PROPOSED REVISIONS RE
NOTICE TO CLASS

Add to Existing ORCP 32 G.:

"The court may order that the cost of any notice under this section be paid by the defendant or the plaintiff or by the parties jointly, as it deems fair and equitable. The court may conduct a hearing to determine who shall pay the cost of notice."

Add to Existing ORCP 32 G.(1):

"* * * and whose potential monetary recovery or liability is extimated to exceed $100."

PROPOSED REVISIONS RE
PRE-LITIGATION NOTICE

Eliminate ORCP 32 A.(5):

"In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule."

Eliminate ORCP 32 I.:

"I. Notice and demand required prior to commencement of action for damages.

"I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of Section B. of this rule, the potential plaintiffs' class representative shall:

"I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

"I.(1)(b) Demand that such person correct or rectify the alleged wrong.

"I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State."

PROPOSED REVISION RE
FLUID RECOVERY

Add to Existing ORCP 32 G.:

"If the court, after determination of liability, is unable to identify all or some members of the class, it shall order that any damages with respect to such unidentified class members shall be distributed in a manner most equitable under the circumstances. Such equitable distribution shall not include retention of such damages by any defendant held liable."

PROPOSED REVISION RE
ATTORNEYS' FEES

Eliminate Existing ORCP 32 O.:

"O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court."

Add to Existing ORCP 32 G.:

"A prevailing plaintiff class, in addition to other relief, shall be awarded reasonable attorneys' fees."

PROPOSED REVISIONS RE
CLAIM FORM ("OPT-IN")

Eliminate Existing ORCP 32 G.(2) and (3):

"G.(2) Prior to the final entry of a judgment against a defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court."

"G.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim."

RULE 32

CLASS ACTIONS

[A.(5) In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule.]

B.(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. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. 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; [including the feasibility of giving adequate notice;] (e) [the likelihood that the damages to be recovered by individual

class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court;] whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class; and (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.

[C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.]

[D. Court order to determine maintenance of class actions.]

C. Determination by order whether class action to be maintained.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained and, in action pursuant to subsection (3) of section B. of this rule, the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or

administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

[E.] D. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.

[F.] E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

[F.] E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or agrument;

[F.] E.(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

[F.] E.(3) Imposing conditions on the representative parties or on intervenors;

[F.] E.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

[F.] E.(5) Dealing with similar procedural matters.

[G. Notice required; content; statements of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases. In any class action maintained under subsection (3) of section B. of this rule:

G.(1) The Court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort. The notice shall advise each member that:

G.(1)(a) The court will exclude such member from the class if such member so requests by a specified date;

G.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

G.(1)(c) Any member who does not request exclusion may, if such member desires, enter an appearance through such member's counsel.]

F. Notice required; content; statements of class members may be required; form; content; effect of failure to file required statement.

F.(1)(a) Following certification, in any class action maintained under subsection (3) of section B. of this rule, the court by order, after hearing, shall direct the giving of notice to the class.

F.(1)(b) The notice, based on the certification order and any amendment of the order, shall include:

F.(1)(b)(i) a general description of the action, including the relief sought, and the names and addresses of the representative parties;

F.(1)(b)(ii) a statement that the court will exclude any member of the class if such member so requests by a specified date.

F.(1)(b)(iii) a description of possible financial consequences on the class;

F.(1)(b)(iv) a general description of any counterclaim being asserted by or against the class, including the relief sought;

F.(1)(b)(v) a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

F.(1)(b)(vi) a statement that any member of the class may enter an appearance either personally or through counsel;

F.(1)(b)(vii) an address to which inquiries may be directed; and

F.(1)(b)(viii) other information the court deems appropriate.

F.(1)(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

F.(1)(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if such class member's identity and whereabouts can be ascertained by the exercise of reasonable diligence.

F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.

F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members and may also direct that notice be included with a regular mailing by defendant to the class members.

[G.] F.(2) Prior to the final entry of a judgment against a defendant the court [shall] may request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. [The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.]

[G.] F.(3) If the court requires class members to file a statement requesting affirmative relief, [F]failure of a class

member to file a statement required by the court [will] may be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

[G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.]

F.(4) Unless the court orders otherwise, the plaintiffs shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification or may allocate the costs of notice among the parties if the court determines there is a reasonable likelihood that the plaintiffs may prevail. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

[H.] G. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses. When appropriate:

[H.] G.(1) An action may be brought or maintained as a class action with respect to particular issues; or

[H.] G.(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[I. Notice and demand required prior to commencement of action for damages.

I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of section B. of this rule, the potential plaintiffs' class representative shall:

I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

I.(1)(b) Demand that such person correct or rectify the alleged wrong.

I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.]

[J.] H. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A. [, B., and C.] and B. of this rule upon a showing by a defendant that all of the following exist:

[J.] H.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such

other people has been made;

[J.] H.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

[J.] H.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and

[J.] H.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted.]

I. Amendment of complaints for equitable relief to request damages permitted. [An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions of section I. of this rule.] Not less than 30 days after the commencement of an action for equitable relief[, and after compliance with the provisions of section I. of this rule,] the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section J. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

[L.] J. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

[M.] K. Coordination of pending class actions sharing common question of law or fact.

[M.] K.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.

[M.] K.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

[M.] K.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.

[M.] K.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.

[M.] K.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.

[M.] K.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

[N.] L. Judgment; inclusion of class members; description [names]. The judgment in an action maintained as a class action under subsections (1) or (2) of section B. of this rule, whether or not favorable to the class, shall include and

describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) of section B. of this rule, whether or not favorable to the class, shall include and specify [by name] those to whom the notice provided in section [G.] F. of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class [, and the judgment shall state the amount to be recovered by each member.]

[O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.]

M. Attorney fees, costs, disbursements, and litigation expenses.

M.(1)(a) Attorney fees for representing a class are subject to control of the court.

M.(1)(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney fees, costs, or disbursements from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney fees, costs, or disbursements from a defendant class, the court may apportion the fees, costs, or disbursements among the members of the class.

M.(1)(c) If the prevailing class recovers a judgment that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

M.(1)(d) The court may order the adverse party to pay to the prevailing class its reasonable attorney fees and litigation expenses if permitted by law in similar cases not involving a class.

M.(1)(e) In determining the amount of attorney fees for a prevailing class the court shall consider the following factors:

M.(1)(e)(i) the time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

K.(1)(e)(ii) results achieved and benefits conferred upon the class;

M.(1)(e)(iii) the magnitude, complexity, and uniqueness of the litigation;

M.(1)(e)(iv) the contingent nature of success; and

M.(1)(e)(v) appropriate criteria in DR 2-106 of the Oregon Code of Professional Responsibility.

M.(2) Before a hearing under section C. of this rule or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately:

M.(2)(a) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts;

M.(2)(b) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangement or fees and

M.(2)(c) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with the law firm of the representative parties' attorney. This statement shall be supplemented promptly if additional arrangements are made.

N. Statute of Limitations. The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

N.(1) upon filing of an election of exclusion by such class member;

N.(2) upon entry of an order of certification, or of an amendment thereof, eliminating the class member from the class;

N.(3) except as to representative parties, upon entry of an order under section C. of this rule refusing to certify the class as a class action; and

N.(4) upon dismissal of the action without an adjudication on the merits.

COMMENT

Report of Class Action Subcommittee

At the request of the Council on Court Procedures and pursuant to a direction by the Senate Judiciary Committee of the 1979 Legislative Assembly, this subcommittee has conducted a detailed review of ORCP 32 relating to class actions. The subcommittee has compared the Oregon rule to Federal Rule 23, reviewed current legislative trends in other states and proposals for federal statutes relating to class action, and reviewed the extensive national literature on class actions. The subcommittee has also considered Oregon cases interpreting ORCP 32 and the legislative history of that rule. The Council conducted a public hearing relating to class actions at which the testimony of 10 persons was received.

The subcommittee now recommends that Rule 32 be amended to incorporate the proposed revisions which are attached. The proposed revisions are:

(1) Elimination of prelitigation notice requirements. The subcommittee recommends that section 32 I. be eliminated, with conforming elimination of subsection 32 A.(5) and modifications to 32 J. and K. This eliminates the requirement of notice 30 days prior to the commencement of class actions for damages. The subcommittee felt the requirement served no useful purpose and contained potential for abuse.

(2) Revision of factors to be considered in deciding predominance of common questions of law or fact. The subcommittee recommends that paragraphs (d) and (e) of subsection 32 B.(3) be changed to eliminate the reference to notice in paragraph (d) (because of the proposed change in 32 G.) and by substitution of paragraph 3(g)(13) of the Uniform Class Actions Act for paragraph B.(3)(e) of existing Oregon Rule 32. (The Uniform Act language more clearly expresses the idea incorporated in paragraph B.(3)(e).)

(3) Elimination of subsection 32 C. The subcommittee felt this provision was of very limited utility and confusing. Anything covered by this subsection could already be considered under B.(3).

(4) Clarification of provision relating to postponement of certification decision to determine legal question. Subsection G.(4) of the existing rule refers to a "stay" of the class action if the outcome turns upon a point of law and the court wishes to consider the legal question first. Technically, what is involved is not a "stay" but a postponement of the certification hearing or decision. The substance of section 32 G.(4) was moved up to subsection C.(2).

(5) Elimination of requirement of individual notice in all cases. The revision would replace the existing requirement of

subsection 32 G.(1) with the language of section 7 of the Uniform Class Actions Act (32 F.(1) of revision). The new language only requires individual notice for claims over $100 and has a number of provisions encouraging flexibility in the notice procedure. The subcommittee felt that an absolute requirement of individual notice was too rigid and imposed an unnecessary impediment to maintenance of class actions involving a large class and small individual claims. The subcommittee drafted revised paragraph F.(1)(f).

(6) Elimination of mandatory requirement of claim by class members prior to judgment. The committee changed the absolute requirement that class members submit claim forms in damage cases as a basis for judgment. The language of existing 32 G.(2) was changed from "the court shall" to "the court may" require such forms and by eliminating the last sentence (32 F.(2) in revision). Conforming changes were also made in 32 G.(3) and 32 N. (32 F.(3) and 32 L. in revision). The subcommittee felt that the requirement of a claim form in every damage case was too rigid and that a judgment listing all class members and individual damages in every case involves an extremely complex and expensive form of judgment for no good reason. The subcommittee took no position regarding award of aggregate damages not identifiable to individual class members (fluid class recovery). The subcommittee felt this was an area better determined by the courts or legislature in the context of remedies and proof of damages.

(7) Preliminary hearing and allocation of damage costs. The proposed revision adds a new subsection, F.(4), adapted from N.Y. C.P.L.R. section 904, which authorizes the court, after a preliminary hearing, to require the defendant to pay all or part of the costs of initial notice to class members. Although the normal rule is that plaintiffs pay the costs of notice, the subcommittee felt the New York approach provided desirable flexibility by allowing the trial judge to require payment by defendant, based upon a likelihood that the plaintiff class will win.

(8) Regulation of attorney fees. The proposed revision would substitute far more detailed provisions, taken from sections 16 and 17 of the Uniform Class Actions Act, for section 32 O. of the existing rule (section M. of revision). These provisions do not provide for or authorize award of attorney fees, not otherwise provided by statute or law, but have much more detailed provisions for court control of attorney fees and litigation expenses. The new language also covers liability of class members for fees, costs, and disbursements awards.

(9) New provision relating to tolling of statute of limitations. The proposed revision adds a new section, N., which is taken from section 18 of the Uniform Class Actions Act. The section clarifies the effect of pendency and termination of class actions upon the running of the statute of limitations against the individual claims of class members. This is an area of considerable confusion and should be clarified. The subcommittee recognizes that this provision may have substantive elements, beyond the rulemaking powers of the Council, and suggests that it be submitted to the legislature with a note asking the legislature to review it in that light.

M E M O R A N D U M

TO: CLASS ACTION SUBCOMMITTEE

FROM: Fred Merrill

RE: PROPOSED CHANGES TO RULE 32

DATE: March 10, 1980

INTRODUCTION

The extent of the current literature relating to class actions and Federal Rule 23 is awesome. Since Federal Rule 23 was amended in 1966 to allow a binding class action for damages, it has been persistently and repeatedly criticized by potential defendants and judges. Beginning in 1969 a series of restrictive interpretations of the rule by the United States Supreme Court has resulted in mounting criticism by plaintiffs attorneys and consumer and environmental interests. A 1977 survey by an informal subcommittee of the Advisory Committee on Civil Rights of Judges and Attorneys revealed substantial dissatisfaction with class action procedures in federal courts.[1]

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1. See 5 Class Action Reports 3-36 (1978). Fifty percent of the district judges, twenty-seven percent of the circuit judges, two-thirds of the defense attorneys, and ten percent of the plaintiffs attorneys responded that Court Rule 23 should be amended to eliminate "cumbersome, expensive, time-consuming procedures." Id., p. 17. As can be seen from the above figures, responses of attorneys to questions relating to specific changes that would either liberalize or restrict class actions under Rule 23 differed markedly depending upon whether the attorneys identified themselves as representing plaintiffs or defendants. See also summary of complaints presented to drafters and at hearings in 1978 relating to § 3495, 93rd Congress, 2d Session, in Kennedy, Federal Class Actions, A Need for Legislative Reform, 32 S.W. Law Journal 1209, 1212-1215 at n.25 (1979).

The key Supreme Court decisions relating to Rule 23 include: (1) Snyder v. Harris, 394 U.S. 332 (1969), which held that damage claims of class members could not be aggregated to meet the $10,000 minimum amount required by diversity jurisdiction in federal court; (2) Zahn v. International Paper Co., 414 U.S. 291 (1974), which held that ancillary jurisdiction could not be used to allow litigation by a class even though some class members had claims over $10,000; (3) and, Eisen v. Carlisle and Jacquelin, 479 F.2d 1005 (2nd Cir. 1973), aff'd 417 U.S. 156 (1974) (commonly referred to as Eisen III and IV). The Eisen case involved a claim brought on behalf of six million purchasers of odd lots on the New York Stock Exchange for overcharges on commissions in violation of anti-trust laws. After over 7 years of litigation the Supreme Court finally decided: (1) Rule 23 C.(2) strictly required individual notice to all class members that could be identified, and (2) there was no available procedure that would allow the trial court to hold a preliminary hearing and make the defendant pay the costs of notice. The district court in the case had also directed use of a fluid class recovery plan. This was emphatically rejected by the circuit court but the Supreme Court opinion does not address the question.

The result of dissatisfaction with the present state of Rule 23 has been a series of proposals for change through legislation or rule-making. There also has been continuing pressure to modify state class

action procedures to provide a state forum for class actions. The debate over class actions is bitter, highly policy oriented, and extensive. Specific changes suggested are complex and are the subject of extensive analysis in cases and literature. A complete analysis of the proposed changes is impossible without extensive research. Rather than enter the debate over the wisdom of liberalizing class action procedure or the desirability of specific changes being proposed, the purpose of this memorandum is the following: (1) to detail the nature and status of proposed changes in class action procedure on the state and federal level; (2) to present a technical summary of the nature of the changes proposed, and (3) to analyze the proposed changes in terms of the rule-making power of the Council.

