Notes

Restitution: A Solution to *Illinois Brick Co. v. Illinois* and to the Manageability Problems of Antitrust and Other Problems of Consumer Class Actions

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The amendment of federal class action rule 23[1] in 1966 met with a mixed reception. Class actions have been termed "one of the most socially useful remedies in history" for the small, individually powerless consumer,[2] while some detractors characterized class actions as either a means of turning courthouses into casinos,[3] or a lever for "legalized blackmail."[4] Since the 1966 amendment of rule 23 there have been several attempts to use the class action device to obtain recoveries on behalf of large classes of plaintiffs where the claims of the class members were individually small, but the defendant's alleged wrongful conduct had inflicted thousands or millions of small injuries.[5] The claims in this category are so minute that their litigation on an individual basis is not economical. Two factors are responsible for this unfeasibility. First, the types of situations which involve a large class of injured persons often entail complicated legal or factual questions, such as an alleged price-fixing scheme violative of the antitrust laws.[6] It is obvious that merely

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1. FED. R. CIV. P. 23.

2. *See* Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 Bus. Law. 1259, 1259 (1970). *See also* Comment, *Class Actions for Consumer Protection*, 7 HARV. C.R.-C.L. L. REV. 601 (1972).

3. *See* Simon, *Class Actions—Useful Tool or Engine of Destruction*, 7 LINCOLN L. REV. 20, 20 (1971).

4. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

5. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).

6. *See, e.g.*, Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert.*

finding a competent attorney to pursue a complex antitrust claim in expectation of one individual's very small recovery is a difficult, if not impossible task.[7] Second, the injured party may not be willing or, indeed, able to incur the costs of litigating a protracted case in expectation of a miniscule individual recovery.[8] In view of the unavailability of counsel and the expense of litigation, the only means of redress available to the aggrieved individuals is litigation of the claims on a class basis, pursuant to rule 23.[9]

However, attempts to obtain classwide damages for antitrust violations currently face some formidable obstacles. First, the United States Supreme Court in *Illinois Brick Co. v. Illinois*,[10] held, in effect, that ultimate consumers may only sue to collect treble damages for antitrust violations resulting in overcharges for goods if the consumers purchased these goods directly from the violator.[11] Second, even assuming a class

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denied, 421 U.S. 963 (1975); *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D. N.J. 1971).

7. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (since no competent attorney would undertake plaintiff's complex antitrust action to obtain plaintiff's expected $70 recovery, "[e]conomic reality dictates that [the] suit proceed as a class action or not at all."). *But cf.* Clayton Act, § 4, 15 U.S.C. § 15 (1970) (providing for award of costs and a reasonable attorney's fee to successful treble damage claimants).

8. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 146, 179 (1974), directing that plaintiff's proposed class action be dismissed due to the named plaintiff's unwillingness to pay $315,000 estimated postage for requisite individual notice.

9. Indeed, the maximization of potential recoveries has the desirable effect of inducing outstanding attorneys to undertake consumer protection litigation. Katz v. Carte Blanche Corp., 496 F.2d 747, 761 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

The class action originated in equity because of the economies of time, effort, and expense it offered to litigants and to the judicial system in comparison to separate litigation of many small claims. Hansberry v. Lee, 311 U.S. 32, 41 (1940); Z. CHAFEE, SOME PROBLEMS OF EQUITY 201-02 (1950). Bringing suit in class form gives small claimants "the opportunity of pooling their resources and letting a few trusted leaders bear the brunt of the fight." *Id.* at 202; *see* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. INDUS. & COM. L. REV. 501, 502 (1969). This pooling of resources, in turn, provides small claimants with group bargaining power in situations where, if no redress were available on a class basis, the small size of an individual's potential recovery would preclude bringing any action against a defendant. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 73 (D.N.J. 1971); Note, *The Cost Internalization Case for Class Actions*, 21 STAN. L. REV. 383, 404 (1969). Class actions also help to conserve limited judicial resources by allowing a determination of the rights of many individuals in one action, thereby avoiding a multiplicity of suits. *See* Comment, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 426 (1973). In addition, to the extent statutory rights and duties have been created, class actions may provide a means of effectuating the policy expressed in a particular enactment. *See* Katz v. Carte Blanche Corp., 496 F.2d at 762; Dolgow v. Anderson, 43 F.R.D. 472, 487 (E.D.N.Y. 1968). Finally, if a defendant has been involved in some wrongdoing, thereby benefiting himself at the expense of a large group, the class action affords a mechanism for depriving a wrongdoer of his illegal gains and preventing his unjust enrichment. Note, *The Cy Pres Solution to the Damage Distribution Problems of Mass Class Actions*, 9 GA. L. REV. 893, 897-98 (1975) [hereinafter cited as Note, *The Cy Pres Solution*].

10. 97 S. Ct. 2061 (1977).

11. *See id.* at 2066; text & notes 15-25 *infra*. It is often true that consumers seek antitrust relief for injuries inflicted by wrongdoers with whom they have not dealt directly. *See, e.g.*, Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert.*

action is brought on behalf of consumers who dealt directly with the wrongdoers, attempts to bring such large consumer class actions for damages under rule 23 have been rebuffed by the courts.[12] Paradoxically, the refusal of the courts to permit these large suits to proceed in class form stems, in large part, from precisely the same consideration which makes class treatment an essential prerequisite to enabling individuals to recover damages—sheer size. In the eyes of some courts, the immensity of some classes renders class treatment of an action inappropriate because of the administrative burdens and legal problems inherent in proving individual damages for each member of the plaintiff class[13] and distributing any damage recovery on an individual basis and in an economical manner.[14] These problems, rather than evoking creative judicial attempts at their resolution, have often resulted in the denial or revocation of certification of suits as class actions.

This Note will examine the legal and practical problems confronting small antitrust claimants seeking monetary recoveries in class actions, and will present restitution as a possible solution to some of these problems. Problems with efficient distribution of restitutionary recoveries will be analyzed with an eye toward suggesting low-cost methods. The availability of the suggested solution under the antitrust laws of the United States will then be examined, in light of the *Illinois Brick Co.* case. Finally, the procedural and constitutional implications of restitution for the Federal Rules of Civil Procedure will be discussed.

THE NATURE OF THE PROBLEM

The Illinois Brick Decision

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[15] the Supreme Court held that an antitrust defendant cannot defend against a treble damage action by a plaintiff who purchased goods directly from him by proving that all or part of the overcharges allegedly charged by him were passed on by plaintiff to its own customers.[16]

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denied, 407 U.S. 925 (1972); Boshes v. GMC, 59 F.R.D. 589 (N.D. Ill. 1973).

12. See text & notes 31-37 *infra*.

13. *See* cases discussed in notes 31-32 *infra*.

14. *See* cases discussed in notes 33-34 *infra*.

15. 392 U.S. 481 (1968).

16. *Id.* at 494. *Hanover Shoe* was an action under section 4 of the Clayton Act against a manufacturer of shoe machinery brought by its customer, a shoe manufacturer. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), permits anyone injured in his "business or property" to obtain treble damages therefor, and defendant in *Hanover Shoe* sought to defend by showing that plaintiff was not injured in its business because it passed the alleged illegal overcharges on to the purchasers of its shoes. The Court rejected this defense, and held that a direct purchaser suing for treble damages is injured in the full amount of the overcharges initially paid by it, regardless of the existence of a pass-on. *See* 392 U.S. at 494. The *Hanover Shoe* decision was founded on two

The unavailability of the pass-on defense in this situation created some confusion; courts were divided as to whether an indirect purchaser—someone who purchased price-fixed goods from an intermediary who bought them from the violator—could recover damages from the wrongdoer for overcharges passed on by the middleman.[17] In *Illinois Brick Co. v. Illinois*[18] the Court resolved the split in authority by concluding that an indirect purchaser is not a person "injured in his business or property" within the meaning of section 4 of the Clayton Act.[19] Indirect purchasers may not recover treble damages; instead, the Court concluded that the direct purchaser is entitled to recover treble the amount of all overcharges collected by the defendant, while the indirect buyers go uncompensated.[20] The *Illinois Brick* decision was based on

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grounds. First, the Court was unwilling to burden treble damage actions with "massive evidence and complicated theories," *id.* at 493, which would be necessary to trace the effect of an overcharge on the costs, prices, sales, and profits of the direct purchaser. *See id.* at 492-93. The Court viewed this tracing as a virtually insurmountable task, but noted that defendants would nevertheless attempt to raise it, often injecting undue complication into treble damage cases. *See id.* The second reason for the holding in *Hanover Shoe* was the Court's apprehension that to permit the pass-on defense would ultimately place the burden of litigating on the consumer whose "tiny stake in the lawsuit," *id.* at 494, probably would not induce him to sue. *See id.*

17. Prior to the Court's decision in Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977), most lower federal courts had concluded that indirect purchasers were not barred by *Hanover Shoe* from seeking treble damages. *Compare* Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1374 n.27 (5th Cir. 1976) (dictum); Illinois v. Ampress Brick Co., 536 F.2d 1163, 1166-67 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 (1977); *In re* Master Key Antitrust Litigation, 528 F.2d 5, 12 n.11 (2d Cir. 1975); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1086-88 & n.2 (2d Cir.), *cert. denied sub nom.* Cotler Drugs, Inc. v. Charles Pfizer & Co., 404 U.S. 871 (1971), *with* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971), *aff'g* Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970). *See generally* Comment, *Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine*, 72 COLUM. L. REV. 394 (1972); Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing On*, 123 U. PA. L. REV. 976 (1975).

