The Class Action as a Consumer Protection Device: State v. General Motors Corp.

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is one of specialized application and, thus, ought to be the primary
guide to decision making in this area. Fourth, despite the admirable
desire of Louisiana to preserve its civil law heritage, uniformity of
decisions in the area of negotiable instruments will serve to stabilize
interstate business transactions involving commercial paper.\textsuperscript{108} Indeed, the legislature's adoption of U.C.C. section 1-102\textsuperscript{109} compels this conclusion.

While \textit{Aiavolasiti} correctly settles the question of which Civil Code provisions apply to the relationship between solidary sureties, it leaves unresolved the proper utilization of negotiable instruments law in regard to suretyship. It is hoped that the Louisiana Supreme Court will clarify this troublesome area in its future opinions.

\textit{J.P. Hebert}

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\textbf{THE CLASS ACTION AS A CONSUMER PROTECTION DEVICE:}
\textit{State v. General Motors Corp.}

The defendant sold over 1,400 Oldsmobiles with substituted Chevrolet engines to Louisiana consumers, allegedly without disclosing the substitution. Claiming violation of the Unfair Trade Prac-

\textsuperscript{108} Adoption of Article 3 [of the U.C.C.] by preserving a core of uniformity for Louisiana should facilitate the multi-state transactions in which these instruments function.

\textsuperscript{109} LA. R.S. 10:1-102 (Supp. 1974) provides:
(1) This Title shall be liberally construed and applied to promote its purposes and policies.
(2) The purposes and policies of this Title are

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
(c) to promote uniformity of the law among the various jurisdictions.
tices and Consumer Protection Law, the state Attorney General filed a class action for injunction, restitution, and damages on behalf of the Louisiana purchasers. The Fourth Circuit Court of Appeal affirmed the trial court's certification of the class action for injunction and restitution, but found class action for actual damages prohibited by the Unfair Trade Practices Law. The Louisiana Supreme Court, on rehearing, affirmed the appellate court decision and held that a class action seeking injunction and restitution for consumers can be brought by the Attorney General under the Unfair Trade Practices Law. State v. General Motors Corp., 370 So. 2d 477 (La. 1979).

The Louisiana Unfair Trade Practices Law, enacted in 1972, addresses the problem that in many consumer cases the expense of litigation so far outweighs probable recovery that consumers suffer deceptive practices without seeking a legal remedy. The federal government enacted the Federal Trade Commission Act to alleviate the consumer's dilemma; Louisiana and other states subsequently enacted statutory remedies, largely modeled on the Federal Trade Commission Act and the model Unfair Trade Practice and Consumer Protection Act. In general, the Louisiana statute creates the Governor's Consumer Protection Division and delegates to that division, to the Attorney General, and to the courts the means to investigate and remedy unfair practices.

Several features of Louisiana's law are particularly beneficial to consumers. First, the statute defines unlawful conduct broadly, after

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8. LA. R.S. 51:1405 (Supp. 1972 & 1977) provides in pertinent part: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." For a discussion of the import of the generalized definition of unlawful conduct on consumers and competitors, see Breeden & Lovett, supra note 5, at 312 & 321.
fording the scope necessary to correct a wide range of trade abuses. Second, the Consumer Protection Division has broad investigatory and regulatory powers which foster efficient, flexible action. Third, the Attorney General is empowered to bring injunctive actions to restrain prohibited practices, and courts are authorized to grant restitution to consumers in connection with the state’s actions. Finally, the statute grants a private cause of action to the individual consumer for the recovery of actual damages, including attorney’s fees and, if the purchaser can prove a knowing violation of the act, treble damages. These provisions insure that even relatively small claims can be pursued advantageously, enhancing a consumer’s bargaining position should he seek to settle and discouraging deceptive acts by making them unprofitable.

Section 1409, granting a private action to injured consumers, expressly prohibits suit “in a representative capacity” for “actual damages.” Prior to the instant case, most commentators interpreted that language as a “bar on class actions,” the exclusion a concession to business interests which speeded passage of the measure. Withholding class actions from private litigants was rationalized on the grounds that class actions would be “effective encouragement to consumer litigation in a quite limited proportion of cases,” because of procedural problems in establishing the commonality of right required by the Code of Civil Procedure and in providing satisfactory notice to absent class members. Also, the grant

12. LA. R.S. 51:1409 (Supp. 1972). For a detailed description of the private action, see Breeden & Lovett, supra note 5, at 319-21; Comment, supra note 11, at 387-89.
15. Comment, supra note 11, at 387. See, e.g., State v. General Motors Corp., 370 So. 2d at 491 (Marcus, J., dissenting); Breeden & Lovett, supra note 5 at 321.
16. Whether or not to include the opportunity for class actions was clearly the most controversial aspect in the legislative history of this law, and of roughly comparable bills offered two years ago . . . . Business interests and their lobbyists were extremely worried about class action dangers, and the progress of this bill definitely was facilitated by an explicit exclusion of class action relief through private litigations.