I. FEDERAL AND STATE CHANGES IN CLASS ACTION PROCEDURE

A. Since Snyder v. Harris, supra, there has been a steady stream of bills introduced in Congress to change Rule 23 and class actions.[2] No comprehensive change has been made, although availability of class actions in specific substantive areas has been affected by amendments to certain substantive acts.[3]

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2. For a summary of various proposals, see American Enterprise Institute, Consumer Class Actions (1977), pp. 3-6; 2 Newberg, Class Actions § 2475. Most of the early proposals were attempts to remove jurisdictional barriers in federal courts. Later proposals also attempt to eliminate restrictions presented by Eisen IV.

3. Such as: limiting liability in claims under Truth-in-Lending Act to one percent of net worth or $500,000; requiring that class members assert affirmative claims for recovery under the Age Discrimination in Employment Act, requiring a minimum number of class members under the Magnuson-Moss Warranty Act. On the other hand, the Hunt-Scott-Rodino Antitrust Improvement Act authorizes fluid class recovery in parens patriae actions brought by State Attorney Generals. See acts cited in Kennedy, supra, at 1212, n.24.

Due to the controversial nature of the subject, the Supreme Court has decided not to amend Rule 23 through the rulemaking power. In March 1978 the Judicial Conference of the United States adopted a resolution which "approve[d] in principle the revision of Rule 23 (b)(3) . . . by direct legislative enactment, rather than by the rulemaking authority.[4]

The most extensive current proposals for revision are in the form of a proposal submitted by the Office for Improvements in the Administration of Justice of the U.S. Justice Department. The proposal was first submitted to the 95th Congress on August 25, 1978, as SB 3475. After extensive hearings before the Senate Judiciary Subcommittee for improvements in judicial machinery, the bill was not passed out by the Committee. In 1979 the Justice Department made substantial revisions in response to objections voiced at the hearings and the proposal was resubmitted as Title 1 of HR 5103, The Small Business Judicial Access Act of 1979.[5] Despite the politically attractive new label, the Bill has not been the subject of Committee hearings.

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4. Proceedings of the Judicial Conference of the United States, 33 Comm. 1978. In fact, the Conference had never specifically considered any amendments other than some minor and non-controversial revisions. See 4 Class Action Reports 288 (1975).

5. The text of SB 3475 is set out as an Appendix to Kennedy, supra, at p. 1241. The Bill Commentary prepared by the Justice Department appears at 124 Cong. Rec. S 14,502 (daily ed, May 25, 1978). The Kennedy article is an extensive analysis of the Bill, and comments also appear in 5 Class Action Reports 1 (1978). HR 5103 and Commentary is set out in full in 6 Class Action Reports 2 (1979), followed by an extensive critique at p. 27. The description of the Justice Department proposal is based on HR 5103.

The Justice Department proposal is based on the premise that there are two different types of class damage actions being litigated under Rule 23 (b)(3):

(1) Where individual economic injury is small and the primary purpose is to prevent unjust enrichment and deter illegal conduct rather than compensate individuals for minor harm.

(2) Where individual economic injury is more substantial and the primary purpose of the suit is to compensate the injured persons.

The proposed Bill would eliminate 23 (b)(3) from the federal rule and establish two separate procedures: one, called a public action procedure, would include cases where claimed illegal conduct involves widespread harm to individuals in small amounts; the other, called a compensatory class action, is designed for cases of more substantial damage.

The Bill also assumes that many major problems in Rule 23 result from the fact that Rule 23 does not provide adequate procedures for judicial management.

The public action procedure could only be brought where at least 200 persons have sustained an injury not exceeding $300 as a consequence of an injury which would otherwise give rise to a civil private

right of action under statutes relating to commercial conduct. The aggregate of all harm must be $60,000 or more. The case is brought in the name of the United States. There must be at least one substantial question of law or fact common to all injured persons, but that question need not predominate. There is no requirement of typicality of the person bringing the action or impracticability of joinder of all class members. A preliminary hearing is required within 120 days of filing. Before such hearing, discovery is limited. The preliminary hearing involves an inquiry into the merits to see if there is a "serious question" of liability. This is not the equivalent of a summary judgment procedure; if the court declines to proceed, there is no binding effect upon the class.

In the public action, the Attorney General or a federal agency may take over the action if injured persons are found in more than ten states or refer the action to a state Attorney General if a substantial number of injured persons reside in one state. Upon assumption, the United States or a state is required to pay, to the extent escheat funds from prior actions are available, the plaintiffs' reasonable attorney fees. The government may also retain the plaintiffs' attorney as private counsel and pay fees out of escheated funds. The Bill also provides an incentive fee to the person initiating a successful action up to $10,000.

This procedure would eliminate the major Rule 23 obstacle of individual notice. In fact, no notice is given at all, and no opt-out

procedure is available to class members.

The public action provides for aggregate recovery. A judgment may be equal to the value of benefit or profit to the defendant or the combined value of all damage to injured persons. Claims administration could be transferred to the administrative office of the U.S. Courts. Unclaimed balances escheat and are used for fees and expenses in future public claims.

The compensatory action is much closer to the present class action procedure. At least 40 persons with claims exceeding $300 would be required. A substantial, but not predominant, common question of law or fact is required. The claims must arise out of the same transaction or series of transactions. Notice would be required, but in more flexible form than in Rule 23 (c). The court must direct notice "reasonably necessary to assure adequacy of representation and fairness" to all persons concerned. Individual notice would not be required absent large claims. There appears to be no specific provision for payment of notice costs by defendants, but a conditional partial expense award (discussed below) might require defendant to pay such costs before the case is completed. The court can either require opt-in or opt-out by class members, but apparently only cases where individuals have claims of $10,000 or so will be appropriate for an opt-in requirement. There would be no fluid class recovery and no payment of fees from a public fund; the government could not take over the case. The option of the court to dismiss a compensatory action on manageability grounds would be retained.

The compensatory action, as well as the public action, would be subject to the preliminary merits hearing. For both actions the Bill also regulates discovery and interlocutory appeals and has detailed provisions for separate trial of issues. It also provides for proof of essential elements of the claim and damages by sampling. For public actions, this could provide the basis of liability and, for compensatory actions, would allow a finding of conditional liability and damage leading to an immediate partial award of expenses, including attorney fees. The Bill also provides more detailed provisions for regulation of settlement and requires approval of attorney fees by the court.

Both persons favoring or disfavoring class actions can easily find some gain and loss in the proposed bill.[6] One difficult problem arises from replacing Rule 23 (b) because the proposed substitute, particularly for claims under $300, does not cover all claims that could be brought in federal courts.[7] Also limiting compensatory damages actions to the same transaction or occurrence may be more limited than Rule 23.[8] Political prospects for passage appear very dim.

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6. The editors of class action reports, who favor expanded class actions, conclude that on balance the gains outweigh losses. 6 Class Action Reports at 41.

7. The public action is limited to consumer claims. See Kennedy, supra, at 1217-18.

8. See 6 Class Action Reports at 28.

B. State Class Actions and the Uniform Class Action Act

1. Uniform Class Action Act

For state courts, the 1966 Revisions of Rule 23 and restriction of access to federal courts have resulted in substantial activity related to state class action procedures.

The most notable event has been the promulgation, by the National Conference of Commissioners on Uniform State Laws, of the Uniform Class Actions Act in 1975. Generally, the Act is designed for state courts with little class action experience and has far more detailed provisions than Rule 23. The Act covers discovery, counterclaims, tolling of the statute of limitations, class liability for costs, and jurisdiction over multi-state classes. The most important differences between the Act and Rule 23 are:

(a) The Act eliminates the mandatory individual notice to class members who can be identified. See Section 7.

(b) The Act provides for fluid class recovery in the form of an aggregate judgment, with unclaimed amounts escheating to the state as unclaimed property. The escheat, however, is not automatic, and the court has the option after considering specified criteria to conditionally or unconditionally return unclaimed amounts to the defendant. See Section 15.

(c) The Act contains extremely detailed provisions and criteria for regulating attorney fees and fee and expense arrangements. See Sections 16 and 17.

2. Distribution of States

In addition to the Uniform Act, the Class action provisions in the states fall into five categories.[9]

(A) States with no formal class action statutes in rules.

(B) States which use the Field Code model (the Oregon statute prior to 1973).

(C) States which have the pre-1966 version of Federal Rule 23.

(D) States which have adopted Federal Rule 23 verbatim.

(E) States which have a modified form of Federal Rule 23.

After 1973 Oregon fits into the last category. In 1973 the distribution of states was as follows:

(A) No statute or rule - 4 states.

(B) Field Code - 9 states.

(C) Pre-1966 Rule 23 - 13 states.

(D) Post-1966 Rule 23 - 19 states.

(E) Modified form of Rule 23 - 5 states.[10]

Other states with a modified Federal Rule 23 included:

(1) Kansas had a version of Rule 23 that allowed the court on its own motion to convert an action into a class action. The Kansas rule also allowed the court to prohibit opting-out of class members in a 23 (b)(3) action.

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9. Note the analysis of state provisions which follows was drawn from 2 Newberg, Class Actions, Chapter 4, pp. 293-454, supplemented by some material in the Class Action Reports.

10. The California Field Code provision and the Pennsylvania pre-1966 Rule 23 had been judicially interpreted as substantially equivalent to present Rule 23. New Mexico, listed in the third category, also had an unrepealed Field Code provision.

(2) Maryland - which had a brief rule that was a precurser of the 1966 Amendment to Federal Rule 23. Notice was discretionary with the court.

(3) Massachusetts - which eliminated 23 (b)(1) and (2), thus requiring predominance of common questions for all actions. The Massachusetts rule also did not have any mandatory notice requirement.

(4) Ohio - which included special provisions relating to aggregation of damages for jurisdictional purposes.

As of 1978, the distribution was as follows:

(A) No statute or rule - 3 states.
(B) Field Code - 8 states.
(C) Pre-1966 Rule 23 - 10 states.
(D) Post-1966 Rule 23 - 18 states.
(E) Modified Rule 23 - 10 states.
(F) Uniform Class Action Act - 1 state.

In 1977, Illinois, which previously had no statute, adopted a modified form of Rule 23 which requires only numerosity, adequate representation, and a predominant common question of law or fact. The Illinois statute does not require individual notice.

In 1975, New York, which had a Field Code statute, enacted a modified form of Rule 23 as a statute. The New York statute eliminates 23 (b)(1) and (2) and requires only the standard prerequisites and a predominant question. Class actions to recover statutory penalties are forbidden. The New York statute makes notice discretionary and has a provision allowing the court to order that the defendant pay notice costs. A new provision allowing the court to award attorney fees was also added.

In 1977 Pennsylvania, which had the pre-1966 federal rule, enacted a new rule, modeled on the federal rule, but with provisions taken from the Uniform Class Actions Act and some new provisions. The three categories of Rule 23 (b) are recited with slightly different language. For 23 (b)(3) class actions, the court is directed to consider whether the amount to be recovered by individual class members, in relation to the expense and effort of administering the action, is so low that a class action would not be justified. In certifying any class the court is directed to consider whether the representative parties have a conflict of interest and whether the representative parties have adequate financial resources to maintain the action. The court is required to make findings of fact and conclusions of law in the certification decision. In certain cases (substantial claims for class members or other special circumstances) the court is given the discretion to require that class members opt-in. The rule eliminates mandatory individual notice but requires payment of notice costs by the plaintiff. The rule allows the court to regulate attorney fees.

In 1977 Texas, which had the pre-1966 federal rule, adopted a modified form of Rule 23. The Texas rule requires mandatory Eisen type individual notice for all 23 (b) categories. It also has a provision making discovery unavailable against unnamed class members.

In 1975 New Jersey, which had a post-1966 federal rule, amended its rule. It eliminates mandatory individual notice and also

allows the court to require that defendant pay notice costs. It also specifically authorizes fluid class recovery.

Idaho, which had a pre-1966 Federal Rule 23, adopted the post-1966 Federal Rule 23.

North Dakota, which had Federal Rule 23, adopted the Uniform Class Action Act.

In California one substantive consumer statute, the California Consumers Legal Remedies Act, contains a provision for publication rather than personal notice in class actions.

III. SUMMARY OF PROPOSED CHANGES

The proposed change would eliminate all of the modifications of Rule 23 enacted by the 1973 legislature and add four new provisions that do not appear in Rule 23. Some of the changes would have clear impact in increasing availability of class actions in Oregon courts; others would seem to have no effect at all. What follows is a brief technical description of the changes.

A. Substantial changes

1. Prelitigation notice

ORCP 32 I., requiring prelitigation notice 30 days prior to filing, and ORCP 32 J., allowing a defendant to avoid a damage action by taking corrective steps, would be eliminated. Prelitigation notice as a prerequisite (32 A.(5)) and the procedure for converting an injunctive claim to a damages claim (32 K.) are also deleted.

Prelitigation notice is unique in the Oregon rule. It does

not appear to be a substantial barrier to certification. On the other hand, its utility may be questionable. The likelihood of a defendant avoiding a substantial case by complying with 32 J. appears low.

2. Pendency notice

The most important limitation in Federal Rule 23 upon maintenance of large class action damage cases is the requirement that individual notice be given to all absent class members whose identity and location can be determined and that plaintiff initially pay the cost. This is the interpretation of Rule 23 by the Supreme Court in the Eisen case. The substantial initial investment would deter bringing most cases with a large class of people and small individual damages. The plaintiff in the Eisen case had a 70 dollar claim and individual notice costs were in excess of $200,000. The Eisen notice decision terminated the case.

The proposed changes would: (a) eliminate any notice when plaintiffs' claims are under $100 by changing 32 G.(1), and (b) add a new provision which does not appear in the federal rule allowing the court to order defendant to pay the initial notice costs (32 F.(3) of proposed rule). The principal question presented by the amendments is whether there are any constitutional problems.

The present Oregon notice requirement, 32 G.(2), is identical to Federal Rule 26 C.(2), and under Eisen requires individual notice. Although the parties in Eisen argued the question of whether individual notice is constitutionally required, the Supreme Court decision is

based solely on the wording of the rule. The suggested change is taken from Section 9 (d) of the Uniform Act. The comment to the Uniform Rule cites two post Eisen state cases (Nebraska and Calfiornia) which hold that notice is not constitutionally required. The lower federal courts have also been consistently holding that notice for 23 (b)(1) and (2) class actions (not required by Rule 23) is not constitutionally required.

The suggested amendment actually requires no notice at all for claims under $100. This would also appear to limit the right to opt-out for such claims. While this is consistent with the public action in the justice department statute, most states have modified Eisen only to require some form of notice less than individual notice. In fact, the Uniform Act also does this. The proposed change leaves out Section 7(e) of the Act:

> (e) For members of the class not given personal or mailed notice under subsection (d), the court shall provide, as a minimum, a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. Techniques calculated to assure effective communication of information concerning commencement of the action shall be used. The techniques may include personal or mailed notice, notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups.

