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New Dimensions in Louisiana Class Actions

James P. Lambert

NEW DIMENSIONS IN LOUISIANA CLASS ACTIONS

The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

*William O. Douglas**

Recent years have seen the class action rise to prominence as a procedural vehicle for the protection of the interests of consumers, taxpayers, environmentalists, and others with small claims. Originally developed by courts of equity as a means of avoiding a multiplicity of actions,[1] the class action now is utilized also to prevent bona fide legal claims of members of a group from remaining unredressed because of the *de minimus* size of individual claims. Two factors, present in most cases of large-scale group injuries, create a necessity for the class action: ignorance of the members of the class as to the existence or nature of their legal rights, and the disproportionate expense involved in enforcing such rights.[2] The class action, by providing adequate monetary incentives to counsel representing the class, aids substantially in the realization and enforcement of rights belonging to those of lesser stature within society's power structure.[3]

The Louisiana Code of Civil Procedure provides only for "true" class actions, which are conclusive of all rights of class members; the Code's redactors deemed the non-conclusive "hybrid" and "spurious" class actions unnecessary in view of

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* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting in part).

1. *See* F. JAMES, CIVIL PROCEDURE § 10.18 (1965); J. STORY, COMMENTARIES ON EQUITY PLEADINGS § 97 (10th ed. 1892).

2. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

3. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1803 (1972) [hereinafter cited as WRIGHT & MILLER]. *See also* Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956).

Louisiana's liberal joinder rules.[4] Under the Code, three elements must exist to bring a class action: a number of class members making joinder impracticable, a right asserted that is common to all members of the class, and one or more class members who will represent the class adequately.[5] The court may award the representative parties their reasonable litigation expenses, including attorney's fees, when a class action results in a recovery beneficial to the class.[6] Finally, the Code provides, consonant with the concept of a "true" class action, that a definitive judgment on the merits concludes the rights of all absent members if the class members named as parties were adequate representatives.[7]

Recent decisions of the United States Supreme Court have reduced the availability of federal class actions involving state-based claims. The "non-aggregation rule" announced in *Snyder v. Harris*[8] prohibits cumulation of separate and distinct claims of class members to reach the amount in controversy required for jurisdiction in diversity and federal question cases.[9] In *Zahn v. International Paper Co.*,[10] the Supreme Court denied the use of a class action to several named plaintiffs, each asserting a claim that met the jurisdictional amount but failing to show that the individual claims of unnamed class members also satisfied the amount requirement.[11] Additionally, the Court held in *Eisen v. Carlisle*

4. *See* LA. CODE CIV. P. art. 591, comment (c). The "hybrid" and "spurious" class actions involved suits in which the character of the right sought to be enforced for or against the class was "several," and a decision would respectively affect rights in specific property ("hybrid") or would involve a common question of law or fact ("spurious"). Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d 144, 148 n.3 (La. 1975).

5. LA. CODE CIV. P. arts. 591-92.

6. *Id.* art. 595.

7. *Id.* art. 597.

8. 394 U.S. 332 (1969).

9. The importance of the jurisdictional amount requirement has waned in the area of federal question jurisdiction under 28 U.S.C. § 1331 (1970), in view of the many statutes conferring jurisdiction upon the federal courts without regard to the amount in controversy. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 32 (2d ed. 1970). Additionally, several federal court decisions have contributed to this trend by holding certain constitutional rights subject to pecuniary valuation. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Spock v. David, 469 F.2d 1047 (3d Cir. 1972).

10. 414 U.S. 291 (1973).

11. *Snyder* involved aggregation of claims by the named representatives to achieve the requisite jurisdictional amount; *Zahn* concerned the question

& Jacquelin[12] that the requirement of Federal Rule 23(c) that class members be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,"[13] is not discretionary and can not be set aside by the trial court, and that the cost of notice is to be borne by the named representative.[14] The Court's decisions virtually eliminate the use of federal class actions in cases involving state-based claims and significantly increase the litigation costs to the named representative in many federal class actions.

Louisiana's apparent response to the Supreme Court's restrictions on the use of the federal class action came in the Louisiana Supreme Court decision of *Stevens v. Board of Trustees of Police Pension Fund.*[15] Justice Tate, writing for three members of the court, effectively revamped article 591 of the Louisiana Code of Civil Procedure, substantially liberalizing the interpretation of the article 591(1) requirement of a right "[c]ommon to all members of the class."[16] The result of the decision is to increase significantly the availability of the class action in Louisiana.