Breeden & Lovett, supra note 5, at 321.
17. Lovett, supra note 4, at 745.
18. LA. CODE CIV. P. art. 591.
19. Lovett, supra note 3, at 745.
of authority to courts to give discretionary restitution to aggrieved consumers was the right to compensate for denial of the class action device.\textsuperscript{21}

The usefulness of the class action as a consumer protection tool has been much debated,\textsuperscript{22} as the nature and prerequisites of the procedure are often hurdles to its effective utilization.\textsuperscript{23} Certainly, the Louisiana class action, as initially formulated, did not lend itself readily to use as a consumer protection tool. Though modeled upon the original rule 23 of the Federal Rules of Civil Procedure,\textsuperscript{24} article 591 of Louisiana’s Code of Civil Procedure, rejecting “hybrid” and “spurious” class actions,\textsuperscript{25} authorizes only “true” class actions in

\textsuperscript{21} Breeden & Lovett, supra note 5, at 321. Even the consumer overlooked by the court in the state’s injunctive suit is not excluded from the prospect of judicial relief: “[O]nce the state had successfully enjoined an activity or obtained restitution for aggrieved consumers, the private plaintiff who was not accorded relief in the state’s action goes into court with a prima facie case whenever he can establish that he was damaged by the use of the proscribed practice.” Comment, supra note 11, at 388.
\textsuperscript{22} Advocates for the use of the class action argue that the small amount of individual claims in the typical consumer suit mandates class actions to insure compensation for victims and a deterrent effect on violators:

The processes of mass production, mass distribution, and mass consumption make it increasingly likely that wrongful conduct by any person will injure not just one or a few others, but a whole class of persons. The injury may be enormous in the aggregate, but too small to justify the expense of litigation by any one victim. Unless the injured persons are allowed to litigate as a class, all of them may be denied relief.

Kirkpatrick, Consumer Class Litigation, 50 Ore. L. Rev. 21, 21 (1970). See Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 642 (1971) (noting that class actions make “a potent deterrent against large-scale antisocial behavior” making them “a potent ally to administrative agencies”); Starrs, supra note 6, at 240-41 (encouraging class actions for injunctive relief in consumer cases).

23. The procedural limitations of the class action, and particularly the difficulty in meeting the required commonality of right in consumer cases, is noted by Lovett, supra note 3, at 745-46. The potential for abuse of the procedure is discussed by Blecher, Is the Class Action Rule Doing the Job? (Plaintiff’s Viewpoint), 55 F.R.D. 365 (1972); Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F.R.D. 375 (1972).


The liberal joinder rules of the Louisiana Code of Civil Procedure make such class actions superfluous: “There is no need for either the hybrid or the spurious class action in Louisiana . . . . The liberality of cumulation of actions and of intervention
which "the character of the right sought to be enforced" is "common to all members of the class." 26 Under articles 591 and 592, judgment in a class action binds all absent class members if the prerequisites to maintenance of the action are met: the class is too large to make joinder practicable, a right is common to all class members, and the class is adequately represented by one or more members. 27

The Louisiana Supreme Court interpreted the criteria for state class actions in Stevens v. Board of Trustees of Police Pension Fund, 28 a class suit brought by a former member of the Shreveport Police Department for refund of compulsory contributions to the police pension fund. Stevens defined the requirement of commonality of right among class members, treated inconsistently by the circuit courts, 29 and expressly adopted the criteria of federal rule 23 of the Federal Rules of Civil Procedure. 30 Rather than reading alternatively the criteria for amended rule 23(b)(1), (2), and (3) suits, 31 the

accomplish the same purposes of the spurious class action directly and much more simply. 26 LA. CODE Civ. P. art. 591, comments (c) to (d). See also Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d at 149.

26. LA. CODE Civ. P. art. 591. See Homburger, supra note 22, at 627 (discussing "true" class actions under the original federal rule 23).


29. The second and fourth circuits had held that a right is not common "if in fact the claims are separate and distinct and the presence of all members of the class is not necessary for the enforcement of the common right." Id. at 146. Thus, a class action was available only if all class members could have been considered indispensable or necessary parties, a stringent test limiting class actions. See, e.g., 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. 1970).

The first circuit, however, used a "community of interest" test "similar to that expressly authorized by Code of Civil Procedure article 463(1) for permissive joinder." Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d 147. See, e.g., Bussie v. Long, 286 So. 2d 689 (La. App. 1st Cir. 1973). Cf. Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966) ("unity of interest" test). See also Note, supra note 24, at 1063-64.

30. Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d at 150-51, citing FED. R. CIV. P. 23(b).