18. 97 S. Ct. 2061 (1977), *rev'g* Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976).

19. *See* 97 S. Ct. at 2069, 2075. In *Illinois Brick*, the State of Illinois and 700 local governmental agencies brought a treble damage action against defendants—manufacturers and distributors of concrete block in the greater Chicago area. *See id.* at 2065. Defendants sell block to masonry contractors who submit bids to general contractors for the masonry work on construction projects. *Id.* Plaintiffs receive bids for these projects from general contractors. *Id.* The complaint alleged that, because of a price-fixing conspiracy among manufacturers and distributors of block, the prices of buildings sold to plaintiffs by general contractors were inflated by $3 million. *See id.* Because the brick passed through two tiers in the distributive chain before reaching plaintiffs, plaintiffs could only have been injured by a partial or total pass-on of any overcharges imposed through two levels in the distributive chain. *See id.*

It did not take long before the effects of *Illinois Brick* began to be felt. *See In re* Folding Carton Antitrust Litigation, 46 U.S.L.W. 2061 (N.D. Ill. 1977) (recertifying a price-fixing class action to include as plaintiffs only those persons who purchased folding cartons directly from the defendants during the relevant period).

20. The Court concluded that a pass-on theory can be used offensively by indirect purchasers as a theory of recovery only when the defendant can use the same theory as a defense in an action by a direct purchaser. *See id.* at 2069. The only situations when the defense will be allowed are apparently cases where a direct purchaser "is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to purchasing a fixed quantity regardless of

two principal grounds. The Court believed that permitting an indirect purchaser to recover treble damages for overcharges which he could prove were passed on to him, while barring the defendant from raising a pass-on defense against a direct purchaser would subject the defendant to an unwarranted risk of double liability.[21] More important, however, was the Court's conclusion that, even though methods are available for apportioning damages between direct and indirect buyers, injecting these apportionment issues into the treble damage action would unduly complicate private antitrust cases.[22] In the majority's eyes, private enforcement of the antitrust laws would lose much of its effectiveness as a deterrent when "complicated theories and massive evidence" were introduced to show a pass-on as a theory of recovery;[23] therefore, the goals of deterring violators and depriving wrongdoers of their ill-gotten gains were held better served by concentrating the entire treble damage recovery in the direct purchaser.[24] In light of *Illinois Brick*, therefore, treble damage class actions on behalf of groups of indirect buyers are not permitted.[25]

Unmanageable Class Actions

Once a potential representative of a large class satisfies the

price." *Id.* at 2070; *see id.* at 2074. As an example of a permissible basis for offensive passing on as a theory of recovery, the Court noted the instance given in *Hanover Shoe, see* 392 U.S. at 494, of a cost-plus contract. *See* 97 S. Ct. at 2064 n.2, 2070, 2074. It is clear that both the defendant and the indirect purchaser can easily show that the pass-on occurred in such a case. However, just as the competitive bidding process in *Illinois Brick* did not contain the simplicity of proof of a cost-plus contract, *see id.* at 2070, neither will ultimate purchasers of consumer goods ordinarily buy under conditions which make it simple for the effects of an overcharge to be traced through the chain of distribution. Therefore, the decision in *Illinois Brick* generally will bar a treble damage action by ultimate consumers where they have not dealt directly with the antitrust violator.

21. 97 S. Ct. at 2067 & n.11. *But see* text & notes 143-61 *infra.*

22. 97 S. Ct. at 2070, 2072, 2073-74. *But see* text & notes 149-61 *infra.*

23. 97 S. Ct. at 2069, 2070.

24. *See id.* at 2069, 2075. Members of both houses of Congress disagreed with the Court's conclusion and reasoning, however, and responded to *Illinois Brick* with the introduction in the Senate and the House of bills designed to nullify the decision. *See* S. 1874, 95th Cong., 1st Sess. (1977); H.R. 8359, 95th Cong., 1st Sess. (1977), proposing amendments to pertinent parts of section 4 of the Clayton Act, 15 U.S.C. § 15 (1970) *as amended by* Pub. L. No. 94-435, §§ 4A-4H (1976), to permit a treble damage action by or on behalf of any person "injured in fact, directly or indirectly," by an antitrust violation. The United States Department of Justice supports passage of these bills, and believes that the requirement that a claimant prove injury in fact will permit both offensive and defensive use of passing on, thereby eliminating all but the most speculative possibilities of multiple recovery. *See Proposed Amendments to the Clayton Act: Hearings on S. 1874 Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 5-6 (1977) (testimony of John H. Shenefield).

25. *See* discussion note 20 *supra.* It is noteworthy that the Court's decision in *Illinois Brick* was based in large part on its desire to apply the *Hanover Shoe* doctrine consistently to plaintiffs and defendants. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2066 (1977); *id.* at 2085 (Blackmun, J., dissenting). Indeed, Justice Blackmun was "positive" that, if *Hanover Shoe* had not already been decided, the Court, perhaps unanimously, would have reached an opposite conclusion in *Illinois Brick. See id.*; discussion note 157 *infra.*

threshold requirements of rule 23(a),[26] a proposed class action for damages must then comply with the requirements of rule 23(b)(3).[27] In recent years several large plaintiff class actions for damages have failed because of an inability to fulfill these requirements.[28] Some of these cases involved treble damages actions under section 4 of the Clayton Act,[29] which requires as an essential element that a plaintiff prove an injury to "business or property."[30] One antitrust price-fixing action failed in large part because members of the plaintiff class would have been unable to produce individual records adequate to prove each person's damages, and the action was, therefore, unmanageable and not capable of class action treatment.[31] Other actions on behalf of large classes of small claimants have been unsuccessful due to the belief that, even if each individual were able to show the impact on him of the defendant's

26. FED. R. CIV. P. 23(a) allows one or more members of a class to sue as representative of all class members only if (1) the size of the class renders joinder of all members impractical, (2) there are factual or legal questions common to the class, (3) the representative's claims are typical of those of the class, and (4) the representative parties will fairly and adequately represent the interests of absent class members. *See generally* 7 & 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, §§ 1751-1803 (1972).

27. FED. R. CIV. P. 23(b)(3) prescribes that, in addition to requiring potential class representatives to fulfill subsection 23(a), the court must find (1) that the questions of law or fact common to class members predominate over any questions affecting only individuals, and (2) that a class action is the superior method for the fair and efficient adjudication of the dispute. Four factors are listed in rule 23(b)(3) as pertinent to these findings. The most significant one for purposes of the small claimant has proven to be subdivision (D): "The difficulties likely to be encountered in the management of a class action." FED. R. CIV. P. 23(b)(3)(D). See text & notes 31-32 *infra.*

28. *See* text & notes 31-34 *infra.* This Note deals primarily with class actions on behalf of large groups of small claimants. These groups are of two basic types. First, there are classes composed of unidentifiable members—classes of persons who consume goods or services, but who either cannot be identified easily, or, even if individually identifiable, cannot submit traditional, individual proof of their purchases of goods or services to show their entitlement to damages. The second type consists of consumers who are both identifiable and able to submit individual proof of damages in the traditional sense, but whose group is of such great size that resort to such methods of securing classwide relief is unduly burdensome to the court. These types of consumer classes are dealt with interchangeably and the theories set forth herein are intended to apply to both situations, as well as to any class action wherein resort to restitutional recovery might permissibly avoid dismissal of a class action. See text & notes 93-162 *infra* regarding statutory schemes under which restitution might be available.

29. 15 U.S.C. § 15 (1970).

30. *Id.*; *see* Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43, 54 (D. Del. 1974).

31. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 72-73 (D.N.J. 1971). In *City of Philadelphia*, the City of Philadelphia and the State of New Jersey brought a class action on behalf of all state and municipal governments and governmental agencies, and all other ultimate consumers of gasoline in the relevant area, against 12 oil companies. The suit alleged, *inter alia*, that for 10 years four of the defendants conspired to and did fix tank wagon and retail prices of gasoline in Delaware, New Jersey, and Pennsylvania, in violation of the Sherman Act, § 1, 15 U.S.C. § 1 (1970). *See* 53 F.R.D. at 49. The action sought treble damages under the Clayton Act, § 4, 15 U.S.C. § 15 (1970). 53 F.R.D. at 49. The court doubted that the members of the class, composed of individuals who purchased gasoline at retail prices (conservatively estimated to number six million persons), could produce adequate individual records of their purchases so as to enable a meaningful distribution of any damages award. *Id.* at 73. Therefore, the court held that the class was unmanageable and could not be certified. *Id.*

illegal conduct, the burden on the judicial system created by requiring individual proof of damages predominated over any questions common to all class members, thereby rendering the actions unsuitable for class certification.[32] It has likewise been held that, assuming damages in a price-fixing action may be computed and recovered on a classwide basis, when individual class members are unable to produce transaction records sufficient to show an entitlement to recovery, the class is unmanageable and cannot be certified.[33] This results from the view that

32. For example, in *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974), the Ninth Circuit reversed a district court's class certification in part because, even if only 10% (four million) of the affected persons came forward to prove the amount of damages sustained, and such proof necessitated only 10 minutes of court time per class member, approximately 100 years would be expended in proof of damages. *Id.* at 89.

Telephone Charges was an action alleging a nationwide conspiracy among 47 hotel chains and 600 individual hotels to increase room rates by addition of a surcharge for telephone services to quoted room rates, in violation of federal and state antitrust laws. *Id.* at 88. Plaintiffs sought damages on behalf of themselves and all others similarly surcharged—a class of approximately 40 million persons. *Id.* The average recovery of each individual class member would have been about $2. The district court's class certification was reversed for several reasons. First, the court held that the predominance requirement of rule 23(b)(3), see discussion note 27 *supra*, had not been met, 500 F.2d at 92, since the federal antitrust claims would raise "individual questions that could require decades of litigation." *Id.* at 89. For example, the court stated that once the defendants were shown to be participants in the conspiracy, and the amounts of each hotel's surcharges ascertained, each class member then would be required to show that he patronized the hotel while the surcharge was in effect and that he paid the surcharge. *See id.* Since, as noted above, this individual proof would require many years, the court concluded that the suit raised "too many individual questions to qualify for class action treatment." *Id.*

Other problems of individual proof arise in class actions on behalf of classes of ultimate consumers. If a defendant manufacturer is shown to have fixed prices for his goods, an ultimate consumer who purchased the defendant's product from an intermediate entity in the chain of distribution may be required to show that the overcharge was passed on to him by the intermediate entity. If it would be administratively burdensome to make this showing on an individual basis for a large class of plaintiffs, a court may well decline to certify the action under rule 23. In Boshes v. GMC, 59 F.R.D. 589 (N.D. Ill. 1973), for example, plaintiffs brought an action on behalf of themselves and all persons who purchased GMC cars between 1965 and 1968, alleging GMC violated federal antitrust laws by fixing and maintaining prices of automobiles during this same period. The complaint sought treble damages, *id.* at 590, as well as certification of the action as a class action on behalf of approximately 17 million purchasers. *See id.* at 599. The court held, however, that the action as framed by plaintiffs was unmanageable and therefore denied the motion for class certification. *Id.* at 602. While the "impossible burden" on the court of providing adequate notice to class members and in accumulating transactional information necessary "to identify the particular interest of millions of purchasers" was sufficient to warrant denial of class certification, *see id.* at 599-600, the court viewed the proof of individual damages as an insurmountable task. *See id.* at 600-02. The court did conclude that, as a matter of substantive antitrust law, the class had standing to sue as indirect purchasers of GMC cars. *See id.* at 597. Class members would be required, however, to demonstrate that any illegal overcharge was passed on to them by intermediate dealer-purchasers, and, while this might not be difficult for a single individual, such proof on a class basis would be "an endless task." *Id.* at 600. The court also believed that GMC was entitled to an adequate opportunity to raise defenses against individual class members and, because of the overwhelming complexity of furnishing this opportunity, the class action was found to be unmanageable. *See id.* at 600-02. *See also* Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43, 54, 57 (D. Del. 1974); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319, 321 (S.D.N.Y. 1970).

33. City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 72-73 (D.N.J. 1971). The court in *City of Philadelphia* was not satisfied that the members of this group could produce the sort of records necessary to allow a meaningful distribution of damages and, therefore denied class certification, *id.* at 73, stating that, regardless of the

the absence of adequate individual records makes impossible the distribution of any general damages award to its rightful recipients.[34]

Annihilating Punishment

In addition, quite apart from the problems of individual proof faced by large class actions, some courts have demonstrated an unwillingness to permit class actions where a multimillion dollar class recovery might annihilate the defendant.[35] For example, the court in *Kline v. Coldwell, Banker & Co.*[36] decried the possibility of overwhelming civil liability in a price-fixing class action, noting that the joint and several liability imposed upon antitrust conspirators threatened a small defendant, who might have earned only $1,000 in illegal overcharges, with liability for the entire $750 million treble damages claim alleged against the defendant class.[37]

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ease with which classwide damages may be calculated, if it is extremely difficult to distribute the recovery to the individual class members entitled thereto, the class is unmanageable. *Id.* at 72. *See also* Boshes v. GMC, 59 F.R.D. 589, 599-600 (N.D. Ill. 1973).

34. City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 72-73 (D.N.J. 1971).

Alternatives to individual proof and distribution of damages have been suggested in "fluid class" recovery and "cy pres" recovery of damages. See discussion note 58 *infra*. These alternative methods of recovering damages have received a poor judicial reception, particularly in antitrust class actions. See discussion note 159 *infra*.

35. *See, e.g.*, Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234-36 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Gerlach v. Allstate Ins. Co., 338 F. Supp. 642, 646 (S.D. Fla. 1972); Alsup v. Montgomery Ward & Co., 57 F.R.D. 89, 93 (N.D. Cal. 1972). In *Alsup*, for example, a case involving two actions under the Truth in Lending Act of 1968, 15 U.S.C. §§ 1601 to 1640(a) (1970), one set of plaintiffs who were holders of revolving credit accounts with the defendant, sued on behalf of themselves and approximately 200,000 other credit customers of defendant. 57 F.R.D. at 89. In the other case, plaintiff, also holder of a revolving credit account with defendant, sued on behalf of himself and between five and eight million other credit customers throughout the United States. *Id.* Both actions alleged inadequate disclosure by defendant of the method used to compute finance charges, a violation of the Act, and sought a statutory minimum recovery of $100 per class member for each month defendant violated the Act. *Id.* at 92. The court noted that, because of the size of the two proposed classes, there was a potential recovery threatened against defendant of $20 million in one case and $8 billion in the other. *Id.* The latter amount was 10 times greater than defendant's net worth. *Id.* Hence, largely because of the "horrendous, possibly annihilating punishment" which might result from recovery of $100 per class member, the court found that class treatment was not superior to other available methods for the fair and efficient adjudication of the controversy, and denied plaintiffs' motions for class certification. *Id.* at 93; *accord*, Gerlach v. Allstate Ins. Co., 338 F. Supp. 642, 646 (S.D. Fla. 1972) (class action for statutory damages under Truth in Lending Act inappropriate in part because of potential result requiring Allstate to pay aggregate damages so large that it would be unable to extend coverage to policyholders); Ratner v. Chemical Bank Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972) (rejecting proposed class action under Truth in Lending Act in part because of huge threatened monetary liability of defendant). The results in *Alsup* and *Gerlach* obtained for additional reasons. In *Alsup* the court regarded a potentially huge class recovery as inconsistent with the provision of a $5,000 maximum penalty for willful violations of the Act. *See* 57 F.R.D. at 92-93. In *Gerlach* the court indicated that since an award of reasonable attorneys' fees is provided by the Act, 15 U.S.C. § 1640(a) (1970), there may be no need to allow maintenance of a class action as an incentive to interested attorneys. *See* 338 F. Supp. at 646.