Requisites For Class Actions Under La. C.C.P. Arts. 591 & 592

Impracticability of Joinder

The requirement that parties be so numerous as to make joinder impracticable has been an integral part of all class action statutes.[17] What constitutes impracticability depends

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of whether the federal court had jurisdiction over the related claims of class members when the claims of the representatives met the jurisdictional amount. *See generally* Theis, *Zahn v. International Paper Co.: The Non-Aggregation Rule in Jurisdictional Amount Cases*, 35 LA. L. REV. 89 (1974).

12. 417 U.S. 156 (1974).

13. FED. R. CIV. P. 23(c)(2).

14. The Court declined to impose notice costs upon the defendant merely because the plaintiff class is likely to prevail on the merits. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

15. 309 So. 2d 144 (La. 1975).

16. Two justices concurred, one dissented, and one was recused. *Stevens* also makes it clear that the general peremptory exception provided in LA. CODE CIV. P. art. 927 is the proper procedural device for challenging the procedural validity of a class action. 309 So. 2d 144, 152 (La. 1975).

17. *See, e.g.*, FED. R. CIV. P. 23(a); Equity Rule 38; 226 U.S. 659 (1912).

upon the facts of each case, thus courts impose no arbitrary numerical requirements.[18] The federal courts impose the burden of showing the impracticability of joinder upon the class representative[19] and the decision of the trial court in this factual matter is final absent an abuse of discretion[20] or an application of impermissible legal criteria.[21]

Louisiana courts appear to be split on the proper standards for evaluating impracticability of joinder.[22] The First Circuit Court of Appeal in *Verdin v. Thomas*[23] stated, "It must only be shown to be impracticable to join all of the persons involved; the plaintiff need not allege or prove that the joinder of all parties is impossible."[24] Applying an apparently more stringent rule to class actions before it, the fourth circuit held that class actions are warranted only "when the persons in the class . . . are so numerous that joinder is impracticable, if not impossible."[25] The view of the first circuit is more in line with federal jurisprudence which indicates that "impracticable" does not mean "impossible" but rather "difficult" or "inconvenient."[26]

Among the factors Louisiana courts have considered in

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18. *See, e.g.*, Cutler v. American Fed. of Musicians of United States & Canada, 211 F. Supp. 433 (S.D. N.Y. 1962), *aff'd*, 316 F.2d 546 (2d Cir. 1963), *cert. denied*, 375 U.S. 941 (1963); Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966).

19. *See* Cash v. Swifton Land Corp., 434 F.2d 569 (6th Cir. 1970); Demarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968); Bolin Farms v. American Cotton Shippers Ass'n, 370 F. Supp. 1353 (W.D. La. 1974).

20. *See In re* Engelhard, 231 U.S. 646 (1914); Cypress v. Newport News General & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967); Pacific Fire Ins. Co. v. Reiner, 45 F. Supp. 703 (E.D. La. 1942).

21. Matthies v. Seymour Mfg. Co., 270 F.2d 365 (2d Cir. 1959), *cert. denied*, 361 U.S. 962 (1960).

22. See cases in notes 23-25, *infra*. The matter remains unresolved by *Stevens*.

23. 191 So. 2d 646 (La. App. 1st Cir. 1966).

24. *Id.* at 650. The court deemed the class action appropriate when it would be "impracticable . . . to join all of [the absent class members] by actual service." *Id.*

25. Caswell v. Reserve Nat'l Ins. Co., 234 So. 2d 250, 256 (La. App. 4th Cir.), *cert. denied*, 250 La. 364, 236 So. 2d 499 (1970).