31. FED. R. CIV. P. 23 provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
supreme court made each criterion an element of a test balancing five factors. Careful scrutiny of the facts of each case is required to determine: (1) whether separate suits would unduly burden courts and prejudice later litigation; (2) whether denial of a class action would threaten the loss of substantive rights, as when individual claims are small; (3) whether the defendant denies liability on grounds common to the class; (4) whether a common question of law or fact outweighs questions affecting only individual claims; and (5) whether a class action is the most efficient and just procedural vehicle. The intent and effect of Stevens was to expand the availability of the Louisiana class action, bringing within its ambit cases in which common questions of law or fact predominate over individual issues and making federal jurisprudence relevant to the Louisiana

(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.

Commentary on amended Rule 23 consistently treats the criteria listed in (b)(1), (2), and (3) as applying to distinct situations. See C. Wright, Federal Courts § 72 (3d ed. 1976); Kaplan, supra note 25, at 388-93; Miller, supra note 25, at 501; Simon, supra note 23, at 376.

However, precedent for the supreme court's refusal to read separately the three kinds of class actions described in rule 23 can be found in the Uniform Class Actions Act drafted by the National Conference of Commissioners on Uniform State Laws. Scher, Opening State Courts to Class Actions: The Uniform Class Actions Act, 32 Bus. Law. 75 (1976).

32. 309 So. 2d at 151.
33. Id. at 150-51. The court noted, though, that "the existence of a common question of law or fact does not by itself justify a class action." Id. at 151. The court also stated that the federal criteria stress limiting the use of class actions to cases in which the procedure will be clearly the most useful means to determine common rights. Id. at 151.
class action.\textsuperscript{34}

The scope of the state class action was expanded further in \textit{Williams v. State},\textsuperscript{35} a tort action brought by the inmates of the Louisiana State Penitentiary against the state for alleged food poisoning. The supreme court certified the class action, despite some indication that mass torts usually are inappropriate for class litigation,\textsuperscript{36} particularly where variable defenses and differing damages militate against the predominance of common questions.\textsuperscript{37} Applying the \textit{Stevens} test, \textit{Williams} held that the possibility that class members might be awarded differing recoveries does not defeat class certification.\textsuperscript{38}

In \textit{General Motors} the Louisiana Supreme Court faced the propriety of a class suit under both the Unfair Trade Practices Law and the class action provisions of the Louisiana Code of Civil Procedure. Interpreting the Unfair Trade Practices Law, the court distinguished restitution from actual damages\textsuperscript{39} to avoid the implication

\begin{itemize}
\item \textsuperscript{34} Comment, supra note 27, at 810; Note, supra note 24, at 1064-65 & 1069.
\item \textsuperscript{35} 350 So. 2d 131 (La. 1977).
\item \textsuperscript{36} See Advisory Committee's Note to Rule 23, Proposed Rule of Civil Procedure, 39 F.R.D. 69, 103 (1966) [hereinafter cited as Advisory Committee].
\item \textsuperscript{37} The usefulness of the rule 23(b)(3) class action for mass torts is hotly contested. The device was designed to enable claimants with small claims to vindicate their rights collectively and to reach "cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." Miller, supra note 25, at 502, quoting Advisory Committee, supra note 36, at 102-03. But the procedure has been attacked as promoting "litigations which would not otherwise have been brought" and coercing settlement of ill-founded claims. Simon, supra note 23, at 377 & 379-80. E.g., Blecher, supra note 23, at 368; Homburger, supra note 22, at 630.
\item \textsuperscript{38} 350 So. 2d at 136. For a discussion of the problems presented by variable damages, see Note, supra note 24, at 1068 (fragmentation of the action into separate suits hampering judicial management), & 1071-72 (problems in damage calculation and distribution). See Blecher, supra note 23, at 372-73 (damage proof problems); Simon, supra note 23, at 379, 386 (excessive awards to attorneys, due process problems with innovative calculation devices). The problem of unclaimed damages is treated in detail in Comment, \textit{Damage Distribution in Class Actions: The Cy Pres Remedy}, 39 U. Chi. L. Rev. 448 (1972).
\item \textsuperscript{39} \textit{Williams} also responded to the decision of the United States Supreme Court in \textit{Eisen v. Carlisle & Jacquelin}, 417 U.S. 156 (1974), an anti-trust class action on behalf of odd-lot stock traders, which mandated actual notice to class members who are identifiable through reasonable effort in federal class actions. Noting that federal and state due process may require actual notice to all identifiable class members, the Louisiana Supreme Court in \textit{Williams} directed the trial court to provide notice to absentees. Although the Louisiana Code of Civil Procedure does not provide for notice to absentees, the supreme court recognized the authority of the trial judges to provide for reasonable notice, which need not be formal service. 350 So. 2d at 137-38.
\item \textsuperscript{39} \textit{Id.} at 486. The court based its distinction upon Civil Code articles 2545 and 2547 and the rationale employed by the appellate court.
\end{itemize}
that the prohibition of representative suits by private litigants in section 1409 might also forbid actions for restitution brought by the state on behalf of consumers. Fusing authority granted the Attorney General under section 1414 with that granted the courts in section 1408, the court determined that the Unfair Trade Practices Law authorizes the Attorney General to bring class actions.46 Addressing then the requirements of the Code of Civil Procedure,44 the court first found the Attorney General a proper party to bring the action.42 The required commonality of right among class members was identified as the legal question of General Motor's duty to disclose the source of the Oldsmobile engines,49 an issue outweighing variable defenses.44 The court concluded, on applying the Stevens test, that a class action was the superior procedure to resolve the claims of the Louisiana consumers.45

