same occupation. They also requested an accounting and a refund of taxes wrongfully collected. In holding that this situation was not proper for the use of a class action, the court relied on the fact that the taxes wrongfully collected did not constitute a separate fund:

35. FED. R. CIV. P. 23(b)(3).
36. See text accompanying notes 48-54 *infra*.
37. Note 26 *supra*.
38. 379 Ill. 148, 39 N.E.2d 995 (1942). *See also* Material Service Co. v. McKibbin, 380 Ill. 226, 43 N.E.2d 939 (1942).
39. ILL. REV. STAT. ch. 120, ¶ 445 (1939).

> A decision sustaining [plaintiffs'] view that no tax is due does not create any fund from which reimbursement can be made, neither does it establish the existence of a right of recovery in every vendor.[40]

Although the court also relied on the fact that each member of the purported class had to make separate proof of his right to recover, this decision has been cited as late as 1972 in *Reardon v. Ford Motor Co.*[41] for the proposition that a common fund is a prerequisite to the maintenance of a class action where the remedy sought is the recovery of money.

Reardon was a products liability action brought on behalf of a class of approximately four million purchasers of allegedly defective automobiles. The appellate court for the third district refused to allow the class action to proceed. After stating the general rule of community of interest in the subject matter and the remedy, the court continued:

> [A] further ingredient must be present if a class action is to stand and that additional requisite is the necessity of a common fund from which reimbursement to the members of the class could be made. . . . We do not deem it to be mandatory that there be *in esse* a common fund in every instance if a class action is to be sustained . . . .
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> . . . .
>
> [I]n the case now before us we hold a common fund to be a necessary requirement.[42]

The court further held that a common fund cannot be created from the general assets of a corporation.

Presumably then, a class action will not lie for the recovery of money unless there is a clearly identifiable fund in which the members of the class share a claim. Can a defendant prevent the use of a class action against him simply by mingling the funds over which plaintiffs have a claim with his other assets? *Moseid* lends some support to this ludicrous proposition.

In *Moseid*, plaintiff sued on behalf of all persons who had paid a statutorily required one dollar library fee upon filing appearances as defendants in the Cook County Circuit Court.[43] Defendant, the Clerk of the Circuit Court, attacked the use of the class action on the basis that there was no common fund. The court disagreed, holding that there was a common fund and that the use of the class action was proper. The *Moseid* court thus distinguished *Peoples Stores*:

> [That case is] distinguishable, however, on the basis that none

40. Peoples Store v. McKibbin, 379 Ill. 148, 154, 39 N.E.2d 995, 998 (1942).
41. 7 Ill. App. 3d 338, 287 N.E.2d 519 (1972).
42. *Id.* at 343-45, 287 N.E.2d at 523-24.
43. County Law Library Act, ILL. REV. STAT. ch. 81, § 81 (1963).

> of the purported class members there, with the exception of the plaintiff . . . had paid any money under the section relating to payment under protest; so the taxes on which refunds were sought had been turned over to the State Treasurer and deposited in the general fund of the State of Illinois. Thus, there was no fund in being in [that case], whereas, in the present case, the County Law Library Act establishes a separate 'County Law Library Fund'.[44]

It appears from this reasoning that the maintainability of a class action depends on the fortuitous circumstance that defendant's accounting procedure has maintained the separate identity of the funds in question.

The First District, in *Perlman v. First National Bank*,[45] recognized the absurdity of the situation, creating a conflict with its own decision in *Moseid* and with that of the Third District in *Reardon*. The plaintiff class was composed of all borrowers from the bank in an action for declaratory judgment and an accounting. Plaintiff alleged that defendant's method of computing interest on loans constituted a breach of contract and a violation of the Illinois Interest Act.[46] Defendant attacked the propriety of the class action on the basis that there was no common fund, since any money over which members of the class might have a claim because of improperly computed interest was mingled with defendant's other assets. The court followed the logic of the situation rather than case precedent, much to its credit:

> There seems no basis in law or logic for permitting a class action against an individual who has sequestered all money wrongfully acquired but denying one against an individual who has comingled it with his other assets. . . . The liability or wrongdoing creates the fund, and whatever is taken wrongfully constitutes the fund.[47]

The *Perlman* court thus satisfied the requirement of a common fund by the determination that any money wrongfully taken constituted the requisite fund. One would hope that in the future, the Illinois courts will accomplish expressly what the *Perlman* court did impliedly—eliminate any requirement of a common fund.