26. *See* Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964); Advertising Specialty Nat'l Ass'n v. FTC, 238 F.2d 108 (1st Cir. 1956); Williams v. Humble Oil & Ref. Co., 234 F. Supp. 985 (E.D. La. 1964). One federal court has interpreted "impracticable" to mean " 'impractical,' 'unwise' or 'imprudent' rather than 'incapable of being performed' or 'infeasible.' " Goldstein v. North Jersey Trust Co., 39 F.R.D. 363, 367 (S.D. N.Y. 1966).

determining impracticability are the number of class members,[27] the possibility of their joinder by actual service,[28] and the knowledge of or possibility of ascertainment of their identity.[29] Additional factors utilized by the federal courts include fluctuations in the membership of the class brought about by the death of its members,[30] administrative problems resulting from a multiplicity of service and pleadings,[31] and the impossibility of obtaining personal jurisdiction over some class members.[32] Federal courts evaluating numerosity have declined to treat as definitive the fact that joinder of certain parties would destroy diversity[33] or that subsequent requests for exclusion by members of the class might render joinder feasible.[34] One federal court has noted that the requirement that the parties be so numerous that joinder is impracticable insures that "members of a small class [will not be] unnecessarily deprived of their rights without a day in court."[35]

Adequacy of Representation

A second prerequisite for class actions under the Louisiana Code of Civil Procedure, in article 592, is a representative

27. *See* Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d 144 (La. 1975) (approximately 100 members sufficient); Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966) (potential class of 270-500 sufficient); Vizier v. Howard, 165 So. 2d 655 (La. App. 1st Cir. 1964) (court intimated that joinder of 30 known owners of communized mineral rights would not have been impracticable).

28. *See* Verdin v. Thomas, 191 So. 2d 646, 650 (La. App. 1st Cir. 1966).

29. *Cf.* Caswell v. Reserve Nat'l Ins. Co., 234 So. 2d 250 (La. App. 4th Cir.), *cert. denied*, 250 La. 364, 236 So. 2d 499 (1970); Danos v. Waterford Oil Co., 225 So. 2d 708 (La. App. 1st Cir. 1969) (dictum); Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966).

30. Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853).

31. Minnesota v. United States Steel Corp., 44 F.R.D. 559, 566 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

32. Hansberry v. Lee, 311 U.S. 32 (1940). *But cf.* Coniglio v. Highwood Services, Inc., 60 F.R.D. 359 (W.D. N.Y. 1972).

33. Hood v. James, 256 F.2d 895 (5th Cir. 1958).

34. Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968).

35. Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704, 712 (D. Colo. 1966). *See also* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 570 (2d Cir. 1968) (Lumbard, C. J., dissenting); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D. N.Y. 1970) (class actions would be disallowed where the size of the class was such that it would be impossible to identify and notify its members).

"who will fairly insure the adequate representation of all members. . . ."[36] Since the named representative asserts or defends the interests of all absent class members, his selection and qualities are bound up inextricably with due process.[37] Although the adequate representative requirement has always had significance since the Louisiana statute embodies only the conclusive "true" class action,[38] the constitutional importance of adequate representation increased when the Louisiana Supreme Court adopted the guidelines of Federal Rule 23(b) which arguably includes the "spurious" class action.[39] The federal courts distinguish between class actions under Federal Rule 23(b)(1) and (2) and class actions under Rule 23(b)(3) in evaluating the constitutional significance of adequate representation. The criteria in Rule 23(b)(1) and (2) allow class actions in which rights of all class members are so closely interrelated that adequate representation satisfies due process by constructively providing absent class members with fair notice and an opportunity to be heard through the named representative.[40] However, class actions brought under Rule 23(b)(3) require notice reasonably calculated to apprise all members of their rights regarding the action to give the judgment binding effect upon all absent members; adequacy of representation alone will not suffice.[41] Since *Ste-*

36. LA. CODE CIV. P. art. 592.

37. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32 (1940). The First Circuit Court of Appeal has stated, "The importance of closely scrutinizing the question of adequacy of representation is essential because of the conclusiveness of the action upon all members . . . of the class." Roussel v. Noe, 274 So. 2d 205, 209 (La. App. 1st Cir. 1973); *accord*, Caswell v. Reserve Nat'l Ins. Co., 234 So. 2d 250 (La. App. 4th Cir.), *cert. denied*, 250 La. 364, 236 So. 2d 499 (1970). *See also* Maraist & Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 TEXAS L. REV. 1, 22 (1970) [hereinafter cited as Maraist & Sharp].