General Motors, a four-three decision,48 is significant because it announces that, under the Louisiana Unfair Trade Practices Law, a class action is available for consumer protection, at least if brought by the Attorney General or a district attorney47 and if the recovery sought is limited to injunction and restitution. Since the availability of a consumer class action was uncertain prior to General Motors, the decision broadens the enforcement procedures of the Unfair Trade Practices Law. But the decision is disquieting because both the necessity and the practicality of the class action as a consumer protection tool are questionable, and the court's application of the Stevens test to the facts of General Motors does not show convincingly that a class action is the superior procedure for consumer litigation.

40. 370 So. 2d at 485-87.
41. LA. CODE CIV. P. arts. 591-92.
42. 370 So. 2d at 487. The court determined that whether the Attorney General brings the action himself or authorizes a consumer to do so is irrelevant.
43. Id. at 489.
44. On original hearing, the variable defenses which General Motors might present to individual claims had been found to preclude commonality. 370 So. 2d at 481 (original hearing). On rehearing, the court felt its determination of commonality was mandated by the possibility that "[a] contrary holding would permit a defendant to defeat maintenance of a class action merely by alleging the existence of a possible defense against some class members but not against others." 370 So. 2d at 489 (on rehearing).
45. A class action was deemed the superior procedural vehicle because: (a) few substantial claims had been filed, indicating that class members had little interest in controlling separate actions; (b) the class action would dispose of almost all claims in a single proceeding; (c) concentration in one forum weighed against the class action; but (d) notice and manageability would present no severe problems. 370 So. 2d at 489-90.
46. Justice Marcus dissented with reasons, while Chief Justice Summers and Justice Dennis reaffirmed the views they expressed on original hearing.
47. LA. R.S. 51:1417 (Supp. 1972) empowers district attorneys to institute and prosecute actions "in the same manner as provided for the attorney general."
The availability of a class action for restitution was questionable under the language of the Unfair Trade Practices Law, which neither explicitly sanctions nor expressly prohibits such an action. Provisions of the Act allow the Attorney General to sue for injunction;\textsuperscript{48} permit the courts to give restitution to individuals found to have been damaged by unfair trade practices;\textsuperscript{49} and give the Attorney General authority to use "all other authority and procedures available to persons under the Louisiana Civil Code, Code of Civil Procedure and Revised Statutes" to enforce the Act.\textsuperscript{50} But the statute does not grant expressly to the Attorney General the right to bring class actions, and their availability had to be resolved by implications of other statutory provisions. A major hurdle to an inference of availability was the express ban on representative suits for actual damages in section 1409.\textsuperscript{51} In order to overcome the implication that the legislature did not intend to allow representative suits,\textsuperscript{52} the supreme court endorsed the Fourth Circuit Court of Appeal's ruling that restitution is distinguishable from actual damages for the purposes of the Unfair Trade Practices Law. The fourth circuit based its ruling on the Civil Code redhibition articles;\textsuperscript{53} but as the Louisiana Unfair Trade Practices Law was drawn from common law sources,\textsuperscript{54} reliance on the Civil Code was inapposite.\textsuperscript{55} However, restitution has been identified as distinct from expectation interests at common law,\textsuperscript{56} and injunctive actions brought under consumer

\textsuperscript{49} LA. R.S. 51:1408 (Supp. 1972).
\textsuperscript{50} LA. R.S. 51:1414 (Supp. 1972).
\textsuperscript{51} LA. R.S. 51:1409 (Supp. 1972) provides in part:

Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages.

Justice Dennis pointed out that "the clear ban against class actions by private persons contained in Louisiana Revised Statutes 51:1409" suggests that "the Legislature did not intend to create a special kind of class action for aggrieved persons in connection with the State's suit for injunctive relief." 370 So. 2d at 483 (original hearing) (Dennis, J., concurring).

\textsuperscript{52} See note 16, supra.
\textsuperscript{53} 354 So. 2d 770 & 775. (La. App. 4th Cir. 1978).
\textsuperscript{54} See notes 6-8, supra.
\textsuperscript{55} Louisiana's unfair trade practices act is modeled after the Uniform Deceptive Trade Practices Act, drafted by the American Bar Association's Committee on Unfair Competition and approved by the National Conference of Commissioners on Uniform State Law. Analogy to the Louisiana Civil Code articles on redhibition is therefore inappropriate to interpretation of this statute.