The ability to force payment of initial costs by defendant would also reverse the Eisen interpretation of Rule 23. The U.S. Supreme Court opinion was based upon the fact that the rule authorizes no initial payment of costs by defendant. The opinion, however, discusses

unfairness and prejudice to a defendant, suggesting due process considerations.[11] On the other hand, the Court does say that in unusual situations, such as the existence of a fiduciary relationship, reallocating notice costs would be justified.

Most states changing their statute or rule in reaction to Eisen have not included the procedure. New York and New Jersey have. Despite the comment next to the proposed change submitted, the cost allocation provision does not come from the Uniform Act. In fact, the Act says in Section F.:

> (f) The plaintiff shall advance the expense of notice under this section if there is no counterclaim asserted. If a counterclaim is asserted the expense of notice shall be allocated as the court orders in the interest of justice.

3. Fluid Class Recovery

Another important issue in class actions is whether judgment for damages is limited to claims actually established by individual class members or damages may be assessed based upon improper gain by the defendant. A related question is distribution of unclaimed portions of aggregate damages.

The present Oregon statute clearly forbids any fluid class recovery. ORCP 32 G.(2) and (3) require that class members file affirmative claims after notice and 32 N. provides that judgment only be for claims actually filed. The proposed change would eliminate this

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11. See 2 Newberg, Class Actions § 2350, pp. 48-56.

and specify that, if after determining liability the court cannot identify class members, the amount of damages for such class members shall be "distributed in a manner most equitable under the circumstances." (32 F.(4) of proposed rule)

The Supreme Court did not pass upon the validity of fluid recovery in Eisen IV. The court of appeals strongly rejected the concept. Rule 23 does not deal with the problem. Apparently, no federal court has entered a judgment granting fluid recovery.[12] The proposed justice department statute would authorize fluid recovery in public actions. The Hunt-Scott-Rodino Antitrust Improvement Act of 1976 does authorize fluid recovery.

Among the states, only New Jersey has a specific provision authorizing fluid recovery.[13] The Uniform Act does authorize such recovery. The suggested provision, however, is different from the suggested change in the Oregon statute. Section 15 of the Act includes the following provisions:

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12. It has been used in settlement in some federal cases.

13. The California court has approved the procedure under its Field Code statute. Daar v. Yellow Cab, 63 Cal. Rptr. 724 (1967).

> (5) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court after hearing shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the defendant.
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> (6) In determining the amount, if any, to be distributed to a state or to the defendant, the court shall consider the following criteria: (i) any unjust enrichment of the defendant; (ii) the willfulness or lack of willfulness on the part of the defendant; (iii) the impact on the defendant of the relief granted; (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant; and (vi) the loss suffered by the plaintiff class.
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> (7) The court, in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him.

The fluid class recovery is at court discretion and factors to be considered are spelled out. The Uniform Act also uses the concept of escheat. Presumably, the state is free to use escheated funds as provided by state law.

4. Attorney Fees

Present Oregon law does not provide a separate authorization for attorney fees in every class action. ORCP 32 O. authorizes the court to regulate fees to be charged. The proposed change would eliminate 32 O. and authorize a separate attorney fee award. (32 F.(5) of proposed rule).

The federal rule does not provide for either regulation or award of attorney fees. Fee awards may be available in federal courts

under a specific statute. Fee awards may be available under federal courts' equitable power to award fees from a common fund.[14] In some cases the federal courts have also controlled fee arrangements between the representative and attorney under the general power to control conduct of a class action, but this does not appear to be a regular practice.[15] The justice department statute would authorize attorney fee awards in public actions from prior unclaimed class action aggregate awards held by the jurisdiction.

In the states, a few rules specifically provide for court regulation of fees. New York specifically authorizes an award of fees. The Uniform Act also authorizes regulation and award of fees, but the Act is again quite different from the proposal presented. Sections 16 and 17 of the Uniform Act provide:

> (a) Attorney's fees for representing a class are subject to control of the court.
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> (b) If under an applicable provision of law a defendant or defendant class is entitled to attorney's fees from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney's fees from a defendant class, the court may apportion the fees among the members of the class.

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14. 3 Newberry, supra, § 6905, pp. 1119-1123.

15. 3 Newberry, supra, § 6914, p. 1126.

(c) If a prevailing class recovers a judgment for money or other award that can be divided for the purpose, the court may order reasonable attorney's fees and litigation expenses of the class to be paid from the recovery.

(d) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney's fees and litigation expenses if permitted by law in similar cases not involving a class or the court finds that the judgment has vindicated an important public interest. However, if any monetary award is also recovered, the court may allow reasonable attorney's fees and litigation expenses only to the extent that a reasonable proportion of that award is insufficient to defray the fees and expenses.

(e) In determining the amount of attorney's fees for a prevailing class the court shall consider the following factors:

(1) the time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

(2) results achieved and benefits conferred upon the class;

(3) the magnitude, complexity, and uniqueness of the litigation;

(4) the contingent nature of success;

(5) in cases awarding attorney's fees and litigation expenses under subsection (d) because of the vindication of an important public interest, the economic impact on the party against whom the award is made; and

(6) appropriate criteria in the [state's Code of Professional Responsibility].

Comment: Most of the factors listed in subsection (e) are taken from Lindy Bros. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973).

Section 17. [Arrangements for Attorney's Fees and Expenses.] (a) Before a hearing under Section 2(a) or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately; (1) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts; (2) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangements or fees and (3) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.

5. Statutory Penalties

The proposal would eliminate ORCP 32 L., which prohibits class actions for statutory penalties. Rule 23 does not have such a provision. Except where limited by a substantive statute, such as the Truth-in-Lending Act, actions may be maintained for statutory penalties. Under the justice department statute, the basis for calculating judgments do not include penalties.

The rationale for limitation in statutory penalty cases is that a result totally out of proporation to defendant's behaviour may result. Another consideration is that statutory penalty statutes are

usually enacted as an incentive for individual small claims; the availability of class recovery makes such incentive unnecessary.[16] On the other hand, if the substantive statute provides for such penalties without limiting the total exposure, as the Truth-in-Lending Act, why should the class action rule limit liability.

The New York statute prohibits statutory penalty cases. The Uniform Act also specifically so provides in Section 15 (b).

6. Criteria for Certification

Class action cases appear to be won or lost on the certification hearing. Almost all Oregon cases relating to the Oregon rule are appeals on the certification hearing and relate to 32 B.(3). For certification under 32 B.(3), the plaintiff must establish predominance of the common questions of law or fact, superiority of the class action over alternative methods of adjudication, and manageability of the action.

The Oregon rule has a number of provisions not appearing in Rule 32 which would be eliminated by the proposed change:

(1) 32 B.(3) requires the court to not find predominance unless separate questions relate "primarily" to damages.

(2) 32 B.(3)(d) requires the court to consider feasibility of notice.

(3) 32 B.(3)(e) requires the court to consider if damages to be received by individual class members are so minimal as not to warrant intervention by the court.

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16. The leading case recognizing the problem is Ratner v. Chemical Bank, 34 F.2d 412 (S.D.N.Y. 1971). See Kennedy, supra, pp. 1932-1235.

(4) 32 B.(3)(f) requires the court to consider likelihood of success at a preliminary hearing.

(5) 32 (c) requires the court to consider the alternative of injunctive relief rather than damages.

(6) 32 G.(4) requires a stay to determine questions of law prior to notice and other class action procedures.

These provisions apparently were taken from the American College of Trial Lawyers, Report and Recommendations of Special Committee on Rule 23 (1972).[17] The first is the most limiting, and the Oregon Supreme Court has concluded that the legislature intended that the scope of 32 B.(3) class actions be more restrictive than the federal rule.[18] They have denied certification in cases when many federal courts would find predominance. The limitation seems to be unique to Oregon, as is the reference to feasibility of notice in 32 B.(3)(d).

The minimal damages limitation of 32 B.(3)(e) and the consideration of alternative remedies of 32 C. are less unusual. Both are particularized aspects of the question of superiority of the class action over other methods of disposing of the controversy. Federal courts can and do consider these factors in particular cases. 32 B.(3)(e) is not very well drafted. Section 3 (g)(13) of the Uniform Act is clearer:

> (13) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.

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17. See Bernhard v. First National Bank, 275 Or. 145, 150-51 (1976).

18. Bernhard v. First National Bank, supra, p. 732. Actually, the American College proposal was that predominance should exist when separate questions relate solely to damages. See Kirkpatrick, Class Actions, 1973 Legislation, OSB; 39, 43.

The preliminary hearing on the merits directed by 32 B.(3)F. was originally intended to provide some control of spurious claims because Oregon did not have a summary judgment procedure in 1973.[19] However, one key element of the new management controls proposed in the Justice Department Act is a preliminary hearing where the court must decide if "there are sufficiently serious questions going to the merits to make them fair ground for litigation." The Comment explains the proposal as follows: (Footnotes omitted)

> a. Merits Inquiry After Limited Discovery. The early merits evaluation promises defendants protection from the costs of extensive and unnecessary discovery (and motion practice) in cases not presenting serious issues. It provides the relator and the United States with an early, tentative judicial determination on the merits so they are better able to assess the wisdom of pursuing the action. Also, given the present potential for excessive discovery and motion practice by both sides, a mandatory preliminary hearing requires the court to take firm, early control of the action. The implementation of a preliminary look at the worthiness of these suits has wide support.
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> The operation of this merits screening procedure differs in many particulars from that of a summary judgment determination under Rule 56. Under §3022(b)(2) the plaintiff does not have as burdensome a showing as a Rule 56 movant. That is, the former must show uncertainty on the merits, not the existence of a clear rule favoring his case. The defendant under §3022(b)(2) has a more difficult showing than the party opposing a Rule 56 motion. He must demonstrate that the law is clearly in his favor, whereas the party adverse to a Rule 56 motion must show only that the merits are uncertain. These balances are struck differently because of the divergent screening and case-disposition purposes motivating the two determinations. Divergent purpose is reflected not only in each determination's standard, but in its effect, timing, and required discovery.

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19. Kirkpatrick, supra, at 45.

> The purpose of a Rule 56 motion is to dispose of the merits of a case and avoid unnecessary trial.[186] An award of summary judgment is binding on the parties.[187] Thus, a complex case may not be "ripe" for summary judgment for many years.[188] Moreover, this device is not a favored means of deciding antitrust violations where, for example, state of mind or intent is at issue, or the facts are peculiarly in the knowledge of the moving party.[189]
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> In contrast, the preliminary hearing test screens out those cases where the merits showing does not justify the expensive panopoly of class treatment. This merits determination does not have binding effect on the injured persons. While a finding adverse to the plaintiff results in a dismissal of the action as formulated in the complaint, the defendant's conduct may be the basis for a subsequent collective action, which is better pleaded or supported

B. Technical Questions

The changes listed below are included in this section because they do not appear to affect the availability of class actions.

1. Findings of fact and conclusions of law. Section 32 (d) requires the court to make findings of fact and conclusions of law in the certification decision. The certification decision is frequently the crucial decision and is appealable. (ORS 13.400) This is a desirable requirement and should be retained.

2. Notice on settlement. Section 32 E. has special language not appearing in Federal Rule 23 which allows dismissal without notice to class members under some circumstances. This provision avoids the expense of mandatory notice for every dismissal.

3. Amending orders. Section 32 F. has a phrase not appearing in Rule 23, reciting that orders of the court in the conduct of actions "may be altered and amended as desirable." The possibility of amendment

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20. Class Action Reports at 21-22.

of the certification order as the action develops seems reasonable and in any case it would be within the inherent power of the court to change any order before final judgment. The Uniform Act has a much more elaborate provision relating to the amendment or certification orders. See Section 5.

4. Consolidation of actions. The proposal would eliminate the procedure for consolidation of actions by the Supreme Court. Although the occasion for use of this provision would be rare, it seems reasonably designed to avoid duplication of effort by circuit courts in unusual cases.

5. Inaccurate notice. The proposals do point out that there is an inconsistency in the existing rule. 32 F.(1) requires a notice which states that class members who do not opt-out are bound but under 32 G.(3) and N., only members who file claims are bound in favorable judgments.

6. Drafting details. Cross references in 32 B., G., and F.(6) eliminate the words "of this rule" and 32 G.(1) has had masculine pronouns reinserted. This style is inconsistent with the ORCP.

C. Areas Not Covered

If Rule 32 is to be revised, there are troublesome areas not addressed. They include (1) jurisdiction over multi-state classes - Section 6 of the Uniform Act, (2) exclusion for members of defendant classes - Section 8 (d) of the Uniform Act, (3) discovery by or against

class members - Section 10 of the Uniform Act, (4) counterclaims by or against the class - Section 11 of the Uniform Act, (5) liability of class members for costs - Section 14 of the Uniform Act, and (6) tolling of the statute of limitations for class members - Section 18 of the Uniform Act.

IV. COUNCIL RULEMAKING POWER

One obvious question presented by any proposed changes is whether they can be promulgated by the Council as rules or could only be submitted to the legislature as a suggested statutory revision. The rulemaking power of the Council is set out in ORS 1.735 as follows:

> The Council on Court Procedures shall promulgate rules governing pleading, practice and procedure, including rules governing form and service of summons and process and personal and in rem jurisdiction, in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant.

The question is, as with similar language in many rulemaking statutes,[21] what is meant by "pleading, practice and procedure." In many cases the question is not capable of a categorical answer. There are, of course, no Oregon cases. Cases in other jurisdictions are spotty and none deal with the particular questions presented. There is also no agreement among commentators on a reasonable definition of substance or procedure in the rulemaking context.

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21. E.g., 28 U.S.C.A. 2072, the Federal Rules Enabling Act.

The most reasonable approach is to recognize that what is at issue is a balance between legislative and judicial power. This balance is controlled by the legislature. The ultimate question is one of legislative intent in ORS 1.735. In using the words "pleading, practice and procedure" the legislature identifies many areas which by common understanding would be procedural, i.e., directly related to the administration of courts with minimal policy implications. The language, however, leaves many other areas in a twilight zone. These areas are clearly related to administration of justice but also have substantive policy implications beyond the court system. Whether or not the legislature intended to trust these policy questions to a judicial body can only be answered by the legislature. The rulemaking structure in this state has a built-in mechanism for resolving doubtful areas. Under ORS 1.735 the rules are submitted to the legislature for review.[22] This is exactly what was done the last biennium with Rule 4 relating to personal jurisdiction.

The federal courts have decided to leave any changes in Rule 23 to the legislature. Whether the Judicial Conference action was motivated by a recognition that they were stalemated on changes or by a fear the changes exceeded rulemaking power is not clear.[23]

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22. This approach is based upon that used by Levin and Amsterdam, Legislature Control Over Judicial Rule Making, 107 U.Pa. L. Rev. 1, 23-24 (1958). See also Comment, Staff Memo to the Enforcement of Judgments and Provisional Remedies Subcommittee, dated February 7, 1980.