38. Louisiana courts have held that in "true" class actions, the only type sanctioned by LA. CODE CIV. P. art. 591, the legal relationship of the members would mandate their joinder except for the impracticability of such in view of their numerosity. *See* Bussie v. Long, 286 So. 2d 689 (La. App. 1st Cir. 1973), *cert. denied*, 288 So. 2d 354 (La. 1974); Caswell v. Reserve Nat'l Ins. Co., 234 So. 2d 250 (La. App. 4th Cir.), *cert. denied*, 250 La. 364, 236 So. 2d 499 (1970); Veal v. Preferred Thrift & Loan, 234 So. 2d 228 (La. App. 4th Cir. 1970).

39. *See generally* 28 U.S.C. Rule 23, comment (b)(2), (b)(3) (Supp. 1966).

40. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

41. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971); Berland v. Mack, 48 F.R.D. 121, 129 (S.D.

vens sanctions a type of class action similar to those under Federal Rule 23(b)(3) which requires not only adequate representation but also some form of notice, the requirement of adequate representation in article 592 may now take on new constitutional significance in view of the traditional role of representatives in providing notice to class members.

Courts have considered numerous factors in the exercise of their discretion to determine the adequacy of representation.[42] Article 592 requires that the named representatives be members of the class. In *City of New Orleans v. Grand Lodge of Independent Order of Odd Fellows*,[43] the corporate owner and the corporate lessee of a cemetery, in attempting to prevent expropriation, sought to represent all persons having rights in the cemetery. The fourth circuit rejected their status as representatives, stating that because the class interests differed from those asserted by the named representatives, in that the plaintiffs, in their corporate capacities, could not possibly suffer or recover for the emotional suffering that they sought to assert on behalf of the absent class members, the corporations were not members of the class they sought to represent.[44] However, in the *Stevens* decision the supreme court clearly indicated that seeking different recoveries will not defeat a class action, so long as the rights asserted are based upon the same factual transaction and the same legal relationship.[45]

One Louisiana court has suggested four criteria as determinative of the question of adequacy of representation:

> (1) whether the interest of the named party is coextensive with the interests of the other members of the class; (2) whether his interests are antagonistic in any way to the interests of those whom he represents; (3) the propor-

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N.Y. 1969); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 939 (1958).

42. *See, e.g.*, Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); Flores v. Kelley, 61 F.R.D. 442 (N.D. Ind. 1973); Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966).

43. 241 So. 2d 7 (La. App. 4th Cir. 1970).

44. *Id.* at 10.

45. 309 So. 2d at 149. Another Louisiana court denied a class action on the basis that the representative was not the real party in interest, and that such party, the state, was not a member of the alleged class. Roussel v. Noe, 274 So. 2d 205 (La. App. 1st Cir. 1973).

> tion of those made parties as compared with the total membership of the class; (4) any other factors bearing on the ability of the named party to speak for the rest of the class.[46]

The requirement of coextensive interests embodies two separate concepts: the typicality of the representative's claim as compared to the claims of other members, and the size of his claim as bearing on his incentive to represent the class vigorously. Federal cases indicate that typicality exists when the representative's claims or defenses are ones "reasonably expected to be raised by the members of the class."[47] Since the decision of the Second Circuit Court of Appeal in *Eisen v. Carlisle & Jacquelin*,[48] federal courts have declined consistently to treat the size of a representative's claim as determinative,[49] but have noted the relevance of a large individual claim in insuring vigorous representation.[50] Both Louisiana and federal courts require the representative to show that his interests are not antagonistic to those of the class he seeks to represent.[51] Federal authority reflects that minor conflicts

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46. These criteria, set forth in 3B J.MOORE, MOORE'S FEDERAL PRACTICE § 23.07[1] at 23-352 (2d ed. 1948), were cited by the first circuit in *Verdin v. Thomas*, 191 So. 2d 646, 650 (La. App. 1st Cir. 1966).

47. Technograph Printed Circuits, Ltd. v. Method Electronics, Inc., 285 F. Supp. 714, 721 (N.D. Ill. 1968); *accord*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968).

48. 391 F.2d 555 (2d Cir. 1968). Prior to that decision, most federal courts considered the size of the representative's claim crucial to his adequacy. *See, e.g.*, Pelelas v. Caterpillar Tractor Co., 113 F.2d 629 (7th Cir.), *cert. denied*, 311 U.S. 700 (1940); Pomierski v. W.R. Grace & Co., 282 F. Supp. 385 (N.D. Ill. 1967).