36. 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

37. *Id.* at 235. *Kline* was an action brought on behalf of a class of plaintiffs against a defendant class consisting of all real estate brokers who were members of

The Burden of Individual Notice

Large class actions for damages under the Federal Rules of Civil Procedure present yet another difficulty for the small claimant. The United States Supreme Court recently held, in *Eisen v. Carlisle & Jacquelin*,[38] that in a class action for treble damages brought under rule 23(b)(3), individual notice must be given to all members of the class who can be located and identified with reasonable effort,[39] and that the cost of giving such notice to a class of plaintiffs must initially be borne by the class representative as part of the usual expense of financing litigation.[40] The expense of giving such individual notice in a rule 23(b)(3) action may be so great as to effectively bar litigation of small claims in class form.[41]

The above cases present some disturbing consequences. First, when a direct purchaser is either reluctant to sue his supplier for treble damages, or settles or obtains a judgment in such a suit for less than the total amount of overcharges reaped by the defendant, the inability of indirect purchasers to bring a treble damage action permits the defendant to keep the remaining unlawfully obtained monies.[42] Second, even if direct consumer purchasers contemplate bringing a treble damage class action, it will probably not be warmly received by the courts.[43] Once the class action avenue is foreclosed, the individual interests of

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the Los Angeles Realty Board during the 4 year period preceding the filing of the action. *Id.* at 228. The action alleged a conspiracy to fix brokerage commissions in violation of federal antitrust laws, *id.*, and sought to hold the members of the defendant class jointly and severally liable for treble damages of approximately $750 million. Because of the possibly devastating result of imposing this entire liability upon small defendants, the court concluded that the action was not superior to other methods of adjudication, and for this and other reasons held the action unsuitable for class treatment. *Id.* at 236. *But see* Chevalier v. Baird Sav. Ass'n, 72 F.R.D. 140, 150 (E.D. Pa. 1976) (holding that potentially overwhelming joint and several liability is no reason to dismiss class; rather, any difficulty in this regard is fault of substantive law, not of class action device).

38. 417 U.S. 156 (1974).

39. *Id.* at 173.

40. *Id.* at 177.

41. For example, in *Eisen*, petitioner brought a class action on behalf of approximately six million individuals, institutions, and financial intermediaries, approximately 2.25 million of whom could be identified with reasonable effort. *Id.* at 166. The cost of mailing the required individual notice to these class members at the time of the Court's consideration of the case amounted to $315,000. *Id.* at 167 n.7. Petitioner had consistently maintained that he would not expend this amount in order to recover his $70 in damages and, therefore, the Court ordered the action dismissed. *Id.* at 179. It is important to note that the individual notice requirement of rule 23(c)(2) only applies to class members who are identifiable through reasonable effort. FED. R. CIV. P. 23(c)(2). As to class members who are not identifiable through reasonable effort, the notice required is the best notice practicable under the circumstances. *Id.* Some less expensive form of notice may be resorted to in this latter situation. Moreover, there is some question whether costly postal notice is the only permissible type of individual notice. *See In re* Arizona Dairy Prods. Litigation, [1975] 2 TRADE REG. REP. (CCH) ¶ 60,555 (D. Ariz. 1975) (ordering that notice be printed on milk cartons in milk price-fixing class action).

42. *See* text & notes 142-47 *infra.*

43. *See* text & notes 31-37 *supra.*

the class members are so small that, in most cases, no individual actions are likely to be initiated.[44] The unavailability of a class action, therefore, ensures that "the bulk of the ill-gotten gains reaped by defendants . . . will remain untouched within their . . . coffers,"[45] and the injuries inflicted upon a large group of individuals will go without legal redress.[46] Moreover, the retention of any unlawfully obtained funds by the defendants frustrates the antitrust laws' policy of deterring violators and compelling disgorgement of the fruits of a violation.[47] Finally, to the extent that a wrongdoer diverts resources from productive uses to his own use, he has caused a misallocation of society's resources which, absent class relief, will go uncorrected.[48]

RESTITUTION AS AN ALTERNATIVE REMEDY

In view of the problems outlined above, it is desirable to adapt to class actions a theory of recovery which will allow private parties to bring such actions on behalf of large consumer classes. The theory must be sufficiently flexible to overcome the problems created by the requirement of proof of damages on an individual basis and the administrative difficulties of making an efficient distribution of any recovery. In addition, the theory should be capable of resolving the dilemma posed by the possibility of "annihilating punishment," as well as circumventing, as far as constitutionally permissible, the obstacle presented by the individual notice requirement. Most importantly, any remedy which can avoid the difficulties confronting classes of small claimants will have the desirable effect of preventing unjust enrichment,[49] thereby eliminating any incentive to mass-produce small injuries.

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44. City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 73 (D.N.J. 1971).

45. *Id.*

46. This means that if an individual wrongfully acquires many small sums from a large number of individuals, he may feel confident that the unavailability of the class device will assure that he will not be held accountable for his misdeeds. Hence, an incentive is provided for a potential wrongdoer to inflict many individually small injuries, thereby amassing a large sum of money with the expectation that the injured parties will either not seek or be denied relief.

47. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2075 (1977); *In re* Multidistrict Vehicle Air Pollution, 538 F.2d 231, 234 (9th Cir. 1976).

48. The most obvious context in which the misallocation occurs is in the area of price-fixing. When a producer or a group of producers sets prices at an unlawfully high level, a misallocation of resources results which is roughly equal to the difference between the gross receipts of the defendants at the price which would have prevailed absent the price-fixing and the gross receipts actually acquired at the unlawfully high price. *See* R. POSNER, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 113 (1974). That is, to the extent consumers continue to buy the price-fixers' products at higher prices rather than spending their funds elsewhere, productive resources have been inefficiently utilized. *See id.* If the class action can achieve a rough form of compensation for the group of individuals required to pay the higher prices, the device serves the laudable purposes of depriving the wrongdoer of his booty and allowing these illegally obtained resources to be channeled back into productive uses.

49. *See* Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*,

The remedy which can achieve these results is restitution. Simply stated, when a person benefits at the expense of another, and the retention of the benefit would be unjust, that person is required to make restitution to the other.[50] That is, the person enriched is compelled to restore the status quo ante.[51] Two elements of the restutionary remedy may serve to eliminate some of the impediments to successful maintenance of class actions. First, the primary purpose of ordering restitution is to force a proven wrongdoer to disgorge ill-gotten gains because of the offense to equity and good conscience occasioned by their retention.[52] This characteristic distinguishes restitution from damages in that damages are intended primarily to compensate a plaintiff for losses sustained,[53] ordinarily necessitating their proof by each individual alleged to have been injured by a defendant.[54] The goal of restitution, on the other hand, is to prevent the unjust enrichment of the defendant by compelling him to restore to the plaintiff that which rightfully belongs to the latter.[55] Accordingly, the amount owing in

39 U. CHI. L. REV. 448, 448-51 (1972) (discussing problem of unjust enrichment occasioned by uncollected damage recoveries in class actions).

50. RESTATEMENT OF RESTITUTION § 1 (1937). Restitution is a remedy of ancient origin, and is utilized in many different contexts. The unjust enrichment principle underlying restitution has been traced back as far as the second century A.D. to a statement attributed to Pomponius: "For this by nature is equitable, that no one be made richer through another's loss." J. DAWSON, UNJUST ENRICHMENT 3 (1951). For a collection of writings on the many areas in which restitutionary remedies are utilized, see Wade, *The Literature of the Law of Restitution*, 19 HASTINGS L.J. 1087 (1968); *Symposium—The Law of Restitution*, 19 HASTINGS L.J. 991-1279 (1968).

51. *See* RESTATEMENT OF RESTITUTION § 1, comment a, at 12 (1937). Restitution is theoretically distinct from damages. The former is designed primarily to compel a defendant to relinquish benefits whose retention by him would be unjust, whereas the latter contemplates compensating the plaintiff for losses he has sustained. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.1, at 224 (1973); *see* Bowles v. Skaggs, 151 F.2d 817, 821 (6th Cir. 1945). For a discussion of the implications of this distinction, see text & notes 52-57 *infra*.

52. *See, e.g.*, Atlantic Coast Line R.R. v. Florida, 295 U.S. 301, 309 (1935); Williams v. Washington Metropolitan Area Transit Comm'n, 415 F.2d 922, 944 (D.C. Cir. 1968); D. DOBBS, *supra* note 51.

53. D. DOBBS, *supra* note 51.

54. *See* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 236 n.8 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (recovery of gross damages on behalf of plaintiff class is impermissible since rule 23 "does not eliminate the ultimate need [once the defendant's liability is established] for individual proof of damages by each member of the class").

