Louisiana Law Review

Volume 38 | Number 4
Summer 1978

Louisiana's Useful Class Action: Williams v. State

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is the proper forum for reconciling divergent findings. The proper approach for the appellate courts to follow is a uniform application of the manifest error doctrine.

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LOUISIANA'S USEFUL CLASS ACTION: *WILLIAMS V. STATE*

> *When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next step is either to kill, or to tame him and make him a useful animal.* *

Five inmates of the state penitentiary attempted to bring a class action on behalf of the approximately six hundred prisoners who had suffered severe attacks of food poisoning. Negligent and unsanitary preparation of the prison meal was the alleged cause of the contamination. Class certification was denied by the district court because of the possible variance in damages to individual class members. The Louisiana Supreme Court *held* that the class action remedy was available to victims of this mass tort, even though there was a possibility of variance in the individual damages. To satisfy due process requirements, however, the court utilized its inherent power to order notice to individual class members in the absence of a statutory provision. *Williams v. State*, 350 So. 2d 131 (La. 1977).

Although unknown in civil law countries,[1] the class action has been adopted by statute in Louisiana.[2] The redactors of the Louisiana Code of Civil Procedure based the class action provisions upon Federal Rule 23, as it was written at that time.[3] Finding Louisiana's liberal joinder

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* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

1. Homburger, *State Class Actions and The Federal Rule*, 71 COLUM. L. REV. 609, 610 n.6 (1971). The class action is an invention of equity which allows a group of claimants with a similar interest in a particular matter to sue through one or more representatives without having to join each member of the class on a suit. *See* Hansberry v. Lee, 311 U.S. 32, 41 (1940); C. WRIGHT, THE LAW OF FEDERAL COURTS, § 72 at 345 (1976) [hereinafter cited as WRIGHT]; Comment, *Federal Rules of Civil Procedure—Litigation of Air Crashes*, 29 RUTGERS L. REV. 425, 427 (1976); Comment, *Federal and State Class Actions: Developments and Opportunities*, 46 MISS. L.J. 39, 40 (1975).

2. LA. CODE CIV. P. arts. 591-597.

3. LA. CODE CIV. P. art. 591, comment (b). As enacted in 1937, Federal Rule of Civil Procedure 23 provided in part:

rules to be sufficient,[4] the redactors omitted the non-conclusive "hybrid" and "spurious" class actions[5] and only provided for "true" class actions which bind all members of the class.[6] Under the scheme of the Code, three elements must exist for a class action to be brought: a class so numerous that joinder is impracticable;[7] the presence of one or more class members who will represent the class adequately;[8] and a right asserted

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(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the Court; . . . one or more, as will fairly insure the adequate representation of all may . . . sue when the character of the relief sought to be enforced for or against the class is
(1) joint or common . . . ;
(2) several, and the object of the action is the adjudication of claims which do or may affect specific property . . . ;
(3) several, and there is a common question of law or fact . . . .

The three different sections of Rule 23 were labeled "true," "hybrid," and "spurious." Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L. J. 551, 572-76 (1937). The various sections proved to be confusing and unworkable. *See, e.g.*, 3B J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 23.01 [8], at 23-19 (2d ed. 1969); 7 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1752 (1972) [hereinafter cited as WRIGHT & MILLER]; WRIGHT, *supra* note 1, § 72 at 345; Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 380 (1967); Simeone, *Procedure Problems of Class Suits*, 60 MICH. L. REV. 905 (1962); Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433 (1960).

4. *See* LA. CODE CIV. P. art. 591, comment (d).

5. The spurious class action had been called a "permissive joinder device" since it only bound the members of the class who had joined in the action. Absentees, in effect, had to "opt in" the suit to avail themselves of the class judgment. *See* WRIGHT & MILLER, *supra* note 3, § 1752 at n.85; Comment, *Making the Class Determination in Rule 23 (b) (3) Class Actions*, 42 FORDHAM L. REV. 791, 792 (1974); Comment, *State Class Action Statutes: A Comparative Analysis*, 60 IOWA L. REV. 93, 107 (1974).

6. *See* LA. CODE CIV. P. art. 591, comment (c); Williams v. State, 350 So. 2d 131, 133 (La. 1977); Stevens v. Bd. of Trustees of Police Pension Fund, 309 So. 2d 144, 149 (La. 1975).