49. "[R]eliance on quantitative elements to determine adequacy of representation . . . is unwarranted" because it ignores the purpose of the class action, *i.e.*, to vindicate *small* claims. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968). *See also* Randle v. Swank, 53 F.R.D. 577 (N.D. Ill. 1971); Shulman v. Ritzenberg, 47 F.R.D. 202 (D. D.C. 1969).

50. Green v. Missouri Pac. R.R., 62 F.R.D. 434 (E.D. Mo. 1973); Guy v. Abdulla, 57 F.R.D. 14, 16 (N.D. Ohio 1972); Rodriguez v. Swank, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd*, 403 U.S. 901 (1971).

51. *See* Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); Leisner v. New York Tel. Co., 358 F. Supp. 359 (S.D. N.Y. 1973); Vizier v. Howard, 165 So. 2d 655 (La. App. 1st Cir. 1964) (plaintiffs failed to allege sufficient facts to negate the prospect of the interest of the lessors not being in conflict); Note, *Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23*, 53 B.U. L. REV. 406 (1973). Additionally, federal courts have held that a person seeking both to represent a class, and simultaneously to act as its attorney, is

will not negate adequate representation; only differences that go to the essence of the subject matter of the litigation will result in loss of representative status.[52]

State ex rel. Trice v. Barnett[53] is authority in Louisiana for the proposition that the proportion of named representatives to the total number of class members is a relevant criterion of adequacy.[54] Both Louisiana cases mentioning the proportion factor were decided prior to the Second Circuit Court of Appeals' decision in *Eisen*. That decision marked the reversal of the federal rule giving relevance to the number of named representatives, and most federal courts now prefer to evaluate instead the qualities of the representative.[55] The *Eisen* court reasoned that "[i]f class suits could only be maintained in instances where all or a majority of the class appeared, the usefulness of the procedure would be severely curtailed."[56]

The ability of a representative to speak effectively for the absent members encompasses several sub-factors. The qualifications and effectiveness of legal counsel retained by the representative have been evaluated by courts reviewing the adequacy of representation.[57] Likewise, recognizing the substantial costs involved in prosecuting complicated litigation, many courts have given weight to the financial ability of the representative to absorb such costs,[58] a requirement of in-

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an adequate representative. *See* Graybeal v. American Sav. & Loan Ass'n, 59 F.R.D. 7 (D. D.C. 1973); Eovaldi v. First Nat'l Bank, 57 F.R.D. 545 (N.D. Ill. 1972).

52. Berman v. Narrangansett Racing Ass'n, 414 F.2d 311 (5th Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970); Frost v. Weinberger, 375 F. Supp. 1312, 1317 (E.D. N.Y. 1974); Davy v. Sullivan, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973).

53. 194 So. 2d 452 (La. App. 1st Cir. 1966), *cert denied*, 250 La. 259, 195 So. 2d 143 (1967).

54. "While there is no set percentage, we do not feel that a ratio of 1 to 7500 is adequate representation." *Id.* at 454; *accord*, Verdin v. Thomas, 191 So. 2d 646, 651 (La. App. 1st Cir. 1966).

55. *See, e.g.*, Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Epstein v. Weiss, 50 F.R.D. 387, 391 (E.D. La. 1970).

56. 391 F.2d 555, 563 (2d Cir. 1968).

57. *See* Katz v. Carte Blanche Corp., 52 F.R.D. 510 (W.D. Pa. 1971), *modified on rehearing on other gnds*, 496 F.2d 747 (3d Cir. 1974); Manual for Complex and Multidistrict Litigation § 1.61 (1970). *See generally* Verdin v. Thomas, 191 So. 2d 646, 651 (La. App. 1st Cir. 1966) (court noted that plaintiffs had retained "able counsel").