55. D. DOBBS, *supra* note 51; Teller, *Restitution as an Alternative Remedy for a Tort*, 2 N.Y.L.F. 40, 47 (1956).

It is true that in some instances a plaintiff may obtain restitution of profits made by a defendant through the use of something belonging to the plaintiff—a patent, for example. D. DOBBS, *supra*, § 4.5, at 273. This aspect of restitution raises an interesting problem: If some of the defendant's profits are not due to the intrinsic value of that which he wrongfully obtained from plaintiff, but are attributable to the defendant's ingenuity, may the plaintiff recover that portion? SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972) answers in the negative, reasoning that the deterrent purpose served by requiring restitution of the payments obtained by a fraudulent stock offering "does not justify arbitrarily requiring those [defendants] who invested wisely to refund substantially more than other [violators]." *Id.* at 1104-05. Hence, the portion of the district court's order requiring restitution of profits was reversed, with directions that defendants be required to pay back only the proceeds of the offering plus interest at the legal rate. *Id.* at 1105. *See generally* D. DOBBS, *supra*, § 3.5, at 169-70

restitution is measured not by the loss incurred by the plaintiff, but rather by the extent of the benefit acquired by the defendant.[56] In terms of large class actions, seeking restitution would eliminate the requirement that each individual member of the class assert and prove a claim for compensatory damages as a prerequisite to recovery of amounts acquired by means of illegal overcharges. It is necessary only for the class representative to establish that the defendant has committed a violation of the law, and that by means of that violation he has acquired and holds a certain quantity of money rightfully belonging to the plaintiff class. These two elements of proof would establish the basic entitlement to restitution on a classwide basis.[57] The potential burden faced by the judicial system if individual proof of damages were required as a prerequisite to compelling a defendant to pay back ill-

(rules regarding recovery in restitution of prejudgment interest); *id.* § 4.5, at 273-77 (discussion of restitution of profits).

This Note deals primarily with a method of obtaining restitution for classes of small consumers who have been wrongfully deprived of funds in some way. Where a proven wrongdoer has converted funds rightfully belonging to a consumer class, and has earned profits or interest on these funds, it is necessary that restitution of the profits or interest be required. Otherwise, the defendant will be permitted to gain by his wrong, and the purpose of restitution—prevention of his unjust enrichment—will be frustrated. *See id.* § 3.5, at 170. The result in *Manor Nursing Centers* appears to develop a strange rule that if the defendant is particularly shrewd he will be required only to make partial restitution. This cuts against the purpose of restitution, as it seems unjust to require full restitution from one defendant while permitting the enrichment of the wrongdoer with greater financial acumen.

56. RESTATEMENT OF RESTITUTION § 150 (1937); Teller, *supra* note 55. There are other differences between the restitutionary remedy and damages. *See* Rogers v. Loether, 467 F.2d 1110, 1120 n.32 (7th Cir. 1972), *aff'd on other grounds sub nom.* Curtis v. Loether, 415 U.S. 189 (1974) (distinction between damages and restitution is such that a trial on the issue of damages would be subject to the seventh amendment's grant of right to jury in actions at law, whereas a suit to obtain restitution would not); Woods v. Bomboy, 179 F.2d 565, 566 (3d Cir. 1950) (distinguishing damages from restitution on ground that suit for restitution is one to enforce federal law and restore status quo, and was not for purpose of awarding damages to injured persons).

A qualification is in order at this point. There is some uncertainty regarding the distinction between equitable and legal relief in determining whether a party is entitled to a jury trial. *Compare* Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977) *with* Morelock v. NCR Corp., 546 F.2d 682 (5th Cir. 1976). This Note is not concerned with the seventh amendment ramifications of restitution; rather, its primary concern is with the flexibility of measurement and distribution of monetary recoveries which can be achieved when restitution is sought instead of damages.

57. This aspect of restitution was apparent in Bebchick v. Public Utils. Comm'n, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963), in which the court had to determine an appropriate means of distributing to the public excess bus fares charged pursuant to an invalid rate increase. *Id.* at 203. Noting that it was "not feasible to require refunds to be made to individuals who paid the increase," the court held that the transit company would be required to establish a fund in an amount equal to the invalid 5% increase during the period in question. *Id.* The disposition of the fund was left to the discretion of the Public Utilities Commission, provided its discretion was exercised in later rate proceedings for the benefit of the users of the transit company's services. *Id.* at 204. Although the court did not denominate it as such, the remedy utilized was later recognized as restitutionary. *See* Williams v. Washington Metropolitan Area Transit Comm'n, 415 F.2d 922, 944 & n.102 (D.C. Cir. 1968). Hence, once the defendant is found liable to a group of persons, and to have benefited at the group's expense, the basic right to restitution is established and individual proof of a right to recovery is not a prerequisite to depriving the defendant of his ill-gotten funds.

gotten funds is thus averted,[58] and a possible justification for denial

58. There are two situations where restitution might arguably lead to a different result than the traditional damage recovery. First, if a defendant is shown to have violated antitrust laws by illegally fixing prices, but individual class members are either unidentifiable or are unable to produce individual purchase records adequate to prove damages, a court would probably dismiss a class action. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 72-73 (D.N.J. 1971). By seeking a restitutional recovery, the focus of the inquiry shifts from proof of individual impact upon class members to proof of the gross amount by which the defendant has benefited from the antitrust violation. This shift of focus should permit a court, once the defendant's liability is shown, to measure the extent of unlawful gain by the defendant's own records and, having determined this, to require the defendant to relinquish his unlawful gains. Since the amount owing in restitution is measured in the first place by the defendant's gains, *see* RESTATEMENT OF RESTITUTION § 150 (1937), the logical way to measure this amount is through the defendant's records of the transactions in question. Hence, the requirement that each individual class member prove the impact of the defendant's wrong upon him as a prerequisite to depriving the defendant of his booty may be dispensed with.

Second, even assuming individual class members are identifiable and capable of furnishing proof of the impact on them of a defendant's wrong, if individual demonstration of that impact is required, a court may deny class treatment of the action on the ground that individual proof would consume too much time. *See In re* Hotel Tel. Charges, 500 F.2d 86, 89 (9th Cir. 1974). The change in focus from damages to restitution (and thus from individual loss to the defendant's unjust enrichment) would allow a court to measure the amount of the defendant's gains, once liability is shown, by its own records, thus avoiding the necessity of marching each individual plaintiff into court to prove damages.

The ease of measurement of unjust enrichment will vary, of course, depending upon the nature of the market involved. In seeking restitution for price-fixing violations, for example, unless there are relatively few sellers involved in the conspiracy, resort to the defendant's records to ascertain the amount of unjust enrichment may not decrease significantly the administrative burden of proving damages. Similarly, if market prices fluctuated greatly prior to the implementation of the conspiracy, and were fixed at different levels by each conspirator, it may be difficult to develop an accurate measure of the amount of overcharge actually imposed. *See* Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. REV. 477, 489-90 (1972). On the other hand, if an industry consists of few conspirators (a characteristic predisposing a market to collusion, *see* R. POSNER, *supra* note 48, at 129), and is characterized by relatively small and infrequent preconspiracy price fluctuations, with prices being fixed at fairly uniform levels, proof by use of defendant's records instead of those of individual class members will be simple.

Once a classwide fund is recovered, two questions arise: (1) how (and with what requirements of proof) to make distributions of a recovery to individual claimants; and (2) how to dispose of any unclaimed portion of the fund after all individual claims have been satisfied. Two theories of proof and distribution have previously been presented in answer to these questions. One possibility which has been suggested is the so-called "fluid recovery" of damages. Fluid class recovery of damages consists of three elements: First, an adjudication is obtained of the amount of damages sustained by the class as a whole, thereby creating a damage fund. Next, those class members who are able to do so are permitted to prove individual claims and obtain a portion of the fund. Finally, the undistributed remainder of the fund is administered in some way for the benefit of the entire class. Malina, *supra* at 482.

Another solution to the problems faced by massive plaintiff class actions has been developed by way of an analogy to the trust doctrine of cy pres, the principle that a court of equity will give effect, "as near as possible," to the charitable intent of a testator or settlor when, for example, the object of the charitable intent no longer exists. *See* Note, *The Cy Pres Solution, supra* note 9, at 904; Comment, *supra* note 49, at 452-53. The cy pres analogy recognizes that the ordinary purpose of the law, of achieving individual compensation for every wrong, cannot be fulfilled in the peculiar circumstances of a large class action, and that a court should instead substitute a flexible classwide recovery in order to deter wrongdoers, *see* Note, *The Cy Pres Solution, supra* at 895, 921-24, and to prevent unjust enrichment, *see* Comment, *supra* at 449-52.