7. LA. CODE CIV. P. art. 591. *See, e.g.*, 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) ("persons in the class . . . are so numerous that joinder is impracticable, if not impossible"); Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966) ("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"); Comment, *New Dimension in Louisiana Class Actions*, 36 LA. L. REV. 798, 800 (1976).

8. LA. CODE CIV. P. art. 592. Because the named representative asserts the interest of all absent class members, due process requirements become involved in his selection. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32 (1940); Roussel v. Noe, 274 So. 2d 205, 209 (La. App. 1st Cir. 1973). *See also* Kane, *Standing, Mootness, and Federal Rule 23—Balancing Perspectives*, 26 BUFF. L. REV. 83 (1977); Maraist & Sharp, *Federal Procedure's Troubled Marriage—Due Process and the Class Action*, 49 TEX. L. REV. 1, 22 (1970); Comment, *supra* note 7, at 802-07.

that is "common to all members of the class."[9] The Code further provides that litigation expenses, including attorney fees, may be awarded by the court if there is a recovery beneficial to the class.[10] Finally, in accord with the "true" class action concept, the Code expressly states that "a definitive judgment on the merits rendered in a class action concludes all members of the class, whether joined in the action or not . . . ."[11]

In applying the class action provisions of article 591, Louisiana courts experienced difficulty in determining when a right was "common to all members of the class."[12] A conflict soon developed among the circuits.[13] The requirement of article 591(1) was interpreted by the Second and Fourth Circuits to mean that the "common right" asserted must be of such a nature that all members of the class would have been necessary, if not indispensable, parties were it not for the size of the class.[14] The First Circuit, on the other hand, applied a more liberal "community of interest" test[15] similar to the requirement for permissive joinder under article 463 of the Code of Civil Procedure.[16]

In the landmark decision of *Stevens v. Board of Trustees of the Police Pension Fund*,[17] the supreme court adopted the federal class action crite-

9. LA. CODE CIV. P. art. 591(1). *See* Comment, *supra* note 7, at 807-11. See also text accompanying notes 19-25, *infra*.

10. LA. CODE CIV. P. art. 595.

11. LA. CODE CIV. P. art. 597.

12. *See, e.g.*, Stevens v. Bd. of Trustees of Police Pension Fund, 295 So. 2d 36 (La. App. 2d Cir. 1974), *rev'd*, 309 So. 2d 144 (La. 1975); 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).

13. *Compare* Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966) *with* 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* Comment, *supra* note 7, at 808; Note, 50 TUL. L. REV. 692 (1976).

14. *See, e.g.*, Stevens v. Bd. of Trustees of Police Pension Fund, 295 So. 2d 36 (La. App. 2d Cir. 1974), *rev'd*, 309 So. 2d 144 (La. 1975); Veal v. Preferred Thrift & Loan, 234 So. 2d 228 (La. App. 4th Cir. 1970).

15. *See, e.g.*, Latino v. City of Bogalousa, 295 So. 2d 560 (La. App. 1st Cir. 1974); Bussie v. Long, 286 So. 2d 689 (La. App. 1st Cir. 1973), *cert. denied*, 288 So. 2d 354 (La. 1974); White v. Bd. of Trustees of Teachers Retirement Syst., 276 So. 2d 714 (La. App. 1st Cir.), *cert. denied*, 279 So. 2d 694 (La. 1973).

16. LA. CODE CIV. P. art. 463 provides in part: "Two or more parties may be joined in the same suit . . . if: (1) There is a community of interest between the parties joined . . . ." For a definition of "community of interest" see Gill v. City of Lake Charles, 119 La. 17, 43 So. 897 (1907).