23. Kennedy, supra, at 1215.

On this basis all changes suggested that would conform Rule 32 to Federal Rule 23 would clearly be procedural. Although some doubt was expressed when Rule 23 was first enacted,[24] after 14 years of acceptance as a judicial rule there is little doubt that Rule 23 as it exists is a valid exercise of rulemaking power.[25]

The real difficult area is in the changes which do not appear in the federal rule:

1. No notice for claims of less than $100.

2. Payment of notice costs by defendant.

3. Fluid class recovery.

4. Authorizing attorney fees.

The first seems the most clearly procedural. Rule 23 originally specified the form of notice. The rules deal extensively with notice relating to conduct of actions.[26]

The last seems clearly substantive. Most commentators agree that remedies are substantive. Right to attorney fees, as opposed to procedure for determining fees, is a form of remedy.[27] The Council is considering rules for assessment of attorney fees but not rules governing the right to such fees. Existing section 32 O. related to controlling fees. The suggested revision would create a right to fees.

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24. Kennedy, supra, at 1215-1216. Ross, Rule 23(b), Class Actions - A Matter of "Practice and Procedure" or "Substantive Right," 27 Emory Law Journal 247 (1978).

25. Kennedy, supra, at 1216. Fyr, on Classifying Class Suits, 27 Emory Law Journal (1978).

26. Joiner and Miller, Rules of Practice and Procedure, A Study of Judicial Rulemaking, 55 Mich. L. Rev. 623, 646 (1957).

27. Joiner and Miller, supra, at 653.

Taxing costs to defendant and fluid recovery could easily be argued as both substantive and procedural. Cost assessments and distributing damages are standard procedural activities. Forcing a defendant to pay initial costs of a suit against him and creating an ability to collect damages that do not go to compensate the person injured have enormous policy implications.

My best analysis is that the notice change is procedural and the attorney fee award is substantive. Only the legislature could settle the question for fluid recovery and payment of costs by defendant.

CONCLUSION

If the subcommittee wishes to have more detailed research in any particular area, this can be done. There certainly is no shortage of material.

One useful approach may be to consider the available empirical data on how class actions actually are operating. There are a few studies available which shed some light on the reality of class action practice:

> "[W]e seem to be in the midst of a holy war over this Rule, one being fought between the defense bar and the plaintiff's bar. In some respects it has become a political figure, for example, in the consumer and environmental areas, and some aspects of the Rule have received public notoriety in many parts of the United States because of media attention. Unfortunately, much of the discussion has been highly emotional and considerable snake-oil has been sold along the way.
>
> . . .

In point of fact, we have precious little empiric evidence as to how the Rule actually has been functioning. The evidence that we have, largely in the form of an excellent report by the Senate Committee on Commerce, the so-called Magnuson Committee Study, and a study done by the American Bar Foundation on antitrust class actions, indicates that much of the debate has been based on erroneous assumptions. The studies indicate that Rule 23 is achieving its intended purposes and may well be providing system-wide economies, even though some cases are incredibly difficult to process. Moreoever, it appears that to the extent there are difficulties with the functioning of Rule 23, they center around the (b)(3) category of cases and do not involve (b)(1) or (b)(2) cases.

These studies also suggest that although there are some indications of undesirable or unprofessional conduct in certain cases, abuse is not widespread. What appears to have happened is that anecdotes about a few situations have been repeated so often at professional meetings that an impression has been created that these abuses occur in every case. The empiric evidence also suggests, contrary to a widely held opinion, that in settled damage class actions, particularly in the treble damage antitrust and securities contexts, the vast majority of the money received actually is distributed to the class members. It does not get devoured by avaricious attorneys questing for fees nor is it eaten-up by administrative expenses.[28]

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28. Miller, An Overview of Federal Class Actions, Past, Present and Future, Federal Judicial Center, 1977.

BACKGROUND - STATUTORY PROVISIONS IN OTHER JURISDICTIONS

I. NOTICE - PENDENCY

A. NO NOTICE UNDER $100

Sec. 7 - Uniform Act

B. OTHER THAN INDIVIDUAL NOTICE

1. Sec. 7e - Uniform Act

2. Small Business Judicial Access Act (see II below)

3. Pennsylvania

4. New York

5. New Jersey

6. Illinois

7. California

8. Hunt-Scott-Rodino Act

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decision on the matters specified in Rules 1702, 1708 and 1709, including findings of fact, conclusions of law and appropriate discussion.

(b) In certifying a class action, the court shall set forth in its order a description of the class.

(c) When appropriate, in certifying, refusing to certify or revoking a certification of a class action the court may order that

(1) the action be maintained as a class action limited to particular issues or forms of relief, or

(2) a class be divided into subclasses and each subclass treated as a class for purposes of certifying, refusing to certify or revoking a certification and that the provisions of these rules be applied accordingly.

(d) An order under this rule may be conditional and, before a decision on the merits, may be revoked, altered or amended by the court on its own motion or on the motion of any party. Any such supplemental order shall be accompanied by a memorandum of the reasons therefor.

(e) If certification is refused or revoked, the action shall continue by or against the named parties alone.

Rule 1711. The Plaintiff Class. Exclusion. Inclusion

(a) Except as provided in subdivision (b) or as otherwise provided by the court, in certifying a plaintiff class or subclass the court shall state in its order that every member of the class is included unless by a specified date a member files of record a written election to be excluded from the class.

(b) If the court finds that

(1) the individual claims are substantial, and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation; or

(2) other special circumstances exist which are described in the order,

the court may state in its order that no person shall be a member of the plaintiff class or subclass unless by a specified date of record a written election to be included in the class or subclass.

Rule 1712. Order. Notice of Action

(a) After the entry of the order of certification and after hearing the parties with respect to the notice to be given, the court shall enter a supplementary order which shall prescribe the type and content of notice to be used and shall specify the members to be notified. In determining the type and content of notice to be used and the members to be notified, the court shall consider the extent and nature of the class, the relief requested, the cost of notifying the members and the possible prejudice to be suffered by members of the class or by other parties if notice is not received. The court may designate in the notice a person to answer inquiries from, furnish information to or receive comments from members or potential members of the class with respect to the notice.

(b) The court may require individual notice to be given by personal service or by mail to all members who can be identified with reasonable effort. For members of the class who cannot be identified with reasonable effort or where the court has not required individual notice, the court shall require notice to be given through methods reasonably calculated to inform the members of the class of the pendency of the action. Such methods may include using a newspaper, television or radio or posting or distributing through a trade, union or public interest group.

(c) The notice shall be prepared by and given at the expense of the plaintiff in the manner required by the order. A proposed form of notice shall be submitted for approval to the court and to all named defendants, who may file objections thereto within ten days. The court may require a defendant to cooperate in giving notice by

taking steps which will minimize the plaintiff's expense including the defendant's established methods of communication with members of provided, however, that any additional costs thereby incurred by the shall be paid by the plaintiff.

Note: Illustrative of the means of reducing the expense of individual the inclusion of the notice in a mailing normally made by the defendant to of the class.

(d) If a defendant asserts a counterclaim against a plaintiff class or subcl expense of a combined notice of the plaintiff's claim and of the defe counterclaim shall be allocated between the parties as the court may orde

Rule 1713. Conduct of Actions

(a) In the conduct of actions to which this rule applies, the court may m appropriate orders

(1) determining the course of proceedings or prescribing measures to prev undue repetition or complication in the presentation of evidence or argumen

(2) requiring, for the protection of the members of the class or otherwise for th fair conduct of the action, that notice, other than notice under Rule 1712, be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate;

(3) permitting an interested person to intervene in accordance with Rules 2326 et seq. governing Intervention;

(4) imposing conditions on the representative party or an intervener;

(5) taking any action to assure that the representative party adequately represents the class;

(6) dealing with other administrative or procedural matters.

(b) Any such order may be revoked, altered or amended as may be appropriate from time to time.

Rule 1714. Compromise. Settlement. Discontinuance

(a) No class action shall be compromised, settled or discontinued without the approval of the court after hearing.

(b) Prior to certification, the representative party may discontinue the action without notice to the members of the class if the court finds that the discontinuance will not prejudice the other members of the class.

(c) If an action has been certified as a class action, notice of the proposed compromise settlement or discontinuance shall be given to all members of the class in such manner as the court may direct.

Rule 1715. Judgment

(a) Except by special order of the court, no judgment by default or on the pleadings or by summary judgment may be entered in favor of or against the class until the court has certified or refused to certify the action as a class action.

(b) A judgment entered on preliminary objections in a class action before certification shall bind only the named parties to the action.

(c) A judgment entered in an action certified as a class action shall be binding on all members of the class except as otherwise directed by the court.

(d) In all cases the judgment shall be framed by the court and shall specify or describe the parties who are bound by its terms.

Rule 1716. Counsel Fees

In all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things, the following factors:

(1) the time and effort reasonably expended by the attorney in the litigation;

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b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

§ 902. Order allowing class action

Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action.

§ 903. Description of class

The order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice.

§ 904. Notice of class action

(a) In class actions brought primarily for injunctive or declaratory relief, notice of the pendency of the action need not be given to the class unless the court finds that notice is necessary to protect the interests of the represented parties and that the cost of notice will not prevent the action from going forward.

(b) In all other class actions, reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs.

(c) The content of the notice shall be subject to court approval. In determining the method by which notice is to be given, the court shall consider

I. the cost of giving notice by each method considered

II. the resources of the parties and

III. the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

(d) I. Preliminary determination of expenses of notification. Unless the court orders otherwise, the plaintiff shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification, or may require each of them to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

II. Final determination. Upon termination of the action by order or judgment, the court may, but shall not be required to, allow to the prevailing party the expenses of notification as taxable disbursements under article eighty-three of the civil practice law and rules.

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NEW JERSEY

[NJ R Civ P 4:32 (effective April 1, 1975)]

RULE 4:32. CLASS ACTIONS

4:32-1. Requirements for Maintaining Class Action

(a) General 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 the 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 paragraph (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk either 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 factors pertinent to the findings include: first, the interest of members of the class in individually controlling the prosecution or defense of separate actions; second, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; third, the difficulties likely to be encountered in the management of a class action.

4:32-2. Determination of Maintainability of Class Action; Notice; Judgment; Partially as Class Actions

(a) Order Determining Maintainability. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditioned, and may be altered or amended before the decision on the merits.

(b) Notice. In any class action maintained under R. 4:32-1(b) (3) the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with due process of law. The notice shall advise that (1) each member, not present as a representative, will be excluded from the class by the court if he so requests by a specified date; (2) the judgment, whether favorable or not, will bind all members who do not request exclusion; and (3) any member who does not request exclusion may enter an appearance. The cost of notice may be assessed against any party present before the court, or may be allocated among parties present before the court, pending final disposition of the cause.

(c) Judgment. The judgment in an action maintained as a class action under R. 4:32-1(b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under R.4:32-1(b) (3), whether or not favorable to the class, shall, to the extent practicable under the circumstances, consistent with due process of law, describe the class and specify those who have been excluded

*Class Upheld

from the class. In any class action, the judgment may, consistent with due process of law, confer benefits upon a fluid class, whose members may be, but need not have been members of the class in suit.

(d) Partial Class Actions. If appropriate an action may be brought or maintained as a class action with respect to particular issues, or a class may be subdivided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

Note: Paragraphs (b) and (c) amended November 27, 1974 to be effective April 1, 1975.

4:32-3. Orders in Conduct of Actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (c) imposing conditions on the representative parties or on intervenors; (d) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (e) dealing with similar procedural matters. These orders may be combined with an order under R. 4:32-2(a) and may be altered or amended as may be desirable from time to time.

4:32-4. Dismissal or Compromise

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

4:32-5. Derivative Action by Shareholders

In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified and allege that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share thereafter devolved on him by operation of law. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort. Immediately on filing the complaint and issuing the summons, the plaintiff shall give such notice of the pendency and object of the action to the other shareholders as the court by order directs. The derivative action may not be maintained if it appears that the plaintiff does not fairly represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. R. 4:32-4 (dismissal and compromise) is applicable to actions brought under this rule.

New Jersey Rules 4:32-1 to 4:32-4 were adopted as part of the 1969 amendments and followed the 1966 revisions of FR Civ P 23. Major further amendments to Rule 4:32-2(b) and (c) were made November 27, 1974, effective April 1, 1975.

Class Notice under New Jersey Rules:

The amendment to Rule 4:32-2(b) significantly relaxes the federal rule requirement in FR Civ P 23(b) (3) actions that individual notice must be given

representative was an adequate representative in that his interests coincided with those of class members and he prosecuted the action vigorously and competently. The court awarded reasonable attorney's fees from the portion of each class member's recovery. *Bush v Upper Valley Telecable Co* 96 Id 83, 524 P2d 1055* (1974)

G65-1. Class upheld in action by corporation and individuals on behalf of 600 landowners, lessees or purchasers of property along a lake to stabilize water level of lakes. *Twin Lakes Improvement Assn v East Greenacres Irrigation District* 90 Id 281, 409 P2d 390* (1965)

G63-1. City had the right to bring an action under Rule 23(a) to enforce a trust to be used primarily for the recreation of youth of the area. *In re Eggan's Estate* 86 Id 328, 386 P2d 563 (1963); also see *Dolan v Johnson* 95 Id 385, 509 P2d 1306 (1973) (challenge to will giving residue of estate for charitable purposes)

ILLINOIS

NEW ILLINOIS CLASS ACTION STATUTE

Until 1977 Illinois followed state common law in the area of class actions. Ill RCivP §§57.2–57.7 (1977) (analyzed at 110a Smith-Gurd Annot. Ill Stat at 1432) now expressly provides for the maintenance of class actions in Illinois

§57.2 Prerequisites for the Maintenance of a Class Action

(a) An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

§57.3 Order and Findings Relative to the Class

(a) *Determination of Class.* As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class. This order may be conditional and may be amended before a decision on the merits.

(b) *Class Action on Limited Issues and Sub-classes.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class. The provisions of this rule shall then be construed and applied accordingly.

§57.4 Notice in Class Action

Upon a determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interest of the class and the parties.

An order entered under paragraph (a) of Section 57.3, determining that an action may be maintained as a class action, may be conditioned upon the giving of such notice as the court deems appropriate.

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(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:

(1) It is impracticable to bring all members of the class before the court.

(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.

(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.

(4) The representative plaintiffs will fairly and adequately protect the interests of the class.

(c) If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:

(1) A class action pursuant to subdivision (b) is proper.

(2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.

(3) The action is without merit or there is no defense to the action.

A motion based upon Section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a).

(d) If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.

(e) The notice required by subdivision (d) shall include the following:

(1) The court will exclude the member notified from the class if he so requests by a specified date.

(2) The judgment, whether favorable or not, will include all members who do not request exclusion.

(3) Any member who does not request exclusion, may, if he desires, enter an appearance through counsel.