These two alternative forms of relief admittedly seek to accomplish the same result which the remedy proposed herein can achieve—classwide relief for large groups of small consumers. The theoretical basis of restitution differs markedly, however, from

of class relief eliminated.[59] Moreover, in certain circumstances measurement of the class recovery by the amount of a defendant's gains may increase the accuracy with which the ultimate recovery is calculated.[60]

The second important characteristic of restitution is that it is an equitable remedy, the availability of which is determined by the exer-

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the underlying aims of the fluid class and cy pres recoveries, and may be more readily adaptable to use in class actions.

First, the fluid class recovery contemplates recovery of classwide *damages*, rather than restitution of wrongfully acquired funds. The pursuit of classwide damages rests theoretically upon the compensation principle, and the requirement that class members individually show that they are entitled to compensation therefore persists as a prerequisite to compelling payment by a defendant. As has already been shown, the need to prove individual damages has resulted in the frequent denial of class action treatment. *See* text & notes 31-34 *supra*. Restitution, on the other hand, is based not upon the compensation principle, but rather on the prevention of unjust enrichment. Although this distinction might be characterized as presenting restitution as merely a euphemism for damages, the change in focus from compensation to the prevention of unjust enrichment vitiates the necessity for individual proof of impact. The distinction, therefore, indicates the superiority of restitution to fluid class recovery of damages.

Second, restitution appears preferable to the cy pres class action recovery and distribution. This is so simply because there is case authority for the use of restitution to compel remuneration to a group of financially injured persons, *see* Williams v. Washington Metropolitan Area Transit Comm'n, 415 F.2d 922, 944 (D.C. Cir. 1968), whereas no similar precedent has been found for the use of cy pres in such situations. Hence, a court presented with a claim for classwide restitution may be more amenable to allowing class treatment of the action than if it were presented with an unprecedented claim based upon a more tenuous analogy to the doctrine of cy pres.

59. To be sure, the discussion thus far pertains only to the proof necessary to require a proven wrongdoer to relinquish his illegal gains. The manner of distributing the funds recovered in restitution to the members of the class entitled thereto presents additional problems. For a discussion of possible methods of distributing a restitutional recovery, see text & notes 75-92 *infra*.

60. This increased certainty results because some situations will involve a defendant (or several defendants) with relatively accurate records of the transactions in dispute, whereas the members of the plaintiff class will have minimal or no records of them. For example, in City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971), the facts of which are discussed in note 8 *supra*, the result would arguably have been different if the class representative had sought a restitutional recovery in lieu of treble damages. While retail purchasers of gasoline probably keep fairly incomplete purchase records, it is extremely likely that a producer of gasoline accounts quite accurately for the gross amount of retail sales of gasoline in a given geographic area. Indeed, the *City of Philadelphia* court acknowledged that quantity and price statistics would be available to establish this amount. *Id.* at 71. Therefore, since restitution is measured in the first instance by the amount of enrichment received by the defendant, once liability for price-fixing is established, the amount of recovery in restitution can be ascertained in two relatively simple steps: Require the defendants each to produce proof of the gross amount of retail sales in the relevant geographic area and calculate the difference between these actual gross sales and the gross sales which would have occurred in the absence of the price-fixing scheme. The former element is readily ascertainable, whereas the latter element need only be proven by evidence sufficient to justify a reasonably accurate estimate, with the wrongdoer bearing the risk of uncertainty. *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946) (measure of damages in antitrust cases). This difference represents the amount of enrichment obtained by the defendants, and, since it was acquired by means of unlawful activity, its retention clearly would be unjust. Therefore, it should be used as the starting point for measuring the ultimate amount of restitution. *But cf.* Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), where a plaintiff class brought an action against a class of approximately 2,000 defendants, seeking to impose joint and several liability for a conspiracy to fix real estate brokerage commissions, and seeking treble damages of $750 million. It is clear that when many defendants are involved, the problem of proving individual participation in the alleged conspiracy cannot be overcome simply by asking for restitution instead of damages. *See id.* at 236.

cise of a traditionally flexible judicial discretion.[61] Hence, restitution is awarded only to the extent necessary to achieve a just result between the parties.[62] Accordingly, a court may, if equitable considerations dictate, order restitution in some amount less than the total enrichment received by the defendant.[63] *Williams v. Washington Metropolitan Area Transit Commission*[64] illustrates this aspect of restitution. In *Williams*, a Transit Commission order authorizing an increase in public transportation fares was declared invalid and set aside.[65] The usual course of action after invalidation of a fare increase would have been to compel the transit company to restore to the public the amount collected during the effective period of the invalid rate increase which represented the difference between the excess fares and the fares in effect prior to the unlawful increase.[66] However, the *Williams* court indicated that there was substantial evidence demonstrating that if such total restitution were ordered, the transit company would be forced to accept an unreasonably low rate of return on its investment.[67] The court therefore held that restitution was proper, but that the transit company could, in equity and good conscience, retain as much of the excess fares as necessary to enable it to earn a reasonable return.[68] If reliable evidence is adduced showing that complete restoration of the status quo would work an unreasonable hardship on the defendant, restitution in a lesser amount may be awarded.[69] This flexible aspect

61. *See* Porter v. Warner Holding Co., 328 U.S. 395, 397-98 (1946). *See also* Hecht Co. v. Bowles, 321 U.S. 321, 328-29 (1943).

62. Democratic Cent. Comm. v. Washington Metropolitan Area Transit Comm'n, 485 F.2d 786, 825 (D.C. Cir. 1973); Williams v. Washington Metropolitan Area Transit Comm'n, 415 F.2d 922, 944 n.106 (D.C. Cir. 1968); *see* Atlantic Coast Line R.R. v. Florida, 295 U.S. 301, 316-17 (1935).

63. Williams v. Washington Metropolitan Area Transit Comm'n, 415 F.2d 922, 944 (D.C. Cir. 1968); *see* Atlantic Coast Line R.R. v. Florida, 295 U.S. 301, 316-17 (1935). The *Atlantic Coast Line* case was an action for restitution of freight charges collected by the railroad pursuant to an invalid Interstate Commerce Commission order. While the Court rejected the claim for restitution, *id.* at 317, it acknowledged that restitution of the full amount of the difference between valid and invalid rates need not be ordered, but that a court might order restitution of an intermediate amount. *Id.* at 316-17.

64. 415 F.2d 922 (D.C. Cir. 1968).

65. *Id.* at 976.

66. *Id.* at 944 (citing Bebchick v. Public Utils. Comm'n, 318 F.2d 187, 203-04 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963)) (following judgment ordering district court to set aside Commission order increasing rates charged by public transit company, court ordered establishment of cash fund or reserve account to be used for benefit of transit customers in later rate proceedings).

67. 415 F.2d at 945.

68. *Id.* at 946, 976. The court further directed that the appropriate amount of restitution be placed in a reserve account to be administered by the Commission for the benefit of farepayers in future rate proceedings. *See id.* at 976 & n.337.

69. It would also seem logical to expect that, since the extent of restitution of illegal overcharges is not a matter of right, but is discretionary with the court, *id.* at 944, the court might properly require restitution of the entire amount of a defendant's unjust enrichment provided that a flexible method of disgorgement were used which would not work an unreasonable hardship on the defendant. For example, instead of requiring a lump-sum payment in an amount less than the total enrichment, the court might com-

of restitution allows the court to tailor an award to avoid imposing an annihilating liability on the defendant.

The two features of restitution just discussed are of particular importance in and uniquely applicable to a class action seeking to recover for price-fixing violations of antitrust law.[70] For example, suppose *A* files a class action in federal court against four paper manufacturers, charging that the four have fixed prices of toilet tissue in violation of federal antitrust laws. The action is brought on behalf of one million users of toilet tissue and seeks a declaration of the defendants' liability and an injunction against further violations. It also seeks to recover the amounts lost by consumers as a result of the conspiracy. The conspiracy is alleged to have continued for 10 years and the total amount of overcharges acquired by the defendants over that period is estimated at $1 billion. Of the four defendants, none has an annual net income in excess of $5 million, so the potential exposure of the four is 200 times this amount. In addition, during the relevant period, many of the class members have moved into and out of the area affected by the conspiracy, thus complicating the possibility of their individual identification. Moreover, few, if any, of these class members will be able to submit proof of the amounts of toilet tissue purchased during the period in question.

If the action proposed in this hypothetical situation proceeds to a judgment determining that the defendants have unlawfully fixed prices, the potential damage liability of the defendants is probably radically disproportionate to their ability to pay a lump-sum judgment. Likewise, if precise individual proof of damages were required, most class members would be unable to prove with reasonable certainty the extent of their injuries.[71] For these reasons, some courts might well decide that

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pel the defendant to make restitution in installments over an extended period of time, calculating the amount of each installment so as to avoid needless damage to the defendant. This installment plan could be continued until the total payments equaled the amount unlawfully collected plus interest.