17. 309 So. 2d 144 (La. 1975), *discussed in The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Civil Procedure*, 36 LA. L. REV. 562, 563 (1975); Comment, *supra* note 7; Note, 50 TUL. L. REV. 692 (1976).

ria to determine the existence of a "common right" as required by the Louisiana statute. In *Stevens*, a former Shreveport policeman instituted a class action on his own behalf and on behalf of other former officers who were denied refunds of their compulsory contributions to the police pension fund. Writing for the supreme court, Justice Tate found the Second Circuit's test for determining what constituted a "common right" to be too restrictive.[18] At the same time, he rejected the "community of interest" test of the First Circuit as being too permissive.[19] Instead, discretionary criteria were adopted based upon the provisions of Federal Rule 23 as amended[20] and the policy goals behind the class action device.[21] Since Rule 23 only provides for a "true" class action which binds all members of the class,[22] Justice Tate stated that the guidelines established therein are indicative of the "occasions for maintaining a class action under our own code articles."[23] In establishing these pragmatic criteria, the court implemented the goals behind the class action procedure—an efficient operation of the judicial system, promotion of maximum fairness for the parties, and implementation of the substantive law of the cause of action.[24]

By the court's action in *Stevens*, the federal jurisprudence and commentary gained added significance for Louisiana class actions.[25] In fed-

18. 309 So. 2d at 147.

19. *Id.*

20. In 1966, FED. R. CIV. P. 23 was amended to provide functional terms in place of the abstract criteria of the original rule. *See, e.g.*, Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B. C. IND. & COMM. L. REV. 501, 504 (1969); Note, 9 GA. L. REV. 893, 898 (1975). The major change initiated by the amendment of Rule 23 was that it provided for only a "true" class action by requiring the judgment in all class actions to be binding on all class members. *Accord*, WRIGHT, *supra* note 1, § 72 at 350.

21. 309 So. 2d at 151.

22. See note 20, *supra*.

23. 309 So. 2d at 150. The pragmatic terms of Rule 23(b) which the court used to determine the availability of class actions are:

> (1) Whether a class action is necessary to avoid possible adverse effects on the opponents of the class or on absent members of the class;
>
> (2) Whether a party opposing the class action has acted or refused to act on grounds generally applicable to the class;
>
> (3) If there is a question of law or fact common to the members of the class,
>
> (a) Whether the common question predominates over any question affecting only individual members;
>
> (b) Whether the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

24. 309 So. 2d at 151.

25. *See* Comment, *supra* note 7, at 810; Note, 50 TUL. L. REV. 692, 698 (1976). The Louisiana Supreme Court has taken an approach similar to that used by the California courts, which have, through a liberalized interpretation of an abstract and general class

eral mass tort class actions, the advisory committee for proposed Rule 23 set the general standard by stating that "a mass accident resulting in injuries to numerous persons is ordinarily not appropriate for a class action . . . ."[26] Most federal courts, with a few notable exceptions,[27] have followed the rule established by the advisory committee.[28] The leading case allowing a class action in a mass tort situation is *American Trading & Production Corp. v. Fischback & Moore, Inc.*[29] in which 1,200 exhibitions were damaged by a fire in an exhibition hall. The court allowed a class action, stating that all of the requirements of Rule 23 were met and that "the only issue distinguishing the class members was the amount of damages sustained."[30] The court held that a possible variance in damages did not defeat the action once the criteria for a class action are met.[31] A similar result was reached in *Bentkowski v. Marfuerza Companía Maritima*[32] in which victims of food and water poisoning on a cruise ship sought damages. The court held that "a collective prosecution was preferable to individual suits" since all of the criteria for Federal Rule 23

action statute, made California class action adjudication mirror the approach of the federal practice. *See, e.g.*, Vasquez v. Superior Court of San Joaquin County, 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964 (1971); Comment, *Determining Class Maintainability in California*, 27 HASTINGS L. J. 293 (1975).

26. *Advisory Committee's Note to Proposed Rule of Civil Procedure 23*, 39 F.R.D. 69, 103 (1966). *See also* Kaplan, *supra* note 3, at 393; Weinstein, *supra* note 3, at 469 (allowing a class action in a mass tort would create a kind of "legalized ambulance chasing"). But, most commentators have stated that under some circumstances the class action remedy should be available in mass tort situations. *See, e.g.*, 3B J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 23.45 [3], at 23-347 n.31 (2d ed. 1969); WRIGHT & MILLER, *supra* note 3, § 1783 at 117 (1972); Comment, *The Use of Class Actions for Mass Accident Litigation*, 23 LOY. L. REV. 383, 405 (1977); Comment, *Federal Rules of Civil Procedure—Litigation of Mass Air Crashes*, 29 RUTGERS L. REV. 425, 452 (1976); Comment, *Mass Accident Class Actions*, 60 CAL. L. REV. 1615, 1633 (1972); Comment, *Damages in Class Actions: Determination and Allocation*, 10 B. C. IND. & COMM. L. REV. 615, 618 (1969).