(f) A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismis-

District court need not apply laches to claims of private plaintiff in injunction action if it finds that sufficient reasons, traditionally cognizable in equity, exist which prevented plaintiff from making timely challenge or that delay caused defendant no prejudice. Id.

Laches, being an equitable consideration, was not a bar to antitrust action brought prior to expiration of four-year statute of limitations period set by Congress. Hecht Co. v. Southern Union Co., D.C.N.M.1979, 474 F.Supp. 1022.

49. Review

Where, in antitrust treble damage action by motion picture accessories jobber against motion picture producer and others for alleged monopolization of motion picture accessories market, trial court had not determined whether there was, during limitations period, mere absence of dealing by defendants with jobber or whether, instead, there was some specific act or word precluding jobber from gaining access to producers posters for distribution during period governed by this section, district court having been of erroneous opinion that cause of action arose in neither case, action would be remanded for proceedings to clarify such issue. Poster Exchange, Inc. v. National Screen Service Corp., C.A.Ga.1975, 517 F. 2d 117, rehearing denied 520 F.2d 943, certiorari denied 96 S.Ct. 2166, 425 U.S. 971, 48 L.Ed.2d 793.

Although, under sections 12–27 of this title, judgment of conviction rendered against same defendants in prior criminal antitrust action brought by United States was only "prima facie" evidence against such defendants in subsequent action brought by State of Illinois, doctrine of collateral estoppel could be invoked to preclude defendants from pleading any defense in subsequent action. State of Ill. v. Huckaba & Sons Const. Co., D.C.Ill.1977, 442 F.Supp. 56.

50. Burden of proof

A party asserting fraudulent concealment as a basis for tolling period of limitations in an antitrust suit bears burden of proof on issue. Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., C.A.N.C.1976, 546 F.2d 570.

Once it appears that statute of limitations on private antitrust action has run, plaintiff must sustain burden of showing not merely that he failed to discover cause of action prior to running of statute, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence. City of Detroit v. Grinnell Corp., C.A.N.Y.1974, 495 F.2d 448.

Plaintiffs in private antitrust class action who attacked proposed settlement, inter alia, on ground that starting date of "settlement period" was incorrectly determined failed to prove that period of fraudulent concealment of monopolistic practices continued to point where it could be "tacked on" to earliest point from which limitations would otherwise run. Id.

That prior judgment in antitrust action against defendant is prima facie evidence in subsequent action simply means that plaintiff can shift burden of proof to defendant, but does not preclude defendant from putting up defense. State of Ill. v. Huckaba & Sons Const. Co., D.C.Ill.1977, 442 F.Supp. 56.

It was the duty of the plaintiffs to come forward and show that the alleged unlawful discriminatory transactions with defendant occurred within four years prior to filing of suit. Beam v. Monsanto Co., Inc., D.C.Ark.1976, 414 F. Supp. 570.

To establish claim of fraudulent concealment in order to avoid defense of limitations in private treble damage antitrust action, plaintiff must prove fraudulent concealment by defendant raising statute together with plaintiff's failure to discover facts which are basis of his cause of action despite exercise of due diligence on his part. In re Independent Gasoline Antitrust Litigation, D.C.Md. 1978, 79 F.R.D. 552.

§ 15c. Actions by state attorneys general—Parens patriae; monetary relief; damages

(a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of Sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

Notice; exclusion election; final judgment

(b)(1) In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

III. OPTIONAL CLAIM FORMS

OPT-in POSSIBLE AT COURT DISCRETION

A. Small Business Access Act

B. Pennsylvania

States described in subsection (a) shall employ procedures provided by that statute or by the State.

§3012. Proof of damages; separate determination of liability and damages; judgment

(a) The amount of injury to each person who remains in or enters a class compensatory action shall be proven by any method permitted by section 3022(f) or other law.

(b) If the court orders separate trial, or trials, of liability issues pursuant to section 3026(b), and a defendant is found liable, he shall be ordered by the court, at his own expense, to—

(1) make reasonable effort to identify from his records or other reasonably available sources the persons likely to have been injured in excess of $300 each by his conduct and the amount of individual injury;

(2) give individual notice of the finding of liability to such persons; and

(3) with respect to all other persons injured or likely to have been injured, give such notice as is reasonably calculated to assure that a substantial percentage of such persons is informed of the finding of liability.

(c) The court may, in addition to an award of damages, order appropriate equitable or declaratory relief.

SUBCHAPTER C—JUDICIAL MANAGEMENT OF PUBLIC AND CLASS COMPENSATORY ACTIONS

§3021. Initial discovery

(a)(1) Prior to the preliminary hearing provided in section 3022, discovery for each side shall be limited to—

(A) thirty interrogatories;

(B) the lesser of not more than ten deposition days, or depositions of not more than ten persons; and

(C) requests for production of documents.

(2) For good cause shown, the court may expand or further limit discovery prior to the preliminary hearing.

(b) Before or after the preliminary hearing, no discovery of injured persons shall be undertaken without leave of court, upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Failure of an injured person to respond to such discovery shall not be grounds for excluding him from recovery, except where the court determines that no other sanction is adequate to protect the interest of the person seeking discovery.

(c) Notice of discovery to be taken by a relator in a public action shall be served on the Attorney General of the United States, who may examine material discovered by the relator. The filing or prosecution of a public action by a relator or by a State shall not preclude issuance of civil investigative demands by the United States pursuant to the Antitrust Civil Process Act (15 U.S.C. §1312(a)).

§3022. Preliminary hearing; scope of action; notice in class compensatory action; sampling

(a)(1) Within thirty days after a public or class compensatory action is commenced, the court shall give notice to the parties and to the relator, if any, of a preliminary hearing to be held to determine whether, and in what manner, the action shall proceed. The hearing shall be held no later than one hundred and twenty days from the date of the commencement of the action.

(2) In a public action the court may, on the petition of the United States within sixty days of service upon it of the complaint and summons in an action brought on relation pursuant to section 3002(a), grant a reasonable postponement of the hearing to permit the completion of a related Federal or State investigation in progress on the date of the commencement of the action or promptly commenced after the service upon the United States.

(3) No motion, other than a discovery motion or motion seeking immediate injunctive relief, shall be heard or disposed of prior to the preliminary hearing.

(b) At or immediately after the preliminary hearing, the court shall make a preliminary determination on the basis of the pleadings, affidavits, material produced during discovery, any statement filed in a public action by an attorney general or agency pursuant to section 3002(b)(3)(C) or 3002(b)(4), and any other matter presented at the hearing—

(1) whether there is a reasonable likelihood that the action meets the prerequisites of section 3001(a) or 3011(a);

(2) whether there are sufficiently serious questions going to the merits to make them fair grounds for litigation;

(3) whether in a public action the relator has demonstrated that the action should proceed as a public action, if an attorney general or agency has filed a statement pursuant to section 3002(b)(3)(C) or 3002(b)(4); and

(4) whether the relator and his counsel in a public action not assumed by an attorney general or agency, or the class representative and his counsel in a class compensatory action, will adequately protect the interests of the United States or the class.

(c) If the court makes a negative determination at the preliminary hearing, or at any time prior to the entry of judgment, with respect to a matter listed in subsection (b), the court shall dismiss the action as a public or class compensatory action: Provided, That where a public action meets the prerequisites of section 3011(a)(1), or a class compensatory action meets the prerequisites of section 3001(a), the court shall permit amendment of the complaint to allow the action to proceed as a class compensatory action, or a public action. If the action proceeds as a public action, the court shall make orders necessary to permit the parties to comply with section 3002.

(d) If the action is not dismissed as a public or class compensatory action, the court shall enter an order describing the scope of the action, including a description of the transaction giving rise to the action and a statement of the substantial question of law or fact common to all injured persons. Such order shall be conditional and may be altered or amended before judgment is entered.

(e)(1) At or immediately after the preliminary hearing in a class compensatory action, the court in its discretion shall determine whether some or all injured persons shall be excluded from or included in the class only if they so request by a specified date. In determining whether persons shall be excluded from the class unless a specific request to be included is made, the court shall consider whether there is a substantial likelihood that—

(A) the amount of their injury or liability makes it feasible for them to pursue their interests separately; and

(B) they have sufficient resources, experience, and sophistication in business affairs to conduct their own litigation.

(2) The court shall promptly thereafter give notice reasonably necessary to assure adequacy of representation of all persons included in the class and fairness to all such persons. Such notice shall describe the persons, if any, by name or category who are to be excluded from the action unless a request to be included is made. The judgment, whether or not favorable to the class, will include all persons who remain in or enter the action pursuant to this subsection.

(f) Except as provided in section 3004(c)(2), where the defend-

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decision on the matters specified in Rules 1702, 1708 and 1709, including findings of fact, conclusions of law and appropriate discussion.

(b) In certifying a class action, the court shall set forth in its order a description of the class.

(c) When appropriate, in certifying, refusing to certify or revoking a certification of a class action the court may order that

(1) the action be maintained as a class action limited to particular issues or forms of relief, or

(2) a class be divided into subclasses and each subclass treated as a class for purposes of certifying, refusing to certify or revoking a certification and that the provisions of these rules be applied accordingly.

(d) An order under this rule may be conditional and, before a decision on the merits, may be revoked, altered or amended by the court on its own motion or on the motion of any party. Any such supplemental order shall be accompanied by a memorandum of the reasons therefor.

(e) If certification is refused or revoked, the action shall continue by or against the named parties alone.

Rule 1711. The Plaintiff Class. Exclusion. Inclusion

(a) Except as provided in subdivision (b) or as otherwise provided by the court, in certifying a plaintiff class or subclass the court shall state in its order that every member of the class is included unless by a specified date a member files of record a written election to be excluded from the class.

(b) If the court finds that

(1) the individual claims are substantial, and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation; or

(2) other special circumstances exist which are described in the order,

the court may state in its order that no person shall be a member of the plaintiff class or subclass unless by a specified date of record a written election to be included in the class or subclass.

Rule 1712. Order. Notice of Action

(a) After the entry of the order of certification and after hearing the parties with respect to the notice to be given, the court shall enter a supplementary order which shall prescribe the type and content of notice to be used and shall specify the members to be notified. In determining the type and content of notice to be used and the members to be notified, the court shall consider the extent and nature of the class, the relief requested, the cost of notifying the members and the possible prejudice to be suffered by members of the class or by other parties if notice is not received. The court may designate in the notice a person to answer inquiries from, furnish information to or receive comments from members or potential members of the class with respect to the notice.

(b) The court may require individual notice to be given by personal service or by mail to all members who can be identified with reasonable effort. For members of the class who cannot be identified with reasonable effort or where the court has not required individual notice, the court shall require notice to be given through methods reasonably calculated to inform the members of the class of the pendency of the action. Such methods may include using a newspaper, television or radio or posting or distributing through a trade, union or public interest group.

(c) The notice shall be prepared by and given at the expense of the plaintiff in the manner required by the order. A proposed form of notice shall be submitted for approval to the court and to all named defendants, who may file objections thereto within ten days. The court may require a defendant to cooperate in giving notice by

IV. REGULATING ATTORNEY FEES

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taking steps which will minimize the plaintiff's expense including the use of the defendant's established methods of communication with members of the class, provided, however, that any additional costs thereby incurred by the defendant shall be paid by the plaintiff.

Note: Illustrative of the means of reducing the expense of individual notice is the inclusion of the notice in a mailing normally made by the defendant to members of the class.

(d) If a defendant asserts a counterclaim against a plaintiff class or subclass, the expense of a combined notice of the plaintiff's claim and of the defendant's counterclaim shall be allocated between the parties as the court may order.

Rule 1713. Conduct of Actions

(a) In the conduct of actions to which this rule applies, the court may make appropriate orders

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice, other than notice under Rule 1712, be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate;

(3) permitting an interested person to intervene in accordance with Rules 2326 et seq. governing Intervention;

(4) imposing conditions on the representative party or an intervener;

(5) taking any action to assure that the representative party adequately represents the class;

(6) dealing with other administrative or procedural matters.

(b) Any such order may be revoked, altered or amended as may be appropriate from time to time.

Rule 1714. Compromise. Settlement. Discontinuance

(a) No class action shall be compromised, settled or discontinued without the approval of the court after hearing.

(b) Prior to certification, the representative party may discontinue the action without notice to the members of the class if the court finds that the discontinuance will not prejudice the other members of the class.

(c) If an action has been certified as a class action, notice of the proposed compromise settlement or discontinuance shall be given to all members of the class in such manner as the court may direct.

Rule 1715. Judgment

(a) Except by special order of the court, no judgment by default or on the pleadings or by summary judgment may be entered in favor of or against the class until the court has certified or refused to certify the action as a class action.

(b) A judgment entered on preliminary objections in a class action before certification shall bind only the named parties to the action.

(c) A judgment entered in an action certified as a class action shall be binding on all members of the class except as otherwise directed by the court.

(d) In all cases the judgment shall be framed by the court and shall specify or describe the parties who are bound by its terms.

Rule 1716. Counsel Fees

In all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things, the following factors:

(1) the time and effort reasonably expended by the attorney in the litigation;

(2) the quality of the services rendered;

(3) the results achieved and benefits conferred upon the class or upon the public;

(4) the magnitude, complexity and uniqueness of the litigation; and

(5) whether the receipt of the fee was contingent on success.

Note: The rule does not determine when fees may be awarded. That is a matter of substantive law.

The order in which the factors are listed is not intended to indicate the priority or weight to be accorded them respectively.

This Order is effective, September 1, 1977.

By the Court:
MICHAEL J. EAGEN, C.J.

EXPLANATORY NOTE CLASS ACTION RULES

The Pennsylvania Rules of Civil Procedure governing class actions, promulgated June 30, 1977, and effective September 1, 1977, are the culmination of more than a two year study of a vast array of resource material embodying practically every point of view. The role and purpose of class actions in modern society, particularly those involving consumer actions or other types of actions involving many thousands of members with their potential for vast amount of damage claims, has caused more debate and roused more passion than practically any other subject in the preceding decade.

Some look upon it as the most effective tool for the protection of individual rights in every field, rights which could not be effectively asserted by individual actions. They consider action by public officials to protect these rights to be inadequate; the attorneys for the class are deemed in effect private attorneys general spurred on by the prospect of substantial fees contingent upon the successful outcome of the action. Others characterize class actions as affording the opportunity for legalized blackmail, forcing defendants into tactical positions where surrender by settlement, even in nonmeritorious cases, often becomes the most expeditious course of terminating the litigation.

The Committee has tried to ignore these polemics and to consider the matter objectively recognizing that sharp differences of opinion will necessarily exist. Many desirable approaches to class action problems involve substantive rather than procedural solutions. The new Uniform Class Action Act approved by the Commissioners on Uniform State Laws in August 1976 which was carefully studied by the Committee presents a number of substantive solutions. These are beyond the power of the Procedural Rules.

In broad outline the Committee has attempted to retain all the best features of Federal Rule 23 excluding those which seem inappropriate or unsuccessful and all the best features of the Uniform Class Action Act. The Committee also has included novel provisions not found in the Federal Rule or in the Uniform Class Action Act. These combinations should simplify and improve class actions in Pennsylvania.