Common Transaction

Another factor mentioned by the *Moseid* court as indicative of the required community of interest is whether the causes of

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44. Moseid v. McDonough, 103 Ill. App. 2d 23, 28, 243 N.E.2d 394, 396 (1968).
45. 15 Ill. App. 3d 784, 305 N.E.2d 236 (1973).
46. ILL. REV. STAT. ch. 74, §§ 9, 10 (1973).
47. Perlman v. First National Bank, 15 Ill. App. 3d 784, 800-801, 305 N.E.2d 236, 249 (1973).

action of the members of the class arise from the same transaction. The Illinois courts have generally refused to permit the class action to be used where each member of the purported class must make separate proof of an element of the cause of action because the claims arose out of separate transactions.[48]

A brief analysis of the Illinois experience with class actions based on fraud will serve to indicate the attitude of the courts toward separate transactions among members of the class.[49] The leading case in this area is *Langson v. Goldberg*[50] in which the plaintiff bondholder sued on behalf of other bondholders for specific performance of certain covenants made by defendant issuer concerning repayment of principal. Defendant asserted that the named plaintiff was not a proper representative because some of the bondholders had signed waivers of the covenents sought to be enforced. Plaintiff responded that the members of the class who had signed waivers had been induced to sign by defendant's fraud.

On the basis that allegations of fraud are personal, requiring individual proof, and thus cannot be litigated in a representative proceeding, the court held that plaintiff was not a proper representative as to members of the class who had signed waivers. It thus became established in Illinois that actions based on fraud, requiring separate proof of the elements of misrepresentation or reliance, are not proper situations for the use of the class action.[51]

One case which has allowed an action based on fraud to proceed as a class action is *Kimbrough v. Parker*.[52] Five named plaintiffs sued on behalf of 3,300 entrants in an allegedly fraudulent puzzle contest. The court determined that the class action could proceed because the solicitation of all members of the class had been through newspaper advertisements so that proof of the element of misrepresentation could be made on behalf of all members. This case is clearly distinguishable from *Langson* on its facts because no personal contact was involved in soliciting contest entrants.

48. *See* Langson v. Goldberg, 373 Ill. 297, 26 N.E.2d 111 (1940); Fisher v. City of Ottawa, 8 Ill. App. 3d 553, 289 N.E.2d 717 (1972); Schick-Johnson Co. v. Malan Construction Co., 49 Ill. App. 2d 277, 200 N.E.2d 76 (1964).

49. *See generally* Comment, *Class Actions and the Illinois Consumer*, 4 J. MAR. J. 217 (1971), in which the author concludes that the law on class actions in Illinois is too restrictive to provide an adequate remedy for a class of defrauded consumers.

50. 373 Ill. 294, 26 N.E.2d 111 (1940).

51. *See* Rice v. Snarlin Inc., 131 Ill. App. 2d 433. 266 N.E.2d 183 (1970) in which a class action based on fraud was denied on the basis that personal solicitations by defendant of each member of the class constituted separate transactions for which separate proof was necessary, even though plaintiff showed that the solicitations were the same in every instance.

52. 344 Ill. App. 483, 101 N.E.2d 617 (1951).

It appears, then, that the Illinois courts will allow a class action involving separate transactions only where the transactions are shown to be substantially identical so that proof of one can serve as proof of all.[53] The drafters of Rule 23 took a more flexible approach.[54]

Adequacy of Representation

Although the *Moseid* court mentioned the adequacy of representation only as a factor to be considered in determining whether community of interest is present, representation of the interests of the non-party members of the class is essentially a due process problem. Where it appears that the named plaintiffs do not adequately represent the interests of all members of the class, the suit cannot proceed as a class action.[55] This result is justified on the basis that the inadequately represented members of the class would not be bound by judgment. Normally, any final adjudication in a class suit is res judicata as to all members of the class. However, any member of the class who can show that the named plaintiff was not a qualified representative will not be bound.[56]

The following statement from the leading case in Illinois on due process in class actions, *Newberry Library v. Board of Education*,[57] is often cited:

> It is not required by the fourteenth amendment that either courts or legislative departments adopt any particular rule for

53. *See also* Boner v. Drazek, 55 Ill. 2d 279, 302 N.E.2d 280 (1973); Perlman v. First National Bank, 15 Ill. App. 3d 784, 305 N.E.2d 236 (1973). *But see* Rodriguez v. Credit Systems Specialists, Inc., 17 Ill. App. 3d 606, 308 N.E.2d 342 (1974) in which plaintiffs sued on behalf of a class of persons who had entered identical contracts with defendant for the consolidation of debts. Although recognizing that separate transactions were involved, the court stated:

> [T]he better view seems to be that notwithstanding whether separate transactions are involved, the existence of a community of interest must be determined in each case from the nature of the action according to the difficulties of administering justice through the medium of a class action as compared with those involved in separate suits.