27. *See, e.g.*, Bentkowski v. Marfuerza Compania Maritima, 70 F.R.D. 401 (E.D. Pa. 1976); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 58 (S.D. Fla. 1973); *aff'd mem.*, 507 F.2d 1278 (5th Cir. 1975); Petition of Gabel, 350 F. Supp. 624 (C.D. Cal. 1972).

28. *See, e.g.*, Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977); McDonnell Douglas Corp. v. U.S. Dist. Ct., 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); Marchesi v. Eastern Airlines, Inc., 68 F.R.D. 500 (E.D.N.Y. 1975); Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392 (E.D. Va. 1975); Daye v. Pennsylvania, 344 F. Supp. 1337 (E.D. Pa. 1972), *aff'd on other grounds*, 483 F.2d 294 (3d Cir. 1973), *cert. denied*, 416 U.S. 946 (1974); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970).

29. 47 F.R.D. 155 (N.D. Ill. 1969).

30. *Id.* at 157.

31. *Id.*

32. 70 F.R.D. 401 (E.D. Pa. 1976).

were met and only minor injury was sustained.[33] Thus while the use of class actions in mass torts is the exception, the federal courts have shown a tendency to allow the device to be used when the class action is superior to other available methods for the fair and efficient adjudication of the controversy.[34]

The general availability of federal class actions has been severely limited by several recent United States Supreme Court decisions.[35] In *Snyder v. Harris*[36] the Supreme Court established the rule that separate claims of the class could not be aggregated to reach the required jurisdictional amount. This rule was extended in *Zahn v. International Paper Company*[37] where it was held that the individual claim of each named and unnamed party must satisfy the jurisdictional amount. A further restricting element on the availability of federal class actions was added in *Eisen v. Carlisle & Jacquelin*,[38] where the Court required that individual notice be given to all identifiable class members with the costs borne by the named representative. Due to these limitations imposed on federal class actions by the Supreme Court, more attention is being placed on the state courts as possible forums in which the class action may be advanced.[39]

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33. *Id.* at 404. If the injury to the individual class members is large, the class action remedy will not be appropriate since there will be a greater need for each individual to control the litigation of his lawsuit.

34. Federal courts now seem to be in agreement that a mass tort class action will not be allowed unless the action is brought under Rule 23(b) (3) and not 23(b) (1) or (2). *See, e.g.*, Vincent v. Hughes Air West, Inc., 557 F.2d 759, 767 (9th Cir. 1977); McDonnell Douglas Corp. v. U.S. Dist. Ct., 523 F.2d 1083, 1085 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392, 397 (E.D. Va. 1975); Comment, *The Use of Class Actions for Mass Accident Litigation*, 23 LOY. L. REV. 383, 404 (1977); Comment, *Mass Accident Class Actions*, 60 CAL. L. REV. 1615, 1620-27 (1972). *But see* Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 560 (S.D. Fla. 1973), *aff'd mem.*, 507 F.2d 1278 (5th Cir. 1975).

35. *See* Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969).

36. 394 U.S. 332 (1969).

37. 414 U.S. 291 (1973). *See generally* Theis, *Zahn v. International Paper Co.: The Non-Aggregation Rule in Jurisdictional Amount Cases*, 35 LA. L. REV. 89 (1974).

38. 417 U.S. 156 (1974), discussed in Comment, *Federal and State Class Actions: Developments and Opportunities*, 46 MISS. L.J. 39 (1975).

39. *See, e.g.*, Scher, *Opening State Courts to Class Actions: The Uniform Class Actions Act*, 32 BUS. LAW. 75, 85 (1976); *State Class Actions*, 27 S. CAROLINA L. REV. 87, 89 (1975); Comment, *New Dimensions in Louisiana Class Actions*, 36 LA. L. REV. 798, 800 (1976); Comment, *Judicial Prerequisites to Class Actions in Illinois: Policy Practice, and the Need for Legislative Reform*, 1976 U. ILL. LAW FORUM 1159, 1168; Comment, *State Class Action Statutes: A Comparative Analysis*, 60 IOWA L. REV. 93, 119 (1974); Note, 8 CREIGHTON L. REV. 496, 505 (1974); Note, 39 MO. L. REV. 447, 453 (1974).