70. A significant threshold question in actions seeking restitution under antitrust law is whether the particular statute providing a private right of action also allows private parties to seek restitution. For purposes of the example to be used in the text, however, it is assumed that restitution is available under a hypothetical statute. The problem of statutory construction is discussed more fully at text & notes 93-162 *infra*.

71. Of course, not all courts require that class members come into court and prove damages on an individual basis. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260-63 & nn. 151, 154 (5th Cir. 1974) (permitting various techniques for classwide distribution of back pay awards, including use of average damages formula, noting that requirement of unrealistic accuracy should not be permitted to frustrate compensatory policy of title VII discrimination suits); Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34, 38 (S.D.N.Y. 1977) (generalized formula may be permissible method for determining damages recovery in antitrust class action); *In re* Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 350-55 (E.D. Pa. 1976) (dictum). *But see* Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 431-34 (W.D. Mo. 1973) (rejecting attempt to utilize average damages formula in price-fixing action, and denying

it would be inappropriate to allow the actions to proceed in class form,[72] and small claimants would effectively be denied any redress, while the defendants, if guilty of violations, would be unjustly enriched at the expense of the plaintiff class and society as a whole.[73] To avoid this undesirable result, *A*'s claim for recovery should be treated not as a claim for damages but as a prayer for restitution.[74]

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motion for certification of suit as class action due, *inter alia*, to problems of proving individual damages).

A recent antitrust settlement of a price-fixing suit in the district of Arizona merely required consumers to submit claim forms containing general information to which the court will apply a "reasonable formula" to determine the aggregate amount of an individual household's purchases. *Notice of Class Action and Settlement to Arizona Bread Consumers*, Ariz. Daily Star, July 25, 1976, § B, at 3, col. 4. The action was originally brought by the Arizona Attorney General and the Arizona Consumers' Council on behalf of all persons in the State of Arizona who purchased bread or bakery products in their original packages at retail prices, and alleged that six bread companies fixed prices for bakery products between 1969 and 1973. *Id.* The defendants denied the charges but agreed to settle the lawsuit, agreeing also to the above-described method of determining the entitlement of individual households to a share of the $6 million settlement fund. *Id.* The district court approved the proposed settlement on July 8, 1976. Ariz. Daily Star, July 9, 1976, § B, at 6, col. 1. Claimants were required as a condition of their recovery to indicate the number of years from 1969 to 1973 that their household was located in Arizona, as well as the average number of persons in the household during the time spent in Arizona. *Claim Form*, Ariz. Daily Star, July 25, 1976, § B, at 3, cols. 4-6. Arguably, this case does not present a true flexible measure of damages. It is merely a mechanism of distributing a settlement to persons entitled thereto. Since there has been no adjudication of the defendants' liability for price-fixing—criminal prosecutions against the defendants terminated with "no contest" pleas, which have no legal effect in later actions, even as prima facie evidence of violations, *see* Clayton Act, § 5(a), 15 U.S.C. § 16 (1970)—the $6 million settlement fund may simply represent the aggregate "nuisance value" of the lawsuit to the defendants; settling may be viewed as cheaper than litigating the action to final judgment. Hence, use of judicially approved settlements, see *In re* Antibiotics Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971), as authority for a means to obtain a money judgment after full litigation of a case, may not be permissible. *See In re* Hotel Tel. Charges, 500 F.2d 86, 90 (9th Cir. 1974).

72. *See, e.g., In re* Hotel Tel. Charges, 500 F.2d 86, 89 (9th Cir. 1974) (necessity of proving individual damages caused individual questions to predominate over common issues, rendering rule 23(b)(3) action alleging violations of Sherman Act inappropriate for class treatment); Alsup v. Montgomery Ward & Co., 57 F.R.D. 89, 93 (N.D. Cal. 1972) (potentially overwhelming liability precluded maintenance of class action for damages under Truth in Lending Act); City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 72-73 (D.N.J. 1971) (certification of antitrust class action for damages on behalf of retail purchasers of gasoline denied due to class members' inability to prove individual damages).

73. See text & notes 33-34 *supra*.

74. Generally, the power of a federal court to order restitution is equitable in nature, arising from the historic power of equity to award complete relief. *See, e.g.*, Mitchell v. Robert de Mario Jewelry, Inc., 361 U.S. 288, 291-92, 296 (1960); Porter v. Warner Holding Co., 328 U.S. 395, 398-99 (1946); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103-04 (2d Cir. 1972). For example, the Court held in *Porter* that, in a suit by the Price Administrator under the Emergency Price Control Act of 1942 to enjoin collection of excessive rents, the district court could order restitution of past overcharges as an adjunct to the decree. 328 U.S. at 398-99. The Court was careful to indicate the distinction between damages and restitution and noted that the Administrator, by seeking restitution, did not seek damages, but rather asked the court to act in the public interest to restore the status quo and order the return of that which rightfully belonged to the defendant-landlord's tenants. *Id.* at 402.

It is also true that an order for restitution may be obtained independently of any injunctive relief if reasonably necessary to enforce compliance with and effectuate the purpose of the particular statute involved. *See* United States v. Moore, 340 U.S. 616, 619-20 (1951) (in action to recover excess rent charges, order of restitution is proper

OBSTACLES TO RESTITUTION

Although the general theoretical basis for restitution is sound, there are, nevertheless, several questions raised by the application of restitution to mass consumer class actions. Among them are problems of efficient distribution of recoveries, statutory construction, and interpretation of the Federal Rules of Civil Procedure in a manner consistent with due process requirements.

Problems of Distributing Classwide Restitution

A perplexing difficulty in using restitutionary principles lies in devising a method of making an effective distribution of any amount ultimately recovered on behalf of the class. It appears consistent with the equitable nature of restitution to state that, once a restitutional fund is recovered by a plaintiff class, it may be distributed by the court in the most practicable way, limited only by the requirement that the fund be used for the general benefit of the class originally injured by the defendant's conduct.[75] The distribution itself really consists of two

"other order" within meaning of statute authorizing suit, and may be awarded in addition to injunctive or other equitable relief). See text & note 57 *supra*.

In the hypothetical presented, however, *A* seeks injunctive relief and, as stated in *Porter*: "Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." 328 U.S. at 399. While the dispute in *Porter* arose under a statute vesting jurisdiction in the district court to grant "a permanent or temporary injunction, restraining order, *or other order*," *see id.* (emphasis added), and might arguably be limited to situations in which issuance of similar "other orders" is expressly permitted, the decision may not be so limited. For example, in Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 19 (1974), the Supreme Court indicated that *Porter* rested not merely on the "other order" language of the statute, but also on the traditionally broad powers of a court of equity. *See also* Walling v. O'Grady, 146 F.2d 422, 423 (2d Cir. 1944) (in suit under Fair Labor Standards Act, district court, notwithstanding absence of express statutory authorization, could order reparation of monetary loss suffered by employees, such power being necessary to carry out the prohibitions of the Act). Therefore, when *A* seeks to enjoin violations of the antitrust laws, the court may, as an adjunct to any injunctive relief, order restitution of any amounts obtained by the defendants as a result of their illegal scheme. Since restitution is measured by the extent of the defendants' gains, any difficulties of individual proof of damages as a condition to class recovery disappear.

Likewise, since the amount of restitution may be limited once evidence of substantial hardship to the defendant is shown, a decree awarding restitution may be tailored so as to eliminate any threat of "annihilating punishment." See text accompanying notes 63-69 *supra*. In the toilet tissue hypothetical there are probably considerations sufficiently compelling to warrant such a limitation on any restitutionary recovery. First, assuming the defendants are all publicly held corporations, it would be inequitable to allow a lump-sum recovery against the defendants since the size of the prospective award would likely prevent the defendants from earning any net income for several years. This works a hardship on the stockholders of the defendants who are probably innocent of any wrongdoing. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). Second, manufacturers of toilet tissue provide a socially desirable and, indeed, necessary product. Liability for a judgment so far in excess of the defendants' earning power would probably drive them out of business, thereby depriving society of economically and socially useful business entities. For both of these reasons, any restitutional recovery should be tailored to the situation before the court.