370 So. 2d at 491 (on rehearing) (Marcus, J., dissenting).

\textsuperscript{56} Restitution protects society's interests against unjust enrichment and unjust impoverishment in a situation wherein one party has conferred a value in exchange for
protection statutes in common law jurisdictions have resulted in a restitution award to consumers to restore the status quo. By identifying "actual damages" in section 1409 with expectation interests and consequential damages at common law, the court could assert legitimately that the ban on class actions for actual damages of section 1409 does not restrict representative suits for restitution.

A possible consequence of the court's damages ruling is the alleviation of the variable damage problem in consumer class actions. The prayer for restitution in General Motors sought four alternative methods of restitution. By specifying the alternative deemed most suitable, a court could order General Motors to fulfill the order "across the board" to injured class members, thereby avoiding the problems presented by class actions involving differing damages. Purchasers who suffer additional expenses as a result of the substitution of the enriched party fails to perform. Its legal measurement is usually the correlation between the promisor's gain and the promisee's loss, seeking to return the promisee to his position before the promise was made. It is distinguishable from expectation interest, which tries to put the promisee in the condition he would have been in had the promise been kept. Fuller & Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 53-55 (1937). Accord, J. Calamari & J. Penillo, Contracts §§ 14-4 & 15 (2d ed. 1977). Cf. W. Prosser, Law of Torts § 94 (4th ed. 1971) (election to sue for restitution in tort cases).

Because restitution interest involves both unjust enrichment and unjust impoverishment and seeks to correct an injustice rather than to bring into being a new situation, restitution interest has the strongest claim to judicial relief at common law. Fuller & Perdue, supra note 56, at 56.


The appellate court had defined "actual damages" as "relief other than the refund of the purchase price and the return to the status quo that constitute restitution." 354 So. 2d at 775.

The problems inherent in class actions involving variable damages are suggested in note 38, supra.

370 So. 2d at 478 & 484 n.1. The alternative forms of restitution sought were: (1) return of the vehicles and an order to General Motors to return the purchase price; or (2) an order requiring General Motors to replace the substituted engines at no cost to the consumers; or (3) return of the vehicles and an order to General Motors to replace them with new automobiles equipped with Oldsmobile engines; or (4) an order to General Motors to pay each aggrieved customer an amount in money damages equal to the diminution in value of his vehicle and to compensate him for all inconvenience occasioned by the substitution.
tuted engine would retain their rights to seek compensation for actual damages in private actions.

However, as attractive as this alternative is, of the four alternative orders requested by the state in General Motors, only the first, return of the vehicles to General Motors and of the purchase price to the consumers, constitutes restoration of the status quo prior to contract formation, the traditional notion of restitution. This remedy seems drastic in light of the probability that the Oldsmobile purchasers sustained little actual harm from the substitution. The most reasonable remedy sought by the state, an order requiring General Motors to pay each purchaser monetary damages equivalent to the diminution in value of his automobile, is accompanied by a request for consequential damages and does not seek to return the parties to the condition they would have been in if the sales had never been made. Thus the concept of restitution employed by the court requires further clarification.

Moreover, the damages/restitution distinction raises problems in construing the Louisiana Unfair Trade Practices Law. Section 1409 grants to private litigants the right to sue for actual damages; but since the court has distinguished actual damages from restitution, the distinction could be read to preclude individual suits for restitution under the consumer protection statute. A consumer could still seek restitution in a redhibition suit, but in order to receive treble damages, his action should be based on the Unfair Trade Practices Law, and he should claim "damages." But the permissibility of suit for restitution based on the Unfair Trade Practices Law is uncertain in light of the court's rationale. Because the purpose of the General Motors ruling is to extend consumer protection, it is unlikely that the court will read section 1409 to authorize only actions for actual damages and not for restitution; to do so would narrow a plaintiff's alternatives and restrict the effectiveness of his statutory remedy. But if, to avoid restricting the private right of action, section 1409's

61. Moreover, restitution is not available as a remedy for partial breach of a contract, and the injured party is required to repudiate the contract. J. Calamari & J. Perillo, supra note 56, at 572-73.
62. Section 1409 only grants a remedy to plaintiffs with ascertainable loss; clearly, restitution by refund of the purchase price would, paradoxically, constitute "restitution" grossly in excess of harms actually suffered, at least by those consumers who did not file suits against General Motors.
63. Justice Marcus, in dissent, maintained that the court's rationale would "allow an injured consumer to file suit seeking damages, but would preclude him from seeking restitution." 370 So. 2d at 491 (on rehearing).
64. LA. CIV. CODE arts. 2545 & 2547.
66. See 370 So. 2d at 487-88.
prohibition of representative actions is read to address only suits for actual damages, nothing in the statute would forbid private litigants from bringing class actions for restitution. The court's reasoning in *General Motors* supports this interpretation, which will arguably expand the private right of action. Thus the damage/restitution distinction creates ambiguity in section 1409, and the consumer's private action may be either narrowed or expanded by future rulings seeking consistency with *General Motors*.