The movement of class action litigation to state courts is demonstrated in *Williams v. State*[40] where the Louisiana Supreme Court considered for the first time the question whether the class action was available in a mass tort situation. The court recognized that the first two requirements for a class action, a numerous class making joinder impractical and an adequate class representative, were easily satisfied.[41] The "common right" requirement posed greater problems for the court, especially in light of possible variance in damages to individual class members. In order to decide whether there was a right "common to all members of the class," the court applied the federally-based criteria established in *Stevens*[42] to the facts presented and found that the class action remedy was favored.[43] The court listed several factors which it deemed decisive in allowing the class action:

(1) Six hundred separate suits would unduly burden the courts and risk inconsistent determinations;[44]

(2) The poverty of the prisoners and their individually small claims threatened the loss of substantive rights if a class action was not allowed;[45]

(3) Defendants' reasons for resisting liability were applicable to the entire class;[46]

(4) The common questions of law or fact predominated over any questions affecting only individual members;[47]

(5) The class action was the most appropriate procedural vehicle to process the dispute fairly and efficiently because:

(a) There was no substantial interest adverse to allowing the class action;

(b) The small number of suits already commenced did not defeat the class action purpose;

(c) There was no difficulty in managing the litigation as a class action.[48]

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40. 350 So. 2d 131 (La. 1977).

41. *Id.* at 133.

42. *Id.*

43. *Id.* at 134.

44. *Id.* at 135. *See also* FED. R. CIV. P. 23(b) (1); Stevens v. Bd. of Trustees of Police Pension Fund, 309 So. 2d 144, 151 (La. 1975).

45. 350 So. 2d at 135.

46. *Id. See also* FED. R. CIV. P. 23(b) (2); Stevens v. Bd. of Trustees of Police Pension Fund, 309 So. 2d 144, 151 (La. 1975).

47. 350 So. 2d at 135. *See also* FED. R. CIV. P. 23(b) (3); Stevens v. Bd. of Trustees of Police Pension Fund, 309 So. 2d 144, 151 (La. 1975).

48. 350 So. 2d at 135.

The possible variation in individual recoveries was held to be only one factor that the court must consider in determining whether the class action is the superior procedural method.[49] The court noted that great differences in individual damages would give rise to a desire for individual lawsuits and the likelihood of fragmentation of the class action into multiple lawsuits.[50] Under such circumstances, the manageability and judicial efficiency criteria would not be satisfied and the lower court would be correct in exercising its discretion not to allow the litigation to proceed as a class action.[51]

In extending the Louisiana class action to reach plaintiffs injured in a mass tort, the Louisiana Supreme Court realized that possible due process problems would arise.[52] United States Supreme Court decisions have established the due process requirement that notice must be given to all identifiable prospective members of the class if they are to be bound by the class action judgment.[53] Unlike the federal rule,[54] the Louisiana Code of Civil Procedure makes no provision for notice to be given to the unrepresented members of the class. Justice Tate, recognizing that article 191 of the Code gives a court all power necessary for the exercise of its jurisdiction,[55] declared that Louisiana courts are authorized to provide reasonable notice to identifiable members of the class.[56] While meeting the due process requirement, notice will also give the members of the class the opportunity to "opt-out" of the class litigation and thus to preserve their individual actions.[57] The court refrained

49. Federal courts have generally held that differences among class members as to damages is not enough to bar the class action remedy. *See, e.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir.), *cert. denied*, 395 U.S. 977 (1968). *See generally* Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23 (b) (3)*, 54 F.R.D. 501, 504 (1972).

50. 350 So. 2d at 136.

51. *Id.*

52. *Id.* at 137.

53. *See e.g.*, Schroeder v. City of N.Y., 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (court held that under federal rules notice must be given to identifiable class members). *See generally* Maraist & Sharp, *supra* note 8.

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

55. LA. CODE CIV. P. art. 191: "A court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law." *See also* LA. CONST. art. V, § 2.

56. 350 So. 2d at 138.