Id. at 611, 308 N.E.2d at 347.

54. Notes of Advisory Committee on Rules, FED. R. CIV. P. 23, U.S.C.A., 299:

> A fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.

For a unique solution to the problem of proof when separate transactions are involved, see Vasquez v. Superior Court, 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964 (1971).

55. Hansberry v. Lee, 311 U.S. 32 (1940).

56. *Id.*

57. 387 Ill. 85, 55 N.E.2d 147 (1944).

> establishing the conclusiveness of decrees in class suits, but where it can be said that the procedure adopted fairly insures the protection of the interests of the absent parties who are to be bound by such proceeding, such does not fail of due process. The test is whether those sought to be bound as members of the class are in fact adequately represented by the parties who actually participate in the conduct of litigation . . .[58]

Adequacy of representation is not related to whether the representatives or their attorneys do in fact vigorously and competently assert their claims. Rather, representation is said to be inadequate when the interests of the named plaintiffs are in conflict with the interests of some or all members of the class.[59] It is not essential, however, that all members of the class have an interest in every matter involved in the suit.[60] Further, the assertion of hypothetical variations in the interests of members of the class is not sufficient to prevent the use of the class action.[61]

It will be noted that the requirement of fair and adequate representation is contained in Rule 23 in subdivision (a)(4). Since this requirement is essentially a constitutional problem controlled by the decisions of the United States Supreme Court, it has been developed and applied in much the same manner both in the Illinois courts and in the federal courts.

Numerosity

Numerosity of interested persons is another basic requirement to the maintenance of a class action. A prerequisite to the use of a class suit, and one of the original justifications for its development, is that the members of the class are too numerous to bring before the court.[62] Both in the Illinois courts[63] and in the federal courts[64] a preliminary determination must be made that the numerosity of interested persons renders use of the class action desirable.

It is well settled in Illinois, however, that numerosity alone is not sufficient to justify the use of a class action.[65] For example, if the named plaintiff does not adequately represent the

58. *Id.* at 90, 55 N.E.2d at 151.
59. *See* Smyth v. Kaspar American State Bank, 9 Ill. 2d 27, 136 N.E. 2d 796 (1956); Hale v. Hale, 146 Ill. 227, 33 N.E. 858 (1893); Southeast National Bank v. Board of Education, 298 Ill. App. 92, 18 N.E.2d 584 (1938).
60. Smyth v. Kaspar American State Bank, 9 Ill. 2d 27, 136 N.E.2d 796 (1956).
61. Harrison Sheet Steel Co. v. Lyons, 15 Ill. 2d 532, 155 N.E.2d 595 (1959).
62. Note 5 *supra.*
63. Fox, *supra* note 11, at 106.
64. FED. R. CIV. P. 23(a)(1).
65. Reardon v. Ford Motor Co., 7 Ill. App. 3d 338, 287 N.E.2d 519 (1972).

interests of the class,[66] if the members of the class must make individual proof of an element of the cause of action,[67] or if there is no common fund in an action for the recovery of money,[68] the class action may be denied regardless of the number of members in the purported class and regardless of whether the claims of the members may not be large enough to justify individual litigagation.

Equitable Cause of Action

The most restrictive requirement in Illinois, as compared to Rule 23, is that a class action is allowed only where the cause of action is cognizable in equity. This requirement is founded on the reasoning that since the class suit was developed in the courts of equity, actions properly cognizable at law cannot be litigated as class actions.[69] This requirement has prevented the use of the class suit in actions for damages for breach of contract,[70] in mandamus actions[71] and in deceit actions.[72] The following is typical of the arbitrary manner in which the Illinois courts apply the rule:

> Representative, or class suits, are allowed only where the question is of a common or general interest, where one sues for the benefit of the whole. In all such cases the parties stand in the same situation, having one common right or one common interest. We find no cases deciding that mere numerousness of parties alone will confer jurisdiction upon a court of equity in a case that is properly cognizable at law.[73]