ANALYSIS OF THE RULES

Rule 1701. Definition. Conformity.

Subdivision (a) defines "Class Action" to include any action brought by or against parties as representatives of a class until the court refuses to certify it as such or revokes a prior certification.

This definition follows language in *Bell v. Beneficial Consumer Discount Company* 465 Pa. 225, 348 A. 2d 734 (1975), that "when an action is instituted by a

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§905. Judgment

The judgment in an action maintained as a class action, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.

§906. Actions conducted partially as class actions

When appropriate,

1. an action may be brought or maintained as a class action with respect to particular issues, or

2. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this article shall then be construed and applied accordingly.

Rule 907. Orders in conduct of class actions

In the conduct of class actions the court may make appropriate orders:

1. determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action;

3. imposing conditions on the representative parties or on intervenors;

4. requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

5. directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such installments as the court may specify;

6. dealing with similar procedural matters.

The orders may be altered or amended as may be desirable from time to time.

Rule 908. Dismissal, discontinuance or compromise

A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

Rule 909. Attorneys' fees

If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class. Added L. 1975, c. 207, §1.

On signing the new class action statute in 1975 New York Governor Carey stated:

> "The present law and its precursors have caused extraordinary judicial confusion extending over the past 125 years and have resulted in needlessly restricting meaningful access to state courts for countless people. Such an anachronism has no place in a legal system which has to cope with contemporary problems." McKinney's N.Y.Sess.Laws 1975, p. 1748.

The 1975 New York class rules substituted a functional approach and pragmatic considerations for the earlier strict requirement that class members had to be in privity. Major criteria for New York class actions are modeled

(2) Any person on whose behalf an action is brought under subsection (a)(1) of this section may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

(3) The final judgment in an action under subsection (a)(1) of this section shall be res judicata as to any claim under section 5 of this title by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

Dismissal or compromise of action

(c) An action under subsection (a)(1) of this section shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

Attorneys' fees

(d) In any action under subsection (a) of this section—

(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Oct. 15, 1914, c. 323, § 4C, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1394.

Effective Date. Section 304 of Pub.L. 94–435 provided that: "The amendments to the Clayton Act [sections 12 to 27 of this title] made by section 301 of this Act [enacting sections 15c to 15h of this title] shall not apply to any injury sustained prior to the date of enactment of this Act [Sept. 30, 1976]."

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

1. Persons entitled to sue

Under this section, State's Attorney General could sue on behalf of State's injured consumer regardless of existence of injury to general economy. In re Montgomery County Real Estate Antitrust Litigation, D.C.Md.1978, 452 F.Supp. 54.

2. Injunctive relief

Under this section, State could maintain suit for injunctive relief where it alleged injury to its general economy. In re Montgomery County Real Estate Antitrust Litigation, D.C.Md.1978, 452 F.Supp. 54.

Index to Notes

§ 15d. Measurement of damages

In any action under section 15c(a)(1) of this title, in which there has been a determination that a defendant agreed to fix prices in violation of the sections 1 to 7 of this title, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

Oct. 15, 1914, c. 323, § 4D, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1395.

Effective Date. Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub.L. 94–435, set out as a note under section 15c of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

§ 15e. Distribution of damages

Monetary relief recovered in an action under section 15c(a)(1) of this title shall—

(1) be distributed in such manner as the district court in its discretion may authorize; or

V. FLUID CLASS RECOVERY

A. Small Business Judicial Access Act

B. Sec. 15 - Uniform Act

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on behalf of the United States relator or other private counsel—

(i) on an hourly basis to the extent funds are authorized by section 3005(c)(2); or

(ii) on a contingent fee basis.

(2) To the extent taxable costs and reasonable expenses are paid by the United States or a State under this subsection, the defendant shall pay costs and expenses provided in subsection (a)(1) to the Department of Justice, a State, or an agency.

§3004. Public recovery; judgment

(a) In a public action in which the defendant is found liable, the judgment shall include a public recovery in an amount to be determined under this section.

(b)(1) Except as provided in subsection (d), the public recovery shall be in an amount equal to—

(A) the monetary benefit or profit realized by the defendant from conduct injuring persons not in excess of $300 each; or

(B) the aggregate damage to persons injured not in excess of $300 each.

(2) If a judgment includes a public recovery, the court may also include in the judgment appropriate equitable or declaratory relief. Any person prosecuting a public action in the name of the United States shall have standing to enforce such relief.

(c)(1) In electing the measure of public recovery to be applied under subsection (b), the court shall consider among other relevant factors—

(A) the intent of Congress embodied in the statute giving rise to the public action under section 3001(a)(1);

(B) the relative expeditiousness of proof; and

(C) The degree of uncertainty in the law upon which liability is based prior to the filing of the complaint.

(2) This determination shall be based upon any reasonable means of ascertaining benefit, profit, or damage provided by law and by section 3022(f). Separate proof of damage to persons injured not in excess of $300 each shall not be required except as necessary to conduct any sampling that the court may direct.

(d) If the statute under which the action was brought provides for—

(1) an award of a multiple of the damage or the recovery, the multiple shall be applied to the public recovery;

(2) a limitation on aggregate liability, that limitation shall apply to the public recovery; and

(3) punitive damages, such damages shall, if awarded, be added to the public recovery.

(e) Within sixty days after entry of judgment against the defendant, or within such time as the court may otherwise order, the defendant shall pay to the clerk of the court the amount of the judgment, which shall be used to establish a public recovery fund under the supervision of the court.

§3005. Public recovery fund; payments to injured persons

(a) The public recovery fund established under section 3004(e) shall be used for—

(1) payments to persons injured in an amount not exceeding $300 by conduct giving rise to the public action;

(2) administrative expenses incurred in carrying out the provisions of this section; and

(3) reasonable expenses provided in subsection (c).

(b) The court shall determine whether the court or the Director of the Administrative Office of the United States Courts shall administer the payment of claims. If the court determines that the Director shall administer the payment of claims, the amount of the public recovery shall be transmitted to the Administrative Office, where it shall be deposited in a public recovery fund. The Director shall administer such claims according to any condition and direction the court may provide. Claims shall be paid within one year from the date of notice. If the public recovery is adjusted as described in section 3004(d), claim payments shall be proportionately adjusted. Notice may be by publication and such other means as the court or Director determines are reasonably likely to inform persons eligible to file claims. The court or Administrative Office may utilize a payment procedure which will distribute payments in a reasonably accurate manner without requiring submission of claims. If the court or Administrative Office finds that it is impracticable to determine with reasonable accuracy the identities of all or some of the injured persons, or the amount of all or some of the individual damages, the court may order that payments not be made to such persons for such damages.

(c)(1) If the public recovery is greater than the administrative expenses and payments referred to in subsection (a), the clerk of the court shall pay the excess amount to the Treasury of the United States. The Treasury shall pay such amount to—

(A) a fund established under the direction and control of—

(i) the Department of Justice or the agency conducting the action, if it has been initiated or assumed by the United States; or

(ii) The Department of Justice, or other executive or independent agency authorized pursuant to section 3001(c) to bring the action in which the public recovery was obtained, if there has been no assumption by the United States or a State; or

(B) a State, if the State has initiated the action and it is not assumed, or prosecuted the action by reference.

(2) Payments under paragraph (A), as appropriated, and paragraph (B), and any funds that Congress or a State may authorize, shall be used to pay the reasonable expenses provided in section 3003(b). Payments not applied to these reasonable expenses after three years from the date of deposit may be employed by the Department of Justice or agency, as appropriated, or by the State for the enforcement of any statute within its responsibility.

(d) The Director shall issue such regulations as are necessary and appropriate to assure the prompt, fair, and inexpensive claim administration by the Administrative Office pursuant to subsection (b). The court or Director may compensate a relator or other private counsel for assistance in claim administration.

SUBCHAPTER B—CLASS COMPENSATORY ACTION

§3011. Class compensatory action; prerequisites; district court jurisdiction

(a) A person whose conduct gives rise to a civil right of action for damages under a statute of the United States shall be liable individually or as a member of a class to the injured persons in a civil class compensatory action if—

(1) such conduct injures forty or more named or unnamed persons each in an amount exceeding $300, or creates liabilities for forty or more persons, each in an amount exceeding $300;

(2) the injuries or liabilities arise out of the same transaction or occurrence or series of transactions or occurrences; and

(3) the action presents a substantial question of law or fact common to the injured or sued persons.

(b) The district courts of the United States shall have jurisdiction, exclusive of the courts of the States, of actions brought under this section. A State court in the exercise of its concurrent jurisdiction expressly conferred by any statute of the United

(4) disapprove the compromise; or

(5) take other appropriate action for the protection of the class and in the interest of justice.

(e) The cost of notice given under subsection (b) shall be paid by the party seeking dismissal, or as agreed in case of a compromise, unless the court after hearing orders otherwise.

Comment

This section covers class actions brought under Section 1 until certification has been refused under Section 2, as well as class actions certified under Section 2.

Library References

Pretrial Procedure ⇐505.
C.J.S. Compromise and Settlement §§ 6, 24.

Section 13. [Effect of Judgment on Class]

In a class action certified under Section 2 in which notice has been given under Section 7 or 12, a judgment as to the claim or particular claim or issue certified is binding, according to its terms, on any member of the class who has not filed an election of exclusion under Section 8. The judgment shall name or describe the members of the class who are bound by its terms.

Comment

Section 13 deals with the application of a class action judgment to the members of the class. This Act does not deal with the preclusive effect of a class action upon a member of the class who has requested exclusion. This is a matter which is governed by the normal rules of res judicata/preclusion.

Library References

Judgment ⇐677.
C.J.S. Judgments §§ 772, 777.

Section 14. [Costs]

(a) Only the representative parties and those members of the class who have appeared individually are liable for costs assessed against a plaintiff class.

(b) The court shall apportion the liability for costs assessed against a defendant class.

(c) Expenses of notice advanced under Section 7 are taxable as costs in favor of the prevailing party.

Comment

Section 14 specifies the liability of class members when costs are assessed against the class and provides for assessment of the expense of notification under Section 7. The nature of other costs and assessments against parties in a class action is left to the law generally applicable in the state.

Historical Note

Costs ⇐93.
C.J.S. Costs §§ 110, 112.

Section 15. [Relief Afforded]

(a) The court may award any form of relief consistent with the certification order to which the party in whose favor it is rendered is entitled including equitable, declaratory, monetary, or other relief to individual members of the class or the class in a lump sum or installments.

(b) Damages fixed by a minimum measure of recovery provided by any statute may be recovered in a class action.

(c) If a class is awarded a judgment for money, the distribution shall be determined as follows:

(1) The parties shall list as expeditiously as possible all members of the class whose identity can be determined without expending a disproportionate share of the recovery.

(2) The reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed.

(3) The court may order steps taken to minimize the expense of identification.

(4) The court shall supervise, and may grant or stay the whole or any portion of, the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant.

(5) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court after hearing shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the defendant.

(6) In determining the amount, if any, to be distributed to a state or to the defendant, the court shall consider the following criteria: (i) any unjust enrichment of the defendant; (ii) the willfulness or lack of willfulness on the part of the defendant; (iii) the impact on the defendant of the relief granted; (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant; and (vi) the loss suffered by the plaintiff class.

(7) The court, in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him.

(8) Any amount to be distributed to a state shall be distributed as unclaimed property to any state in which are located the last known addresses of the members of the class to whom distribution could not be made. If the last known addresses cannot be ascertained with reasonable diligence, the court may determine by other means what portion of the unidentified or unlocated members of the class were residents of a state. A state shall receive that portion of the distribution that its residents would have received had they been identified and located. Before entering an order distributing any part of the amount to a state, the court shall given written notice of its intention to make distribution to the attorney general of the state of the residence of any person given notice under Section 7 or 12 and shall afford the attorney general an opportunity to move for an order requiring payment to the state.

Comment

Subsection (c)(3) is similar to subsection 7(g) in its purpose and scope and should be construed similarly.

Subsection 15(c)(5) provides for the possibility of escheat of funds available for the payment of the judgment if the court, applying the relevant criteria, so orders. The escheat provision is similar to that found in the Model Escheat of Postal Savings System Accounts Act.

If the court decides that undistributed funds available for the payment of the judgment should be distributed to the defendant, the court under subsection 15(c)(7), "in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him." For example, if the plaintiff class sued for damage done because of the discharge of pollutants by the defendant and the class won a money judgment, the court might distribute to the defendant funds undistributed to the plaintiff class on condition that the defendant use the funds to install pollution-control devices.

C. New Jersey

adjudication of the controversy. The factors pertinent to the findings include: first, the interest of members of the class in individually controlling the prosecution or defense of separate actions; second, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; third, the difficulties likely to be encountered in the management of a class action.

4:32-2. Determination of Maintainability of Class Action; Notice; Judgment; Partially as Class Actions

(a) Order Determining Maintainability. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditioned, and may be altered or amended before the decision on the merits.

(b) Notice. In any class action maintained under R. 4:32-1(b) (3) the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with due process of law. The notice shall advise that (1) each member, not present as a representative, will be excluded from the class by the court if he so requests by a specified date; (2) the judgment, whether favorable or not, will bind all members who do not request exclusion; and (3) any member who does not request exclusion may enter an appearance. The cost of notice may be assessed against any party present before the court, or may be allocated among parties present before the court, pending final disposition of the cause.

(c) Judgment. The judgment in an action maintained as a class action under R. 4:32-1(b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under R.4:32-1(b) (3), whether or not favorable to the class, shall, to the extent practicable under the circumstances, consistent with due process of law, describe the class and specify those who have been excluded from the class. In any class action, the judgment may, consistent with due process of law, confer benefits upon a fluid class, whose members may be, but need not have been members of the class in suit.

(d) Partial Class Actions. If appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be subdivided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

Note: Paragraphs (b) and (c) amended November 27, 1974 to be effective April 1, 1975.

4:32-3. Orders in Conduct of Actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (c) imposing conditions on the representative parties or on intervenors; (d) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (e) dealing with similar procedural matters. These orders may be combined with an order under R. 4:32-2(a) and may be altered or amended as may be desirable from time to time.

D - Hunt - Scott - Rudino

(2) Any person on whose behalf an action is brought under subsection (a)(1) of this section may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

(3) The final judgment in an action under subsection (a)(1) of this section shall be res judicata as to any claim under section 5 of this title by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

Dismissal or compromise of action

(c) An action under subsection (a)(1) of this section shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

Attorneys' fees

(d) In any action under subsection (a) of this section—

(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Oct. 15, 1914, c. 323, § 4C, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1394.

Effective Date. Section 304 of Pub.L. 94–435 provided that: "The amendments to the Clayton Act [sections 12 to 27 of this title] made by section 301 of this Act [enacting sections 15c to 15h of this title] shall not apply to any injury sustained prior to the date of enactment of this Act [Sept. 30, 1976]."