57. *Id.* The "opt-out" device is an invention of amended Rule 23 whereby parties who do not want to be bound by the class judgment may express this desire and "opt-out" of the class. *See, e.g.*, WRIGHT, *supra* note 1, § 72 at 354; Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW 1259, 1266 (1970) ("The sole

from requiring written notice in every situation but held that under the circumstances of this case, each member of the class was to receive written notification.[58] Justice Tate explained, however, that this notice need not be given by formal service or even by mail, but may be delivered by other "reliable informal means of communication."[59]

The decision in the instant case convincingly proves that Louisiana has embraced the full breadth of the federal class action rule.[60] Even 23(b) (3) class actions, which resemble in character the old "spurious" class actions, are now included in the wide scope of the state remedy.[61] Plaintiffs who have before looked to the federal court as the forum to bring their class action suits, may now turn to the state courts with more likelihood of success.

Although the extent and availability of the Louisiana class action has been established in the instant case, the problems in controlling the litigation have not been discussed.[62] The management problems will involve two principal components: providing notice to the absent class members, and calculating and distributing damages.[63]

The court in *Williams* has judicially made notice a mandatory part

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function of the required notice is to inform class members of their right to opt-out."); Note, 53 N. CAROLINA L. REV. 409 (1974).

58. 350 So. 2d at 138. See text at note 71, *infra*.

59. *Id.* at 139. *See generally* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973); Comment, *Management Problems of the Class Action under Rule 23(b) (3)*, 6 U. SAN. F. L. REV. 343, 354 (1972). *But see* Becker, *The Class Action Conflict: A 1976 Report*, 75 F.R.D. 167, 170 (1977) (possibility that constitutional due process requires notice to be given by first class mail where the absent class members' addresses are ascertainable).

60. The *Williams* decision is the first time a majority of the supreme court adopted the federal class action criteria since the *Stevens* decision was only a plurality opinion. See note 23, *supra*. The class action in *Williams* would have had to qualify under rule 23(b) (3) in order to have been allowed in federal court.

61. *See* Williams v. State, 350 So. 2d 131 (La. 1977). Under original Rule 23, a mass tort class action would have been a spurious class action. *See, e.g.*, Pennsylvania R.R. v. United States, 111 F. Supp. 80, 90 (D.N.J. 1953); Williams v. State, 350 So. 2d 131, 140 (La. 1977) (Sanders, C.J., dissenting). It must be remembered that there are no spurious class actions under the present Rule 23 but only "true" class actions. *See* WRIGHT, *supra* note 1, § 72 at 350 ("Nothing in the new rule corresponds to the former spurious class action, since . . . the judgment in a class action under the new rule will bind all members of the class . . . ."). *See also* Homburger, *supra* note 1, at 632; Kaplan, *supra* note 3, at 395 n.150.

62. To determine if a class action is manageable, the court weighs the costs to it in terms of the expenditure of judicial resources against the benefits which would accrue to the class members should their action prove successful. *See Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1500 (1976) [hereinafter cited as *Developments*].

63. *See, e.g.*, Comment, *The Cy Pres Solution to the Damage Distribution Problem of*

of the Louisiana class action procedure.[64] No mention is made, however, of who is to pay for the notice or of what method of giving notice is to be followed in other cases. In *Eisen v. Carlisle & Jacquelin*,[65] the United States Supreme Court established the rule that in Rule 23(b) (3) class actions the class representative must pay for individual written notice to all identifiable class members.[66] Since *Eisen* deals only with the federal class action,[67] the states are free to establish other guidelines consistent with due process requirements.[68] In Louisiana, a more flexible rule should be established when the class claims are individually small. In such a situation, requiring the class representative to give individual written notice to each class member would have the effect of defeating the class action. When the individual class claims are small, alternatives to individual written notice should be devised. For example, the *Williams* court said newspaper publication or public posting would be appropriate in some instances.[69] A workable rule for the state courts to follow would be that established by the Uniform Class Actions Act[70] which requires individual written notice only if the individual's claim is over one hundred dollars. If the claim is under one hundred dollars, other reasonable notice methods could be used.[71]

A related problem concerns the professional responsibility aspect of the class action notice requirement.[72] When notice is to be given indi-

Mass Class Actions, 9 GA. L. REV. 893, 901 (1975); Comment, *Manageability Under the Proposed Uniform Class Action: An Empirical Study*, 62 GEO. L. J. 1123, 1172 (1974).

64. 350 So. 2d at 138.

65. 417 U.S. 156 (1974).

66. *Id.* at 173, 177.