Less significant, but also questionable, is the finding by the court of statutory authorization for the Attorney General to bring a consumer class action. Relying on the broad enforcement powers that section 1414 confers on the Attorney General, the court nevertheless found it necessary to grant to him the discretionary power that section 1408 confers on the courts to give relief to injured consumers. Arguably, this expands the powers that the legislation grants the Attorney General, clouds the clarity of the statute, and, more significantly, renders less persuasive the court's finding of legislative intent to permit a class action, a problematical issue in any case. The court may have been motivated to put "teeth" into the legislation, since a class action is a potent deterrent to a willful violator. But the need for the procedure is questionable, given the broad scope of the private right of action.

Determination that class actions are permitted by the Unfair Trade Practices Law does not foreclose inquiry as to their propriety under the Code of Civil Procedure. In order to find a class action against General Motors proper under articles 591-92, the court had to determine whether the Attorney General is a proper party to bring the action and whether the Oldsmobile purchasers shared the commonality of right required in a Louisiana class action. The court answered the first inquiry affirmatively, relying on section 1414 of title 51. Authorization in the Unfair Trade Practices Law does not answer the requirement of the Code of Civil Procedure that the plaintiff be a member of the class.

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67. *Id.* at 485-87.

68. The deterrent effect of class actions in consumer cases is discussed by Biderman, *Consumer Class Actions Under the New Mexico Unfair Practices Act*, 4 N.M. L. Rev. 49 (1973); Kirkpatrick, *supra* note 22, at 21; Starrs, *supra* note 6, at 240-41.

69. Section 1414 allows the Attorney General to use all lawful procedures to enforce the consumer protection law; the court reasoned that if the legislature had intended to forbid his bringing a class action, "this was the place to do it." 370 So. 2d at 486.

70. As former Chief Justice Sanders argued:

It is true that Louisiana Revised Statutes 51:1414 allows the Attorney General to use all other existing authority in actions to enforce the Unfair Trade Practices Law. This section makes clear, however, that the authority applies only to "ac-
section 1414 might just as well have intended to exclude class actions, because the Attorney General is not a class member. However, the state can sidestep the problem by joining a class member as a named representative, as in the instant case.

A more telling problem is the court's reversal of its holding on original hearing on the required commonality of right. On original hearing, the supreme court found "substantial dissimilarities" among the claims of the class members. General Motors could assert different defenses to individual claims by showing differences in representations made during the sales; also, the buyers' subjective expectations and personal awareness of the substitution are relevant, particularly as some consumers were probably indifferent and therefore not aggrieved. Though a defendant clearly should not be able to defeat a class action by alleging differing defenses, the Stevens balancing test would defeat such a facile maneuver. Yet in the instant case potentially wide variations in the conditions surrounding individual purchases bear directly on General Motors' liability, because the right to proceed under the consumer protection statute is granted only to persons with ascertainable losses. To ignore factual evaluation of loss in favor of the possible existence of a duty to disclose is to substitute a generalization for analysis of fact, an approach inconsistent with the Stevens rationale.

The state, itself, can bring no class action for restitution and damages, because among other impediments it is not a member of the class.

370 So. 2d at 482 (original hearing) (Sanders, C.J., concurring).

71. 370 So. 2d at 483 (original hearing) (Dennis, J. concurring).

72. LA. CODE CIV. P. art. 591.

73. The alleged violation of Revised Statutes 51:1405 was a common issue at law and General Motors' production of all the automobiles involved a common question of fact. 370 So. 2d at 479 (original hearing). But the court, finding "no additional similarities," noted:

In order to make a showing that other similar legal and factual relationships are common to the claims of the members of the class it is necessary to inquire into each and every purchase . . . . A determination then must be made if any representations by their dealer or salesman to individual buyers were made regarding the source of the engine installed in the automobile purchased. Only in such an inquiry, by the testimony of the witnesses and parties to the sales transaction, could General Motors defend itself against the claim of unfairness and deceit.

Id. at 480. However, if General Motors had a duty to disclose the substitution and failed to do so, the representations made by individual dealers would be immaterial to General Motor's breach of duty, though the subjective expectations of the purchasers would still bear on liability under section 1409.

74. In the instant case General Motors had not answered, and the defenses it may have asserted to individual liability are an open question.