58. *See, e.g.*, National Auto Brokers Corp. v. General Motors Corp., 376 F. Supp. 620 (S.D. N.Y. 1974); Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D. Mo. 1973).

creased importance since the Supreme Court's holding in *Eisen v. Carlisle & Jacquelin* requiring representatives to bear the costs of initial notice to members of the class.[59] Acquiesence by class members to representation by the named party is not essential,[60] although at least one Louisiana court has held it to be of relevance.[61] The interests of the class members are also a sub-factor to be considered here. Thus, "[w]hen more than one member of a class seeks to represent the class, the court must determine which applicant's interests are most typical of the interests of the class as a whole and which group will most fairly and adequately protect the interests of the class they represent."[62] The eventual costs to the class as a whole should be taken into account; when, for example, a state attorney general may serve legitimately as a class representative, this possibility should be strongly considered.[63] Although "[t]here is no fixed rule by which the 'adequacy' of representation can be determined,"[64] the burden is clearly upon the named party to demonstrate his ability to represent the class.[65]

A Right Common to All Members of the Class

Louisiana Code of Civil Procedure article 591(1) requires that a class action be founded upon a right common to all class members. Exactly when such a right exists was the central issue in the *Stevens* case, and its solution provides a

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59. 417 U.S. 156 (1974).

60. *See, e.g.*, Moss v. Lane Co., 50 F.R.D. 122 (W.D. Va. 1970) (district court allowed representation despite affidavits from *all* members denying plaintiff's adequacy); Shulman v. Ritzenberg, 47 F.R.D. 202 (D. D.C. 1969).

61. State *ex rel.* Trice v. Barnett, 194 So. 2d 452, 454 (La. App. 1st Cir. 1966), *cert. denied*, 250 La. 259, 195 So. 2d 143 (1967).

62. Moore v. Tangipahoa Parish School Bd., 298 F. Supp. 288, 294 (E.D. La. 1969). Two groups of parents sought to intervene on behalf of a class in a school desegregation suit. The court, choosing between them, examined each group's educational background, community standing, and familiarity with the suit.

63. Manual for Complex and Multidistrict Litigation § 1.61 (1970). *See* Indiana v. Chas. Pfizer & Co., 51 F.R.D. 493 (S.D. N.Y. 1970). *But cf.* Hawaii v. Standard Oil Co., 301 F. Supp. 982 (D. Hawaii 1969), *rev'd on other gnds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972).

64. Caswell v. Reserve Nat'l Ins. Co., 234 So. 2d 250, 256 (La. App. 4th Cir.), *cert. denied*, 250 La. 364, 236 So. 2d 499 (1970).

65. *See, e.g.*, Roussel v. Noe, 274 So. 2d 205 (La. App. 1st Cir. 1973); McClure v. A. Wilbert's Sons Lumber & Shingle Co., 232 So. 2d 879 (La. App. 1st Cir. 1970); Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966).

functional approach to the definition of a conceptual provision.

Prior to *Stevens*, a conflict existed among the circuits in Louisiana as to when "the character of the right sought to be enforced" was "common to members of the class." The second and fourth circuits had held that because article 591 encompasses only "true" class actions which conclude the rights of all class members, the character of the right in question must be such that joinder of all class members would have been mandated, had the size of the class not been prohibitive.[66] The effect of this test was to limit the class action to situations in which the members of the class were indispensable, or at least necessary parties.[67] In rejecting this position in *Stevens*, Justice Tate characterized it as overly stringent, and pointed out that while some federal decisions concerning true class actions based their findings of a common right upon such a criterion, many involved separate and distinct claims based on an overall right of a common character.[68] The first circuit had employed a "community of interests" test prior to *Stevens* which was very similar to the requirement for permissive joinder under Code of Civil Procedure article 463(1).[69] Under that test, "common rights" existed despite differences in the monetary claims or other minor diversities of interest among class members if the source of the legal claim asserted was common to all. In utilizing this test, however, the common questions asserted were required to prevail over any individual questions involved in the case.[70] The Louisiana Supreme Court, though recognizing the relevance of the "community of interests" factor in determining the existence of a "common right" among class members, held it inconclusive.[71]

66. Stevens v. Board of Trustees of Police Pension Fund, 295 So. 2d 36 (La. App. 2d Cir. 1974), *rev'd*, 309 So. 2d 144 (La. 1975); Caswell v. Reserve Nat'l Ins. Co., 234 So. 2d 250 (La. App. 4th Cir.), *cert. denied*, 250 La. 364, 236 So. 2d 499 (1970); Veal v. Preferred Thrift & Loan, 234 So. 2d 228 (La. App. 4th Cir. 1970). This position is in accord with the intent of the redactors of the 1960 code. LA. CODE CIV. P. art. 591, comment (c).

67. 309 So. 2d at 147.