The only justification offered by the courts for this rule disallowing a class action merely because the cause of action is "properly cognizable at law", even where all other requirements are met, is that the class action is unique to the equity courts. The merger of law and equity courts in Illinois had no effect on the rule.[74]

The difficulty with the rule comes in defining "cognizable in equity" and "cognizable at law". The basic principle of equity jurisdiction is that equity takes jurisdiction where the remedy at law is inadequate. Is not the remedy at law inadequate in any action, whether traditionally labeled legal or equitable, when

66. See text accompanying notes 55-61 *supra*.
67. See text accompanying notes 48-54 *supra*.
68. See text accompanying notes 37-47 *supra*.
69. Fox, *supra* note 11, at 97-98.
70. Murley v. Local Union No. 147, 133 Ill. App. 2d 578, 273 N.E.2d 538 (1971); Arthur Rubloff & Co. v. Leaf, 347 Ill. App. 191, 106 N.E.2d 735 (1952).
71. Retail Liquor Dealers Protective Assn. v. Schreiber, 382 Ill. 454, 47 N.E.2d 462 (1943); People *ex rel.* Aramburu v. City of Chicago, 73 Ill. App. 2d 184, 219 N.E.2d 548 (1966).
72. Fetherston v. National Republic Bancorporation, 280 Ill. App. 151 (1935).
73. *Id.* at 160.
74. ILL. REV. STAT. ch. 110, § 1 (1973).

the individual expense of bringing suit is prohibitive because of the relatively small individual claims? The answer seems obvious, because in such a situation there is, in effect, no remedy at all. Yet the Illinois courts have consistently maintained that a legal action is not maintainable as a class suit.[75] Unless the attorney frames his complaint to avoid its effect, this rule requires the dismissal of any class suit for money damages based on contract or tort regardless of whether all other requirements to the maintenance of a class suit are met.

Conclusion

Illinois does not have a viable alternative to the common question class action under Rule 23(b)(3). Not only is the decisional law in an unsatisfactory condition because of the inconsistency between districts and even within districts, but the principles which can be extracted from the cases present limitations to the maintainability of the common question class suit that go far beyond the limitations of Rule 23.

Consider the plight of the *Zahn* class which had been denied access to the federal court because of a failure to satisfy the jurisdictional amount. They were forced to bring their class suit, if at all, in the state court. In Illinois, they would be faced with an insuperable number of tenable arguments which could be made by the defendant against the use of a class action. The defendant could successfully argue that a nuisance action for damages is properly cognizable at law so that the court does not have equity jurisdiction, that there is no common fund from which recovery could be had, and that there is no community of interest in the subject matter because separate proofs would be required on the issue of damages. The result is that the members of the class would be required to litigate individually. If they chose to do so, the effect would be a multitude of suits further congesting the courts. If the cost of individual litigation proves prohibitive, the practical effect would be a wrong with no remedy.

In light of the restrictions placed upon use of the federal class action procedure[76], and in light of the inadequacy of the

75. Rule 23 and its predecessor, Rule 38 of the Equity Rules of 1912, have always applied to all civil actions, legal or equitable. 3B J. Moore, Federal Practice, ¶ 23.02 (2d ed. 1974).

76. In addition to the jurisdictional amount restriction of *Zahn*, the Supreme Court has determined that named plaintiffs in a Rule 23 class action must bear the cost of notice to all members of the class who can be identified through reasonable effort under Rule 23(c)(2). Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974). When the number of class members renders the cost of notice prohibitive, Rule 23 is not a feasible method of litigation.

Illinois decisional law of class actions, the development of a viable class action procedure would appear an appropriate subject for legislative consideration. The Illinois Constitution of 1970 mandates that "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation."[77] Although this language is essentially hortatory, it does indicate the intent of the framers of the constitution that no wrong should go without a remedy.[78] It is submitted that the Illinois law on class actions presents just such a situation. Certainly the experience of the federal courts with Rule 23 could provide sufficient guidance to the Illinois legislature in creating a statutory class action device to provide the remedy which is now lacking.

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77. ILL. CONST. art. I, § 12.
78. For a discussion of the hortatory effect of the section, see Gertz, *Hortatory Language in the Preamble and Bill of Rights of the 1970 Constitution*, 6 J. MAR. J. 217 (1973).