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

1. Persons entitled to sue

Under this section, State's Attorney General could sue on behalf of State's injured consumer regardless of existence of injury to general economy. In re Montgomery County Real Estate Antitrust Litigation, D.C.Md.1978, 452 F.Supp. 54.

2. Injunctive relief

Under this section, State could maintain suit for injunctive relief where it alleged injury to its general economy. In re Montgomery County Real Estate Antitrust Litigation, D.C.Md.1978, 452 F.Supp. 54.

Index to Notes

§ 15d. Measurement of damages

In any action under section 15c(a)(1) of this title, in which there has been a determination that a defendant agreed to fix prices in violation of the sections 1 to 7 of this title, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

Oct. 15, 1914, c. 323, § 4D, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1395.

Effective Date. Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub.L. 94–435, set out as a note under section 15c of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

§ 15e. Distribution of damages

Monetary relief recovered in an action under section 15c(a)(1) of this title shall—

(1) be distributed in such manner as the district court in its discretion may authorize; or

(2) be deemed a civil penalty by the court and deposited with the State as general revenues;

subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

Oct. 15, 1914, c. 323, § 4E, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1395.

Effective Date. Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub.L. 94–435, set out as a note under section 15c of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

§ 15f. Actions by Attorney General

(a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under sections 12 to 27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

(b) To assist a State attorney general in evaluating the notice or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.

Oct. 15, 1914, c. 323, § 4F, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1395.

Effective Date. Injuries sustained prior to Sept. 30, 1976, not covered by this section, see section 304 of Pub.L. 94–435, set out as a note under section 15c of this title.

Legislative History. For legislative history and purpose of Pub.L. 94–435, see 1976 U.S.Code Cong. and Adm.News, p. 2572.

1. Disclosure of grand jury material

The investigative files or other materials which the Attorney General of the United States is required to make available to state Attorneys General under this section do not include grand jury materials. Matter of Grand Jury Criminal Indictments 76–149 and 77–72 In Middle Dist. of Pennsylvania, D.C.Pa.1978, 469 F.Supp. 666.

Under this section, State Attorney General suing on behalf of State's consumers was entitled to disclosure of all federal grand jury materials, including transcripts, in possession of government, absent provision specifically prohibiting disclosure of such materials. In re Montgomery County Real Estate Antitrust Litigation, D.C.Md.1978, 452 F.Supp. 54.

§ 15g. Definitions

For the purposes of sections 15c, 15d, 15e and 15f of this title:

(1) The term "State attorney general" means the chief legal officer of a State, or any other person authorized by State law to bring actions under section 15c of this title, and includes the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on—

(A) a contingency fee based on a percentage of the monetary relief awarded under this section; or

(B) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under section 15c(d)(1) of this title.

(2) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(3) The term "natural persons" does not include proprietorships or partnerships.

Oct. 15, 1914, c. 323, § 4G, as added Sept. 30, 1976, Pub.L. 94–435, Title III, § 301, 90 Stat. 1396.

RULE 32

CHANGES - SUMMARY

1.	A.(5)	Eliminate prelitigation notice.
2.	B.(3)	Eliminate special predominance rule.
3.		Eliminate feasibility of notice factor.
4.		Substitute Uniform Act provision - 3(g)(13) for paragraph B.(3)(e).
5.	C.	Eliminate discretion to use injunction instead of damages.
6.	D.	Renumber as C. Add old G.(4) with language changed to eliminate reference to "stay."
7.	E. and F.	Renumber as D. and E.
8.	G.	Renumber as F. Replace notice provisions of subsection (1) with provisions from Uniform Act, section 7; includes no individual notice where claims are less than $100. F.(1)(f) is not in Uniform Act and was added. Subsection (2) has "shall" changed to "may" making opt-in provision for judgment discretionary, and F.(3) was changed to conform. Last sentence of F.(2) eliminated. Language of F.(4) allowing court to order defendant to pay notice costs adapted from section 904 of N.Y. C.P.L.R.
9.	H., L., and M.	Renumbered as G., H., and I. Retains statutory damages limit and supreme court coordination.
10.	I., J., and K.	Eliminated - gets rid of prelitigation notice.
11.	N.	Renumber as J. and change language to conform to Pozzi's suggestions.
12.	O.	Renumber as K. and replace with attorney fee provisions from sections 16 and 17 of Uniform Act.
13.		Add new section L. relating to tolling of statute of limitations - taken from section 18 of Uniform Act.

PROPOSED REVISIONS TO RULE 32

[A.(5) In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule.]

B.(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. [Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages.] 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, [including the feasibility of giving adequate notice;] (e) [the likelihood that the damages to be recovered by individual class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court;] <u>whether or not the claims of individual class</u>

members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class; (f) after a preliminary hearing or otherwise, the determination by he court that the probability of sustaining the claim or defense is minimal.

[C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.]

[D. Court order to determine maintenance of class actions.]

C. Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained and, in action pursuant to subsection (3) of section B. of this rule, the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

[E.] D. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice →

of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.

[F.] E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

[F.] E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

[F.] E.(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

[F.] E.(3) Imposing conditions on the representative parties or on intervenors;

[F.] E.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

[F.] E.(5) Dealing with similar procedural matters.

[G.] F. Notice required; content; statements of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases. [In any class action maintained under subsection (3) of section B. of this rule:]

[G.(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort. The notice shall advise each member that:

G.(1)(a) The court will exclude such member from the class if such member so requests by a specified date;

G.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

G.(1)(c) Any member who does not request exclusion may, if such member desires, enter an appearance through such member's counsel.]

(included as F.(1)(b)(i) thru F.(1)(b)(iii) below)

F.(1)(a) Following certification, in any class action maintained under subsection (3) of section B. of this rule, the court by order, after hearing, shall direct the giving of notice to the class.

F.(1)(b) The notice based on the certification order and any amendment to the order shall advise each member that:

F.(1)(b)(i) The court will exclude each member from the class if such member so requests by a specified date;

F.(1)(b)(ii) The judgment, whether favorable or not, will include all members who do not request exclusion; and

F.(1)(b)(iii) any member who does not request exclusion may, if such member desires, enter an appearance th ugh such member's counsel.

F.(1)(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

F.(1)(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if his identify and whereabouts can be ascertained by the exercise of reasonable diligence.

F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.

F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members

and may also direct that notice be included with a regular mailing by defendant to the class members.

[G.] F.(2) Prior to the final entry of a judgment against a defendant the court [shall] / may request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. [The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.]

[G.] F.(3) If the court requires class members to file a statment requesting affirmative relief, [Failure] failure of a class member to file a statement required by the court [will] / may be grounds for the entry of judgment

dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

(Under C. above with addt'l language)

[G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.]

F.(4) Unless the court orders otherwise, the plaintiff shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification, or may allocate the costs of notice among the parties if the court determines there is a reasonable likelihood that the plaintiff may prevail. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

[H.] G. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses. When appropriate:

[H.] G.(1) An action may be brought or maintained as a class action with respect to particular issues; or

[H.] G.(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[I. Notice and demand required prior to commencement of action for damages.

I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of Section B. of this rule, the potential plaintiffs' class representative shall:

I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

I.(1)(b) Demand that such person correct or rectify the alleged wrong.

I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.]

[J. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A., B., and C. of this rule upon a showing by a defendant that all of the following exist:

J.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such other people has been made;

J.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

J.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and

J.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.]

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted. An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions of section I. of this rule. Not less than 30 days after the commencement of an action for equitable relief, and after compliance with the provisions of section I. of this rule, the class representative's complaint may be amended without leave of court to

include a request for damages. The provisions of section J. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.]

[L.] H. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

[M.] I. Coordination of pending class actions sharing common question of law or fact.

[M.] I.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.

[M.] I.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and

personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

[M.] I.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.

[M.] I.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.

[M.] I.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.

[M.] I.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure

for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

[N.] J. Judgment; inclusion of class members; description; names. The judgment in an action maintained as a class action under subsections (1) or (2) of section B. of this rule, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) of section B. of this rule, whether or not favorable to the class, shall include and specify [by name] those to whom the notice provided in section [G.] F. of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class[, and the judgment shall state the amount to be recovered by each member.]

[O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.]

K. Attorney fees, costs, disbursements, and litigation expenses.

K.(1)(a) Attorney fees for representing a class are subject to control of the court.

K.(1)(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney fees, costs, or disbursements from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney fees, costs, or disbursements from a defendant class, the court may apportion the fees, costs, or disbursements among the members of the class.

K.(1)(c) If the prevailing class recovers a judgment that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

K.(1)(d) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney fees and litigation expenses if permitted by law.

K.(2)(b) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangements or fees and

K.(2)(c) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.

L. Statute of limitations. The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

L.(1) upon filing of an election of exclusion by such class member;

L.(2) upon entry of an order of certification, or of an amendment thereof, eliminating the class member from the class;

L.(3) except as to representative parties, upon entry of an order under subsection (2) of this section refusing to certify the class as a class action; and

L.(4) upon dismissal of the action without an adjudication on the merits.

1980 PROPOSED CHANGES IN CLASS ACTIONS

RULE 32

This proposal is essentially the well-tested Federal Rule 23 (now the law in 24 states and the District of Columbia).

Recommended Changes (Six)

Changes made in the existing law are included in the attached proposed amendments. These changes are largely based on Federal Rule 23, and the case law under Rule 23. Certain identified changes, not contained in Rule 23, are designed to make the rule less restrictive. Oregon has lagged behind the other states in development of its class action law, and now possesses restrictive provisions found in no other state law!

Attached is a list of the 24 states, plus the District of Columbia, which have adopted Federal Rule 23, together with a copy of Rule 23 for purposes of comparison. In summary, the proposed changes provide for:

A. ELIMINATION OF PRELITIGATION DEMAND NOTICE. The notice serves no useful purpose and is an additional burden to plaintiff. It was argued that this provision would encourage settlements. In fact, its only use has been in the case of a few unscrupulous defendants to attempt to pay off the plaintiffs and the attorney before suit is filed. Rule 23(e) protects class members (after filing) by prohibiting compromise or dismissal without court approval. The requirement that a defendant be given notice

before filing is contrary to the spirit of Rule 23(e) and is in conflict with the interest which 23(e) seeks to protect; namely, the buyout of the class representative or his attorney.

B. NOTICE--TO WHOM GIVEN. This provision is an improvement over Rule 23 and is adopted from the Uniform Act. It does not require individual notice to class members whose recovery or liability is estimated to be $100 or less. Rule 23 provides for "the best notice practicable under the circumstances, <u>including individual notice to all members</u> who can be identified through reasonable effort."

C. NOTICE--COST OF NOTICE. The United States Supreme Court has held that plaintiffs must bear the cost of the initial notice (in every case), thus, effectively eliminating all large consumer-type class actions. The proposed amendment will permit the court to decide who must pay the cost of notice. It may be the plaintiff or defendant exclusively, or may be by the parties jointly.

D. CLAIM FORM. The requirement of Oregon law that a claim form be submitted by each class member is eliminated. This requirement is not contained in Rule 23, and is believed not to exist in any other state. The effect of the requirement of a claim form is to change the opt-out provision to an opt-in provision. The proposed amendment, however, does allow for the filing of claim forms in cases where the court deems this to be necessary.

E. REASONABLE ATTORNEYS' FEES TO PREVAILING PLAINTIFF CLASS, including fees assessed against the defendant, as well as against any fund which may have been created.

F. FLUID RECOVERY. Unclaimed funds may be disposed of as directed by the court.

RULE 32

CLASS ACTIONS

A. Requirement for class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

A.(1) The class is so numerous that joinder of all members is impracticable; and

A.(2) There are questions of law or fact common to the class; and

A.(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

A.(4) The representative parties will fairly and adequately protect the interests of the class; and

[A.(5) In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule.] (Eliminate to conform to Rule 23)

B. Class action maintainable. An action may be maintained as a class action if the prerequisities of section A. [of this rule] are satisfied, and in addition:

B.(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

B.(1)(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.(1)(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

B.(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

B.(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. [Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages.] The matters pertinent to the findings include: (a) the interest of mem-

(Eliminate to confor to Rule 2

bers 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, [including the feasibility of giving adequate notice; (e) the likelihood that the damages to be recovered by individual class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court; (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal].

(Eliminate t conform to Rule 23. (and (f) add tional clau unique to Oregon clas action stat

[C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.]

(Not in Rule but unique Oregon clas action statute)

[D. Court order to determine maintenance of class actions.]

C. Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions. As soon as practicable after the commence- (Rule 23(c))

ment of an action brought as a class action, the court shall determine by order whether it is to be so maintained [and, in action pursuant to subsection (3) of section B. of this rule, the court shall find the facts specially and state separately its conclusions thereon.] An order under this section may be conditional, and may be altered or amended before the decision on the merits.

(Not in Rule but unique Oregon clas action statute)

D. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, [except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.]

(Inconsisten with provis for require ment for pr litigation notice)

(Para. E is serted out order; iden cal to Rule 23(e), exce for languag after the w "directs"; unnecessary and unique Oregon clas action stat

[F. Court authority over conduct of class actions.]

E. Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders [which may be altered or amended as may be desirable]:

(Adapted fro Rule 23)

[F.]E.(1) [D]determining the course of proceedings or (No paragrap
prescribing measures to prevent undue repetition or compli-
cation in the presentation of evidence or argument;

[F.]E.(2) [R]requiring, for the protection of the mem-(No paragrap
bers of the class or otherwise for the fair conduct of the
action, that notice be given in such manner as the court may
direct to some or all of the members of any step in the ac-
tion, or of the proposed extent of the judgment, or of the
opportunity of members to signify whether they consider the
representation fair and adequate, to intervene and present
claims or defenses, or otherwise to come into the action;

[F.]E.(3) [I]imposing conditions on the representative (No paragra
parties or on intervenors;

[F.]E.(4) [R]requring that the pleadings be amended to (No paragra
eliminate therefrom allegations as to representation of
absent persons, and that the action proceed accordingly;

[F.]E.(5) [D]dealing with similar procedural matters. (No paragra

[G. Notice required; content; statement of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases.]

F. Determination by Order Whether Class Action to be (Rule 23(c))
Maintained; Notice; Judgment; Actions Conducted Partially as
Class Actions. In any class action maintained under subsec- (Rule 23(c)
(1) and (2)
tion (3) of section B. [of this rule]:

[G.]F.(1) The court shall direct to the members of the
class the best notice practicable under the circumstances,

including [I]individual notice [shall be given] to all members who can be identified through reasonable effort and whose potential monetary recovery or liability is estimated to exceed $100. The notice shall advise each member that:

(Verbatim f
Uniform Cl
Actions Ac

[G.]F.(1)(a) The court will exclude [such member] him from the class if [such member] he so requests by a specified date;

[G.]F.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

(This para.
taken from
Rule 23; in
may,
correct as
matter of
See ORCP G(

[G.]F.(1)(c) Any member who does not request exclusion if [such member] he desires, enter an appearance through [such member's] his counsel.