68. *Id.* at 149-50.

69. *See, e.g.*, Bussie v. Long, 286 So. 2d 689 (La. App. 1st Cir. 1973), *cert. denied*, 288 So. 2d 354 (La. 1974); State *ex rel.* Trice v. Barnett, 194 So. 2d 452 (La. App. 1st Cir. 1966), *cert. denied*, 250 La. 259, 195 So. 2d 143 (1967); Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966).

70. State *ex rel.* Trice v. Barnett, 194 So. 2d 452, 454 (La. App. 1st Cir. 1966), *cert. denied*, 250 La. 259, 195 So. 2d 143 (1967).

71. 309 So. 2d at 147. The court compared the first circuit test to the

The *Stevens* court noted the difficulty of ascribing a meaningful definition to the concept of a common right; it referred to such a right as a "common-based" right[72] and stated that the mere "existence of a common question of law or fact does not by itself justify a class action."[73] Justice Tate pointed out that a similar definitional problem was solved on the federal level by the 1966 amendment to Federal Rule 23 which "translate[s] these abstractions into pragmatic terms."[74] Embracing a functional approach,[75] he suggested that the criteria in the federal rule be used along with the basic policy goals behind the device to determine the "occasions for maintaining class actions."[76]

Justice Tate characterized the federal criteria as "indicative of the guidelines for ascertaining the occasions for maintaining class actions under our own code articles."[77] He then indicated the function of the Rule 23(b) criteria in determining the propriety of a class action:

> These guidelines emphasize limiting the use of the class action—when a common-based right is at issue and other requirements are met (such as too-numerous parties to join and adequate representation of the class)—to occasions where the class action will clearly be more useful than other available procedures for definitive determination of a common-based right, *if* such definitive determination in the single proceedings *should* be afforded in the interests of the parties (including both the class and the opponent(s) to it) and of the efficient operation of the judicial system.[78]

"community of interests" test of LA. CODE CIV. P. art. 463(1), governing permissive joinder of causes of action or defenses. The court's position appears quite sound in light of the extreme liberality of permissive joinder in Louisiana. *See* Gill v. City of Lake Charles, 119 La. 17, 43 So. 897 (1907); McMahon, *The Joinder of Parties in Louisiana*, 19 LA. L. REV. 1, 5 (1958).

72. Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d 144, 151 (La. 1975).

73. *Id.*

74. *Id.* at 150.

75. The movement of the Louisiana Supreme Court to a "pragmatic" approach in the area of procedural law is also apparent in *State Dep't of Hwys. v. Lamar Advertising Co.*, 279 So. 2d 671 (La. 1973). There the court suggested the use of the guidelines contained in FED. R. CIV. P. 19 in construing the Louisiana provisions on compulsory joinder.

76. 309 So. 2d at 150-51.

77. *Id.* at 150.

78. *Id.* at 151.

The Federal Rule 23 criteria reciting occasions necessitating class actions now appear to be part of the article 591 requirement of a common right, therefore, the provisions of Federal Rule 23(b) and federal cases decided thereunder merit careful attention by one who seeks to determine the maintainability of a class action in Louisiana courts.

Basic policy goals behind the class action constitute another important facet of the court's functional approach to the common right requirement. Two goals are suggested by the court in implementing the substantive law through class actions: efficient operation of the judicial system, and promotion of maximum fairness for the parties.[79] In assessing the former goal, *Stevens* urges Louisiana courts to examine the extent to which a clear legislative policy might be hampered by the lack of availability of class actions. Fairness to both the plaintiff and defendant is an additional policy consideration to be weighed by the court in reviewing the propriety of the class action. With regard to this requirement, the court indicated that the crucial question is whether permitting separate adjudication of claims would be unfair. The precedential value of the first decision, any injustice produced by possible inconsistent judgments in separate actions, and the relative interest of individuals in prosecuting sizable claims separately were among the factors cited as relevant to this inquiry.[80]

The trial court has much discretion in evaluating the viability of a class action in a given factual context. Federal Rule 23(c)(1) requires a judicial determination of whether a class action may be maintained as soon as possible after the commencement of the action. The provision affords great flexibility and vests broad discretion in the trial court for such a decision,[81] and this judicial role was recognized by the *Stevens* court.[82] Justice Tate underscored the discretion to be given a Louisiana court in his statement that class actions are to be sanctioned only "*if* such definitive determination in the single proceedings *should* be afforded in the interests of the parties . . . and of the efficient operation of the judicial

79. *Id.*

80. *Id.*

81. *See, e.g.*, 3B J. MOORE, MOORE'S FEDERAL PRACTICE §§ 23.31-23.45 (2d ed. 1948); WRIGHT & MILLER at §§ 1772-84; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967).