The court's application of the Stevens test in General Motors was less thorough than the Williams analysis. In Williams the concentration of class members favored focusing the litigation in a single forum and simplified management problems. But the circumstances surrounding the instant case do not suggest so clearly that judicial efficiency, forum convenience, or manageability will be furthered by representative suit. The court found in General Motors that the small number of suits already filed suggests that a class action would be efficient. But a paucity of separate claims may just as logically indicate that few class members are aggrieved. In that case, class action certification simply encourages litigation. The fact that a class action consolidates individual claims into a single suit does not make the action efficient per se if it spawns litigation which otherwise would not have been brought. Also, the efficiency of a class action depends to some extent upon the desirability of litigating all the claims of the class in a single forum. The court, in General Motors, conceded that forum convenience "militates against the use of the class action," but apparently accorded the finding little weight. The fact that class members are scattered across the state bodes ill for manageability, particularly in giving notice to absentees. As in Williams, the court suggests that absentees be notified, not only of the existence and disposition of the suit, but also of "incidental episodes" occurring during litigation. Notice, presumably by mail, to 1,467 consumers renders questionable the court's determination that notice costs will be "not unreasonable" and that "manageability is no acute problem in this case." Insofar as one goal of a class action is to benefit the judiciary by conserving its resources, the court appears to be doing itself no favors in the instant case.

76. 350 So. 2d at 136.
77. 370 So. 2d at 489-90. The determination is consistent with the Williams statement that "the lower the number of additional suits filed, the more useful is the class action." 350 So. 2d at 135. Accord, Fed. R. Civ. P. 23(b)(3); Comment, Mass Accident Class Actions, 60 Cal. L. Rev. 1615, 1636 (1972).
78. See Kirkpatrick, supra note 22, at 21; Simon, supra note 23, at 377-78 & 386.
80. 370 So. 2d at 490.
82. 370 So. 2d at 490. The court was not certain that actual notice is required in state class actions by Eisen, see note 38, supra, but, as in Williams, chose to provide for actual notice in the interest of fairness. In the instant case, names and addresses of class members were to be obtained from defendant's sales lists.
83. Id.
The holding of General Motors is a procedural decision, intended to implement the policies underlying the consumer protection law: to compensate injured consumers and to deter unfair trade practices. Certainly these goals deserve all the protection courts can afford. The ultimate question raised by General Motors is whether class actions brought by the Attorney General will in fact promote either goal. The question is important, because the instant case suggests problems inherent in class litigation of consumer claims. Practical problems of management, notice, forum convenience, and variable defenses indicate that the typical consumer class action may be neither easily manageable nor judicially economical; thus, promotion of consumer protection by class actions may be dearly bought. The extent to which class actions are needed to insure deterrence and victim-compensation may warrant reconsideration.

The provisions of Louisiana's Unfair Trade Practices Law, particularly section 1409, seem adequate to meet the goal of victim-compensation. If a consumer suffers an "ascertainable loss" as the result of a deceptive practice, section 1409 makes it worthwhile for him to bring a private action. The recovery provisions of the private right of action protect even consumers who sustain small losses. The compensation offered by Louisiana's statute is equivalent to that afforded consumers in many other jurisdictions, so that

84. In determining how the legislature intended the courts to define and apply the concept of allowing a class action to enforce rights with a common character, we are mindful of the basic goals or aims of any procedural device: to implement the substantive law, and to implement that law in a manner which will provide maximum fairness to all parties with a minimum expenditure of judicial effort. 

Id. at 488, quoting Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d at 151.

85. Breeden & Lovett, supra note 5, at 308-10; Comment, supra note 11, at 375.

86. Recurring problems in large-scale class actions which are particularly relevant to consumer suits include:
   (1) typicality of claims. Kirkpatrick, supra note 22, at 31-34; Comment, supra note 77, at 1619-20;
   (2) cost of notice. Blecher, supra note 23, at 372; Maraist & Sharp, supra note 81, at 13; Comment, supra note 29, at 811-12;
   (3) creative judicial management. Homburger, supra note 22, at 657-58; Miller, supra note 25, at 503-05, 509-12;
   (4) differing damages. Comment, supra note 77. Uniform damages to all class members may be available under the restitution theory of General Motors. See text at note 61, supra.

87. Section 1409 grants attorney's fees and costs to a successful plaintiff; if he can show that the defendant's deceptive act was intentional, the court is mandated to award treble damages.

88. Lovett, supra note 3, at 745, 747-48; Breeden & Lovett, supra note 5, at 320.

anyone with actual loss can find relief.\textsuperscript{90} In some consumer cases, the common interest of class members may make a class action the most effective procedure.\textsuperscript{91} But in most cases a class action for compensation will be unnecessary in Louisiana; the only persons excluded from benefit of the private action are those who can find no loss, and to encourage litigation on their behalf is pointless.