67. *Id. See, e.g.*, Scher, *supra* note 40, at 85; Note, 53 N. CAROLINA L. REV. 409 (1974).

68. *See, e.g.*, Cartt v. Superior Court, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (2d Dist. 1975). *See also* Comment, *Manageability Under the Proposed Uniform Class Actions Act*, 31 SW.L.J. 715, 723 (1977); Note, 64 CAL. L. REV. 1222 (1976).

69. Williams v. State, 350 So. 2d 131, 138 (La. 1977). Other alternatives used in federal court have allowed the cost of notice to be divided between the class representative and the defendant, *see, e.g.*, Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd*, 438 F.2d 825 (2d Cir. 1971); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); or allowed the initial cost to be borne by the court, *see, e.g.*, Illinois v. Harper & Row Publ. Inc., 301 F. Supp. 484 (N.D. Ill. 1969); Note, 20 WAYNE L. REV. 943, 947 (1974).

70. U.C.A.A. § 7. *See* Scher, *supra* note 39, at 78; *Uniform Class Actions*, 63 AM. B. J. 837 (1977); Comment, *supra* note 68, at 731.

71. U.C.A.A. § 7(e). Other possible notice methods are newspapers, television, radio, and public postings.

72. *See, e.g.*, Simone, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 392 (1972) (author suggests that attorneys in class actions may unethically solicit their clients); Comment, *Ethical Obligations of the Attorney Under Rule 23—Abuses and*

vidually to the absent class members, court supervision must be exercised to prevent the notice requirement from becoming a solicitation device for the representative's attorney. At least one federal case has cited solicitation by attorneys as justification for refusing to certify a class action.[73] Notice should be "neutral and objective in tone, and should neither promote nor discourage the assertion of claims."[74] A good practice would be for the attorneys to present to the court for its approval the notice they intend to use.[75]

Special problems also arise in damage computation and distribution.[76] If the conventional judicial mechanisms are followed for the determination of damages, an intolerable burden might be placed on the courts.[77] It will be necessary for the courts to exercise discretion in selecting innovative methods, tailored to the needs of particular cases, if the class action device is not to be defeated for a lack of judicial efficiency.

Calculation and distribution methods fall into four general categories.[78] First, the traditional method could be used which requires a full evidentiary hearing with each class member having a separate day in court. Although a precise computation of damages is possible under this approach, the method would be time-consuming and confusing if a large class is involved. Second, a summary judgment procedure could be employed whereby each absent member who furnished an affidavit could recover a base amount, at least in the absence of contradictory evidence. This is probably the best method to be used where all class members are identified and the amount claimed by each is small. Since some proof of damage is needed, the defendant does receive protection against totally unjustified claims. A third method is to calculate damages on a class-

Reforms, 12 SAN DIEGO L. REV. 224, 226 (1974). *But see* Moore, *Does It Go Far Enough?*, 63 AM. B. J. 842, 843 (1977) (author argues that lawyers should be able to solicit in class action situation).

73. Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237 (N.D. Texas 1972).

74. Philadelphia Elect. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 462 (E.D. Pa. 1968).

75. *See, e.g.*, Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (N.D. Ind. 1966); Comment, *Federal Rules of Civil Procedure: Rule 23, The Class Action Device and its Utilization*, 22 FLA. L. REV. 631, 638-41 (1970).

76. *See, e.g.*, *State Class Actions*, 27 S. CAROLINA L. REV. 87, 155 (1975); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 360 (1971); Note, 4 SW. U. L. REV. 112, 116 (1972).

77. *See, e.g.*, Comment, *Mass Accident Class Actions*, 60 CAL. L. REV. 1615, 1637 (1972).

78. *See Developments, supra* note 62, at 1516.

wide basis[79] with a jury available at the defendant's option.[80] Under this method, the damages are based on the injury to the class as a whole and not upon the individual injury to the class members. Use of this approach should be reserved for a very large class when all members are not identifiable. A quasi-administration system could be set up to distribute the damages.[81] Finally, damages could be calculated on a class-wide basis with any residue used for the benefit of the class. This is called the "cy pres" method of recovery.[82] Funds which cannot be delivered precisely to those class members with a legal claim are put to the "next best" use to aid the class. This method can best be used when members of a successful class action cannot be individually compensated because of difficulties in identifying class members and in determining the amounts of the individual claims.