82. 309 So. 2d at 150.

system."[83] Just as in the determination of whether the statutory prerequisites of articles 591 and 592 have been met, whether a class action is maintainable under the new functional approach of *Stevens* now appears to be a question to be decided by Louisiana trial courts.

A Related Problem—Constitutionally Required Notice

The Louisiana Code of Civil Procedure envisions only the "true" class action, *i.e.*, one in which the rights of all the members of the class are concluded by a definitive judgment.[84] Normally in a "true" class action, the class members' rights will be closely interrelated, so that the individual members will be directly affected as a practical matter; thus, actual notice and an opportunity to be heard are not crucial. Once the court determines that the members are adequately represented, it is reasonably certain that the named representative will protect the absent members and give them the functional equivalent of a day in court.[85] For this reason, notice to class members is not required by the Louisiana Code, which contemplates such a situation.

The court in *Stevens* maintained the settled position that only "true" class actions exist in Louisiana.[86] However, the court's endorsement of the criteria contained in Rule 23(b)(3) for determining whether a common right exists appears to expand the "true" class action by deeming it maintainable when common questions of law or fact predominate over individual questions *and* the class action is superior to other available procedural devices.[87] According to the Louisiana Code of Civil Procedure, the "true" class action concludes the rights of all class members who are represented adequately even though they have been given no notice.[88] However, Rule 23(c)(2) requires that "the best notice available" be given in *all* class actions brought under the Rule 23(b)(3) criteria em-

83. *Id.* at 151.

84. *See* LA. CODE CIV. P. art. 591, comment (c).

85. *Hansberry v. Lee*, 311 U.S. 32 (1940), has often been cited for the proposition that adequate representation, *per se*, satisfies the due process requirements of fair notice and an opportunity to be heard in the true class action. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968). *But see* Maraist & Sharp at 6.

86. 309 So. 2d at 151.

87. *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Civil Procedure*, 36 LA. L. REV. 562, 563 (1975).

88. *See* LA. CODE CIV. P. art. 591, comment (c); LA. CODE CIV. P. art. 597.

braced in *Stevens*.[89] That this notice to class members in Rule 23(b)(3) actions is an essential element of due process was recently reaffirmed by the United States Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*.[90]

Even when no notice is given to class members, Louisiana class actions maintained under *Stevens* and the Federal Rule 23(b) criteria may be constitutionally conclusive upon absent class members when the action falls within the parameters of the traditional "true" class action. Under the court's broadened concept of a "common right," however, cases analogous to federal class actions maintained under Rule 23(b)(3) may run afoul of the due process requirements if notice is not *in fact* given in accordance with constitutional standards even though the Louisiana statute does not require it.[91] The court recognized this problem in *Stevens*, but it was not presented for resolution.[92] Since the Louisiana class action provisions are silent with respect to initial notice, this matter is a proper object of legislative concern.

Conclusion

After *Stevens*, Louisiana courts have functional, pragmatic guidelines for determining the maintainability of class actions, assuming the basic statutory requirements are met. The decision also clarifies the definition of a right "common to all members of the class." Thus, the *Stevens* case stands as a testament of judicial "legislation" in the field of procedural law, the judiciary responding to rapidly changing social and legal developments in a field of law in which the legislature is often slow to make changes. The propriety of such action, in light of the legislative history behind the Louisiana statutes, will no doubt be debated by legal scholars for some time to come. If the *Stevens* approach to class actions proves durable, the effects of this decision will be far-reaching—the net result being that class actions will be made more readily available in Louisiana to those seeking redress for wrongs perpetrated by or against a class.

James P. Lambert

89. FED. R. CIV. P. 23(c)(2).

90. 417 U.S. 156 (1974). *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); WRIGHT & MILLER at § 1786.

91. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Maraist & Sharp at 1.

92. 309 So. 2d at 152.