The deterrent effect of class actions, however, is noted frequently\textsuperscript{92} as the cost of defending class suits and the adverse publicity they generate discourages willful trade deception. But it is sobering to note that, though consumer protection has been identified as an express goal of federal rule 23(b)(3),\textsuperscript{93} recent federal decisions show a trend toward closing federal courts to class actions,\textsuperscript{94} in an attempt, at least partially, to "prevent federal courts from being swamped by unwieldy, frivolous class suits."\textsuperscript{95} The federal experience has led to limitations on the procedure in order to avoid spurious actions and undue pressure on defendants;\textsuperscript{96} the federal example, then, suggests caution. Also, the efficacy of the class action as a consumer protection device is not firmly settled, particularly in

\textsuperscript{90} Even if a claim is too small to justify hiring counsel, city and justice of the peace courts are available for self-representation. Comment, \textit{supra} note 11, at 379.

Also, a relevant policy consideration is whether the staff of the Attorney General or of the district attorney is the best party to ensure consumer restitution, particularly as the provision granting attorney's fees makes available, even to economically disadvantaged consumers, counsel from the private sector.

\textsuperscript{91} \textit{Kirkpatrick, supra} note 22, at 33.

\textsuperscript{92} \textit{Biderman, supra} note 67, at 53; \textit{Blecher, supra} note 23, at 368-69; \textit{Starrs, supra} note 6, at 240-41; Comment, \textit{The Products Liability Class Suit: Preventive Relief for the Consumer}, 27 S.C. L. \textit{REV.} 229, 248-49 (1975).

\textsuperscript{93} \textit{Kirkpatrick, supra} note 22, at 33-34; Comment, \textit{Federal and State Class Actions: Developments and Opportunities}, 46 MISS. L.J. 39, 51-52 (1975).

\textsuperscript{94} \textit{Eisen} makes class action in a federal court financially onerous by requiring the class representative to provide actual notice to all known class members. \textit{Zahn v. International Paper Co.}, 414 U.S. 291 (1973), requires that in diversity cases all class members, named and absent, meet individually the jurisdictional amount requirement of 28 U.S.C. § 1332. The \textit{Zahn} requirement will effectively close federal courts to most diversity class suits, as only in exceptional cases will each class member meet the $10,000 jurisdictional amount requirement. The financially burdensome notice requirement imposed by \textit{Eisen} will further discourage class litigation in federal courts. With the federal courts closing their doors to class actions, state courts will become the only forums available for class suits which involve no federal questions. \textit{E.g.}, \textit{Scher, supra} note 31, at 85-86; Comment, \textit{supra} note 27, at 799-800; Comment, \textit{supra} note 93, at 45-53; Note, \textit{supra} note 24, at 1086; Note, \textit{Class Actions—Closing the Doors to the Federal Courts: Zahn v. International Paper}, 39 Mo. L. \textit{REV.} 447, 452-53 (1974); Note, \textit{Civil Procedure—Class Actions—Amending Rule 23 in Response to Eisen v. Carlisle & Jacquelin}, 53 N.C. L. \textit{REV.} 409 (1974).

\textsuperscript{95} Comment, \textit{supra} note 96, at 53.

\textsuperscript{96} \textit{Eisen v. Carlisle & Jacquelin}, 391 F.2d 555, 570 (2d Cir. 1968); \textit{Lovett, supra} note 3, at 746.
cases when the defendant's conduct was not intentionally deceptive. Other alternatives may satisfy the deterrent goal of consumer legislation with less strain on judicial resources. One such alternative is the imposition of a civil fine, to be imposed not merely, as at present, for violation of an injunction, but upon a court's finding, after adversarial hearing, that a defendant knowingly engaged in a deceptive practice.

Adequate compensatory measures presently exist in the Unfair Trade Practices Law, and deterrence could be strengthened by legislative amendment. However, in the interest of discouraging deceptive conduct, the state supreme court, by allowing the Attorney General to bring class actions, has fashioned an additional consumer protection tool, albeit as yet a blunt one. It will be the task of the lower courts to hone the instrument for effective use in specific cases. Ultimately, the wisdom of the court's decision will depend upon the way it is applied in future actions. Careful attention to the facts of each case in light of the Stevens test will be essential if class actions are to effectuate the consumer protection General Motors seeks to promote.

Kelly Mangum

THE PROSECUTOR'S DILEMMA — A DUTY TO DISCLOSE OR A DUTY NOT TO COMMIT REVERSIBLE ERROR

In a series of cases following the United States Supreme Court decision of United States v. Agurs, the Louisiana Supreme Court has significantly altered its approach to the prosecutor's duty of

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97. Obviously, deterrence is relevant only to intentional offenders, and the common law class actions which the appellate court had cited as precedent for allowing class suits to be brought by the state for restitution all involved intentional violations by defendants. Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971); Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (1972); State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 87 Wash. 2d 298, 553 P.2d 423 (1976).

98. Section 1416 provides a maximum fine of $5000 per violation of any injunction issued under sections 1407 or 1408. The Louisiana fine is lower than those in most other jurisdictions, which generally are about $10,000. See Lovett, supra note 3, at 739 (discussion of civil penalties in a majority of states with a deceptive practice statute).