The supreme court in *Williams* has expanded the Louisiana class action remedy to include the full latitude of the federal action, including the area of mass torts. By applying the legislative intent behind the class action statute, Justice Tate has created a functional procedural rule which is needed for efficient and fair judicial operation in a complex society. A greater burden is placed upon the trial judge who will be called upon to devise new methods of administration and application of the judicial process.[83] In many new areas, such as environmental law, the Louisiana class action remedy should offer protection for the small claimants who are injured and may find their only recovery in numbers. Justice Tate in *Stevens* allowed the class action dragon to come out of

79. *See, e.g.*, West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970); Daar v. Yellow Cab Co., 67 Cal. 2d 645, 63 Cal. Rptr. 724, 433 P.2d 732 (1967). This method of recovery has been called the fluid class recovery. *See, e.g.*, Comment, *supra* note 68, at 724; Comment, *Management Problems of the Class Action Under Rule 23 (b) (3)*, 6 U. S. SAN. F. L. REV. 343, 363 (1972).

80. No constitutional problems should be raised with a classwide damage assessment if the defendant is given an opportunity to adjudicate the damage claim before a jury. *See* WRIGHT & MILLER, *supra* note 1, § 1784 at 122; *Developments, supra* note 62, at 1524.

81. Special masters or other judicially appointed officers could be in charge of the administrative aspect of distributing the class recovery.

82. *See, e.g.*, Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259, 1260 (1970); Comment, *The Cy Pres Solution to the Damage Distribution Problem of Mass Class Actions*, 9 GA. L. REV. 893 (1975); Note, 39 U. CHI. L. REV. 448, 452-53 (1972).

83. *See* Blecher, *Is the Class Action Doing the Job?*, 55 F.R.D. 365, 374 (1973). ("To the judiciary must be committed the responsibility for balancing all of the competing interests: The innocent defendant should not be raped; the avaricious lawyer should not be rewarded and the guilty defendant must not be permitted to profit.").

his cave; in *Williams* he has tamed the dragon and made him a useful animal.

Guy Holdridge

SPECIAL PROBLEMS OF INTERPRETATION ARISING OUT OF PROCEDURE FOR LEVYING SPECIAL ASSESSMENTS

Nine property owners petitioned to have their properties stricken from an ordinance[1] assessing each lot for street improvements in proportion to the frontage it bore to all of the abutting lots.[2] The plaintiffs contended that the ordinance resulted in excessive assessments against their properties which caused them to pay a disproportionately larger share of the cost of the improvements than other citizens of Baton Rouge to whose general benefit these improvements accrued. After the trial court denied relief, the First Circuit Court of Appeal reversed and ordered that the respective properties be deleted from the assessment ordinance.[3] On appeal, the Louisiana Supreme Court reversed and *held* that although the council received no evidence on the issue of proportional benefit, the statement in the council's resolution and assessment ordinance which recited that "each lot or parcel of real estate to be assessed will be benefited to an amount not less than the proposed local or special assessment" was a sufficient compliance with the statutory provisions concerning the requisite benefits determination. The court further concluded that one may not protest that a legislative body has not done what a resolution and/or ordinance proclaims that it has done, and that the council's determination of benefits was a legislative act that may not be upset absent a manifest abuse of power exceeding limits of legislative

1. Local or Special Assessment Ordinance No. 4047 was adopted by the East Baton Rouge Parish Council on June 27, 1973, assessing property adjacent to North Street in the City of Baton Rouge for construction of improvements along North Street. This assessment ordinance purported to assess the plaintiffs' property in accordance with LA. R.S. 33:3301-3319 (1950).

2. These properties are located adjacent to North Street in the City of Baton Rouge. Before the improvements North Street was a two-lane asphalt street, bordered by sidewalks, street lights, and underground drainage. With the improvements it became a four-lane concrete street bordered by wide sidwalks, underground conduits for street lighting, improved drainage, and tree wells for plantings. Landry v. Parish of East Baton Rouge, 343 So. 2d 207, 210 (La. App. 1st Cir.), *rev'd*, 352 So. 2d 656 (La. 1977).

3. Landry v. Parish of East Baton Rouge, 343 So. 2d 207 (La. App. 1st Cir.), *rev'd*, 352 So. 2d 656 (La. 1977).