[G.]F.(2) Prior to the final entry of a judgment against a defendant the court shall request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from

sources other than the individual class members. The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.]

[G.(3) Failure of a class member to file a statement required by the court will be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.]

F.(3) The court may order that the cost of any notice under this section be paid by the defendant or the plaintiff or by the parties jointly, as it deems fair and equitable. The court may conduct a hearing to determine who shall pay the cost of notice.

(Verbatim Uniform C Actions A

[G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.]

F.(4) If the court, after determination of liability, is unable to identify all or some members of the class, it shall order that any damages with respect to such unidentified class members shall be distributed in a manner most equitable under the circumstances. Such equitable distribution shall not include retention of such damages by any defendant held liable.

(Verbatim f Uniform Cl Actions Ac

[O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.]

(Eliminate conform to Rule 23)

F.(5) Attorneys' fees. A prevailing plaintiff class, in addition to other relief, shall be awarded reasonable attorneys' fees.

(Verbatim f Uniform Cl Actions Ac

[N.] F.(6) [Judgment; inclusion of class members; description; names.] The judgment in an action maintained as a class action under subsections (1) or (2) of section B. [of this rule], whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) or section B. [of this rule], whether or not favorable to the class, shall include and specify [by name] those to whom the notice provided in section F. [of this rule] was directed, and who have not requested exclusion and whom the court finds to be members of the class [and the judgment shall state the amount to be recovered by each member].

(Rule 23(c)

[H. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses.]

F.(7) When appropriate:

F.(7)(a) An action may be brought or maintained as a class action with respect to particular issues; or (Rule 23

F.(7)(b) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[I. Notice and demand required prior to commencement of action for damages.] (Elimina conform Rule 23)

[I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of Section B. of this rule, the potential plaintiffs' class representative shall:]

[I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and]

[I.(1)(b) Demand that such person correct or rectify the alleged wrong.]

[I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.]

[J. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A., B., and C. of this rule upon a showing by a defendant that all of the following exist:] (Eliminate t conform to Rule 23)

[J.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such other people has been made;]

[J.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;]

[J.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and]

[J.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.]

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted. An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions (Eliminate t conform to Rule 23)

of section I. of this rule. Not less than 30 days after the commencement of an action for equitable relief, and after compliance with the provisions of section I. of this rule, the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section J. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.]

[L. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.] (Eliminate t conform to Rule 23)

[M.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.] (Eliminate t conform to Rule 23)

[M.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is pre-

dominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.]

[M.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.]

[M.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.]

[M.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.]

[M.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.]

Rule 84 F. The Council unanimously decided to delete the provisions relating to release of liens, F.(2)(a) through F.(2)(e), in their entirety. The Council also unanimously agreed to delete the last sentence of F.(1)(a): "Delivery of property under this section does not affect the attaching plaintiff's lien."

Rule 81 B. Judge Sloper moved, seconded by Darst Atherly, that paragraphs B.(2)(b) through B.(2)(d) be deleted from the notice of exemption section. The motion carried unanimously. It was suggested by Frank Pozzi that some simple and clear language relating to possible exemptions be added to the notice. The Executive Director was asked to draft language and submit it for approval to the subcommittee.

Rule 83 G.(1). The Council decided that the following sentence should be added at the end of G.(1): "If the plaintiff so requests, the hearing date may be set at some date later than the seventh day."

Rule 83 A. Upon motion by Laird Kirkpatrick, seconded by Don McEwen, the Executive Director was asked to redraft the first paragraph of this rule to allow the required showing to be made by affidavits submitted in support of plaintiff's petition. Judge Dale opposed the motion.

Upon motion by Carl Burnham, seconded by Judge Sloper, the Council unanimously approved release of the tentative draft of Rules 78-85, dated August 29, 1980, as modified by the actions taken by the Council.

Class Actions. Austin Crowe moved, seconded by Charles Paulson, that Rule 32 be amended to incorporate the revisions submitted on July 21, 1980, by the class action subcommittee. The motion carried, with Carl Burnham, Darst Atherly Garr King, Judge Buttler, and Don McEwen opposing it.

The Council had no further objections to or suggestions regarding the draft of Rules 65-72 and amendments to ORCP 1-64 dated August 27, 1980, which had been approved for release at the last meeting.

The Council discussed the suggested changes in ORCP 7 set out in Frank Pozzi's letter dated August 4, 1980, and in the staff memorandum dated June 16, 1980.

A motion was made by Austin Crowe, seconded by Don McEwen, to adopt the change in 7 D.(4)(a) set out in the June 16, 1980, memorandum reinstating service on the Department of Motor Vehicles, with the substitution of "registered agent" for "attorney in fact" in paragraph (i). The motion passed unanimously.

A motion was made by Frank Pozzi, seconded by Charles Paulson, to adopt the change in D.(4)(c) on Page 2 of the August 4th letter.

[A.(5) In an action for damages under subsection (3) of section 8. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule.]

8.(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. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. 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[, including the feasibility of giving adequate notice]; (e) [the likelihood that the damages to be recovered by individual

class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court;] whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class; and (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.

[C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.]

[D. Court order to determine maintenance of class actions.]

C. Determination by order whether class action to be maintained.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained and, in action pursuant to subsection (3) of section B. of this rule, the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or

administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

[E.] D. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.

[F.] E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

[F.] E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or agrument;

[F.] E.(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

[F.] E.(3) Imposing conditions on the representative parties or on intervenors;

[F.] E.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

[F.] E.(5) Dealing with similar procedural matters.

[G. Notice required; content; statements of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases. In any class action maintained under subsection (3) of section B. of this rule:

G.(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort. The notice shall advise each member that:

G.(1)(a) The court will exclude such member from the class if such member so requests by a specified date;

G.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

G.(1)(c) Any member who does not request exclusion may, if such member desires, enter an appearance through such member's counsel.]

F. Notice required; content; statements of class members may be required; form; content; effect of failure to file required statement.

F.(1)(a) Following certification, in any class action maintained under subsection (3) of section B. of this rule, the court by order, after hearing, shall direct the giving of notice to the class.

F.(1)(b) The notice, based on the certification order and any amendment of the order, shall include:

F.(1)(b)(i) A general description of the action, including the relief sought, and the names and addresses of the representative parties;

F.(1)(b)(ii) A statement that the court will exclude any member of the class if such member so requests by a specified date;

F.(1)(b)(iii) A description of possible financial consequences on the class;

F.(1)(b)(iv) A general description of any counterclaim being asserted by or against the class, including the relief sought;

F.(1)(b)(v) A statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

F.(1)(b)(vi) A statement that any member of the class may enter an appearance either personally or through counsel;

F.(1)(b)(vii) An address to which inquiries may be directed; and

F.(1)(b)(viii) Other information the court deems appropriate.

F.(1)(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

F.(1)(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if such class member's identity and whereabouts can be ascertained by the exercise of reasonable diligence.

F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.

F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members and may also direct that notice be included with a regular mailing by defendant to the class members.

[G.] F.(2) Prior to the final entry of a judgment against a defendant the court [shall] may request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. [The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.]

[G.] F.(3) If the court requires class members to file a statement requesting affirmative relief, [F]failure of a class

member to file a statement required by the court [will] may be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

[G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.]

F.(4) Unless the court orders otherwise, the plaintiffs shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification or may allocate the costs of notice among the parties if the court determines there is a reasonable likelihood that the plaintiffs may prevail. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

[H.] G. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses. When appropriate:

[H.] G.(1) An action may be brought or maintained as a class action with respect to particular issues; or

[H.] G.(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[I. Notice and demand required prior to commencement of action for damages.

I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of section B. of this rule, the potential plaintiffs' class representative shall:

I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

I.(1)(b) Demand that such person correct or rectify the alleged wrong.

I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.]

[J.] H. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A. [, B., and C.] and B. of this rule upon a showing by a defendant that all of the following exist:

[J.] H.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such

other people has been made;

[J.] H.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

[J.] H.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and

[J.] H.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted.]

I. Amendment of complaints for equitable relief to request damages permitted. [An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions of section I. of this rule.] Not less than 30 days after the commencement of an action for equitable relief[, and after compliance with the provisions of section I. of this rule,] the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section [J.] H. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

[L.] J. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

[M.] K. Coordination of pending class actions sharing common question of law or fact.

[M.] K.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.

[M.] K.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

[M.] K.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.

[M.] K.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.

[M.] K.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.

[M.] K.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

[N.] L. Judgment; inclusion of class members; description[; names]. The judgment in an action maintained as a class action under subsections (1) or (2) of section 8. of this rule, whether or not favorable to the class, shall include and

describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) of section B. of this rule, whether or not favorable to the class, shall include and specify [by name] those to whom the notice provided in section [G.] F. of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class [, and the judgment shall state the amount to be recovered by each member].

[O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.]

M. Attorney fees, costs, disbursements, and litigation expenses.

M.(1)(a) Attorney fees for representing a class are subject to control of the court.

M.(1)(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney fees, costs, or disbursements from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those amounts. If a plaintiff is entitled to attorney fees, costs, or disbursements from a defendant class, the court may apportion the fees, costs, or disbursements among the members of the class.

M.(1)(c) If the prevailing class recovers a judgment that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

M.(1)(d) The court may order the adverse party to pay to the prevailing class its reasonable attorney fees and litigation expenses if permitted by law in similar cases not involving a class.

M.(1)(e) In determining the amount of attorney fees for a prevailing class the court shall consider the following factors:

M.(1)(e)(i) The time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

K.(1)(e)(ii) Results achieved and benefits conferred upon the class;

M.(1)(e)(iii) The magnitude, complexity, and uniqueness of the litigation;

M.(1)(e)(iv) The contingent nature of success; and

M.(1)(e)(v) Appropriate criteria in DR 2-106 of the Oregon Code of Professional Responsibility.

M.(2) Before a hearing under section C. of this rule or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately:

M.(2)(a) A statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts;

M.(2)(b) A copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangement or fees and

M.(2)(c) A copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with the law firm of the representative parties' attorney. This statement shall be supplemented promptly if additional arrangements are made.

N. Statute of Limitations. The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

N.(1) Upon filing of an election of exclusion by such class member;

N.(2) Upon entry of an order of certification, or of an amendment thereof, eliminating the class member from the class;

N.(3) Except as to representative parties, upon entry of an order under section C. of this rule refusing to certify the class as a class action; and

N.(4) Upon dismissal of the action without an adjudication on the merits.

COMMENT

Report of Class Action Subcommittee

At the request of the Council on Court Procedures and pursuant to a direction by the Senate Judiciary Committee of the 1979 Legislative Assembly, this subcommittee has conducted a detailed review of ORCP 32 relating to class actions. The subcommittee has compared the Oregon rule to Federal Rule 23, reviewed current legislative trends in other states and proposals for federal statutes relating to class action, and reviewed the extensive national literature on class actions. The subcommittee has also considered Oregon cases interpreting ORCP 32 and the legislative history of that rule. The Council conducted a public hearing relating to class actions at which the testimony of 10 persons was received.

The subcommittee now recommends that Rule 32 be amended to incorporate the proposed revisions which are attached. The proposed revisions are:

(1) Elimination of prelitigation notice requirements. The subcommittee recommends that section 32 I. be eliminated, with conforming elimination of subsection 32 A.(5) and modifications to 32 J. and K. This eliminates the requirement of notice 30 days prior to the commencement of class actions for damages. The subcommittee felt the requirement served no useful purpose and contained potential for abuse.

(2) Revision of factors to be considered in deciding predominance of common questions of law or fact. The subcommittee recommends that paragraphs (d) and (e) of subsection 32 B.(3) be changed to eliminate the reference to notice in paragraph (d) (because of the proposed change in 32 G.) and by substitution of paragraph 3(a)(13) of the Uniform Class Actions Act for paragraph B.(3)(e) of existing Oregon Rule 32. (The Uniform Act language more clearly expresses the idea incorporated in paragraph B.(3)(e).)

(3) Elimination of subsection 32 C. The subcommittee felt this provision was of very limited utility and confusing. Anything covered by this subsection could already be considered under B.(3).

(4) Clarification of provision relating to postponement of certification decision to determine legal question. Subsection G.(4) of the existing rule refers to a "stay" of the class action if the outcome turns upon a point of law and the court wishes to consider the legal question first. Technically, what is involved is not a "stay" but a postponement of the certification hearing or decision. The substance of subsection 32 G.(4) was moved up to subsection C.(2).

(5) Elimination of requirement of individual notice in all cases. The revision would replace the existing requirement of

subsection 32 G.(1) with the language of section 7 of the Uniform Class Actions Act (32 F.(1) of revision). The new language only requires individual notice for claims over $100 and has a number of provisions encouraging flexibility in the notice procedure. The subcommittee felt that an absolute requirement of individual notice was too rigid and imposed an unnecessary impediment to maintenance of class actions involving a large class and small individual claims. The subcommittee drafted revised paragraph F.(1)(f).

(6) Elimination of mandatory requirement of claim by class members prior to judgment. The committee changed the absolute requirement that class members submit claim forms in damage cases as a basis for judgment. The language of existing 32 G.(2) was changed from "the court shall" to "the court may" require such forms and by eliminating the last sentence (32 F.(2) in revision). Conforming changes were also made in 32 G.(3) and 32 N. (32 F.(3) and 32 L. in revision). The subcommittee felt that the requirement of a claim form in every damage case was too rigid and that a judgment listing all class members and individual damages in every case involves an extremely complex and expensive form of judgment for no good reason. The subcommittee took no position regarding award of aggregate damages not identifiable to individual class members (fluid class recovery). The subcommittee felt this was an area better determined by the courts or legislature in the context of remedies and proof of damages.

(7) Preliminary hearing and allocation of damage costs. The proposed revision adds a new subsection, F.(4), adapted from N.Y. C.P.L.R. section 904, which authorizes the court, after a preliminary hearing, to require the defendant to pay all or part of the costs of initial notice to class members. Although the normal rule is that plaintiffs pay the costs of notice, the subcommittee felt the New York approach provided desirable flexibility by allowing the trial judge to require payment by defendant, based upon a likelihood that the plaintiff class will win.

(8) Regulation of attorney fees. The proposed revision would substitute far more detailed provisions, taken from sections 16 and 17 of the Uniform Class Actions Act, for section 32 O. of the existing rule (section M. of revision). These provisions do not provide for or authorize award of attorney fees, not otherwise provided by statute or law, but have much more detailed provisions for court control of attorney fees and litigation expenses. The new language also covers liability of class members for fees, costs, and disbursements awards.

(9) New provision relating to tolling of statute of limitations. The proposed revision adds a new section, N., which is taken from section 18 of the Uniform Class Actions Act. The section clarifies the effect of pendency and termination of class actions upon the running of the statute of limitations against the individual claims of class members. This is an area of considerable confusion and should be clarified. The subcommittee recognizes that this provision may have substantive elements, beyond the rulemaking powers of the Council, and suggests that it be submitted to the legislature with a note asking the legislature to review it in that light.