75. *See, e.g.*, Democratic Cent. Comm. v. Washington Metropolitan Area Transit Comm'n, 485 F.2d 786, 26-28 (D.C. Cir. 1973) (court's duty in administering restitu-

parts. As a threshold matter, some form of notice should be given to absent class members, notifying them of the recovery and of their right to submit a claim for an individual share thereof.[76] Once these individual claims have been satisfied, the court must determine the disposition to be made of the unclaimed funds.[77]

In the context of price-fixing, perhaps the easiest, most direct method of distributing the uncollected funds so as to benefit class members is by the same conduit through which the defendant acquired the monies—the price mechanism.[78] Simply stated, a wrongdoer might be directed to perform "price distribution" by reducing its prices to a reasonable level until the uncollected fund is fully depleted. This method of distribution, in addition to benefiting consumers of the de-

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tional fund of excess bus fares was to choose among the "many ways in which the sum owing in restitution could be utilized profitably by the bus-riding public"); SEC v. Texas Gulf Sulphur Co., 443 F.2d 1301, 1307-08 (2d Cir. 1971) (affirming order that profits made by illegal insider stock dealings be paid into escrow account, subject to payment of claims, with any unclaimed funds to become the property of Texas Gulf Sulphur); Bebchick v. Public Utils. Comm'n, 318 F.2d 187, 203-04 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963) (disposition of restitutionary fund left within discretion of Commission subject to requirement that discretion be exercised for the benefit of the class of utility users who paid excessive rates).

76. If the action is one brought under FED. R. CIV. P. 23(b)(2), pretrial notice arguably should not be required. *See* text & notes 176-98 *infra.*

Once a restitutionary fund is established and opened for individual claims, a proof of claim procedure should be adopted which serves both to minimize the likelihood of fraudulent claims and to lessen the possibility of protracted claim litigation. Perhaps the simplest method would be to distribute the fund on a pro rata basis to the class members who seek individual shares. *See* Dickinson v. Burnham, 197 F.2d 973, 978 (2d Cir. 1952) (pro rata distribution of recovery in securities fraud action). If, in the hypothetical already discussed, the injured class consisted of all persons who purchased toilet tissue at retail outlets during the period of the conspiracy, then pro rata distribution could be effectuated by paying funds to individual consumers who submit a sworn claim form showing that they are members of the class. For all practical purposes, this proof could be made by an affidavit stating that the claimant was a resident of the geographic area served by defendants during the conspiracy. A formula could then be devised, based upon population and sales data, to arrive at appropriate distributive shares. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260-63 (5th Cir. 1974); discussion note 71 *supra.* For example, the fund could be divided into as many shares as the formula indicates are proper, and each class member would be entitled to at least one share, and a special master might be appointed to process claims. *See In re* Western Liquid Asphalt Cases, 487 F.2d 191, 200-01 (9th Cir. 1973) (dictum). *But cf.* Bernard v. First Nat'l Bank, 275 Ore. 145, —, 550 P.2d 1203, 1218 (1976) (unless separate adjudications are eliminated, nothing is accomplished by shifting the onus of adjudication onto a special master). This approach should result in a significant savings of time and effort. Protection against sham claims might be provided by an in-depth audit of small samples of claims submitted. *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1520-21 (1976). For a discussion of the possible due process implications of such a procedure, see discussion note 198 *infra.*

77. See discussion note 58 *supra*, describing cy pres and fluid recovery methods of damage distribution in class actions.

78. The first case to suggest this type of distribution was Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 265 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974), in which the district court developed the "fluid recovery" theory for recovery of treble damages. See discussion note 58 *supra.* The court of appeals subsequently rejected this approach to class recovery in an opinion vacated by the United States Supreme Court. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974). For a complete history of the *Eisen* saga, see 417 U.S. at 159-69.

fendant's goods, operates to correct the misallocation of resources originally occasioned by the defendant's conduct.[79] Price distribution, however, poses several interesting problems. This form of distribution occurs over time, and, during the period over which the price reductions extend, consumers may move into and out of the relevant market. This fact has led to the criticism of price distribution on the ground that newcomers in the market will obtain windfalls and, conversely, that those who depart from the market will receive no compensation.[80] This disapproval, however, is unwarranted. First, it should be kept in mind that to bestow a windfall on a few consumers is preferable to permitting a wrongdoer's unjust enrichment.[81] More fundamentally, since the individual claims involved in this discussion are assumed to be very

79. The extent to which any misallocation will be eliminated depends largely upon the responsiveness of the demand for the defendants' goods to changes in price. If the quantity of the defendants' goods demanded changes little in response to fluctuations in price, then a restitutionary decrease in price will make funds available to consumers which can be spent on other goods or services, thereby reallocating society's resources. On the other hand, if the quantity demanded varies substantially with changes in price, the price reduction may simply increase the volume of the defendants' sales and result in little or no reallocation to other sectors of the economy. The increase in the defendants' sales appears superficially to be a windfall to the defendants. This, however, would not be the case if prices of the defendants' products were reduced to the break-even point, where the defendant can earn only so much as is necessary to cover his costs of production. Consumers, on the other side, are benefited, since although they do not transfer purchases to other sectors of the economy, they are compensated by being enabled to purchase greater quantities of the defendants' goods than they would be able to in the absence of a price reduction.

80. *See* Comment, *supra* note 49, at 461-62.

81. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2075 (1977) (deterrence and disgorgement functions of antitrust laws better served in treble damage actions by permitting triple windfalls for direct purchasers than by requiring apportionment of recovery between direct and indirect purchasers); D. DOBBS, *supra* note 51. However, if there is no overlap between the members of a plaintiff class and the group actually injured by the wrongful conduct of a defendant, a court may refuse to compel restitution, even though the defendant has been shown to be unjustly enriched. For example, in Bangor & Aroostook R.R. v. Brotherhood of Locomotive Firemen & Enginemen, 442 F.2d 812 (D.C. Cir. 1971), four railroad carriers unlawfully eliminated 183 fireman positions from their crews. *See id.* at 815-17. The union filed a motion for an accounting, seeking, *inter alia*, an order requiring payment of the total amount of wages saved by the railroads as a result of eliminating these positions, less any wages already paid to individual firemen, for distribution to the appropriate class of firemen or for the benefit of firemen generally. *Id.* at 817. However, recovery for this latter purpose was denied. *See id.* at 821-22. The union argued that if recovery were not allowed for the benefit of firemen generally, the carriers would be unjustly enriched, and it therefore urged that funds attributable to the wages saved by failing to hire firemen should be devoted to use for the general benefit of the group it claimed most nearly approximated the class damaged—the individuals employed as firemen. *See id.* at 820. In support of this argument, the Brotherhood relied upon Bebchick v. Public Utils. Comm'n, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963), discussed in note 57 *supra*. However, the court distinguished *Bebchick* on the following ground: "The theory of The Order [in *Bebchick*] was that there was a reasonable continuity and equivalence between the class of persons injured . . . and the class of riders who would receive the benefits of the fund in the future . . . ." 442 F.2d at 821. The court could not, however, "say with reasonable confidence that the class of injured persons [in *Bangor*] coincide[d] in substantial part with the membership of the Brotherhood, or firemen as a whole." *Id.* at 820; *see also* Blue Chip Stamps v. Superior Court, 18 Cal. 3d 381, 386-87, 556 P.2d 755, 759, 134 Cal. Rptr. 393, 397 (1976) (vacating, on similar grounds, a superior court order certifying a class action against Blue Chip seeking recovery of excess sales tax charges).

small and widely dispersed, it is necessary to recognize that a class action cannot, in the ordinary sense, seek precise individual compensation for class members' losses.[82] Instead, class relief for large groups of small claimants should aim primarily at the prevention of unjust enrichment, at benefiting the class as a whole, and at the correction of a gross misallocation of resources. Viewed in this light, it should be immaterial that a few class members may not benefit from the ultimate recovery, or that a few newcomers probably will gain therefrom.

A more serious criticism of price distribution is that it may have undesirable competitive effects if goods identical to or substitutable for those subject to the price-fixing agreement are supplied by other sellers who have not engaged in any unlawful activity.[83] In this situation, a reduction in the price of the wrongdoer's goods may, depending upon the responsiveness of purchasers to price changes, cause an increase in the wrongdoer's sales and a corresponding decrease in the sales of innocent suppliers.[84] This potential occurrence has been characterized as court-ordered predatory pricing,[85] and it has been suggested that, in order to minimize this competitive disadvantage, prices might be lowered substantially so that the fund would be exhausted in a short time span.[86] Since the recovery is distributed rapidly through a large price decrease, the number of newcomers to the market who obtain windfalls will be decreased. Likewise, because fewer people will have left the market, more members of the original class will benefit from the recovery.[87] However, requiring a large, rapid price distribution yields one undesirable effect. The larger the price decrease, the greater will be the potential for imposing a sudden, crushing liability on the wrongdoer, possibly driving him out of business altogether. If he provides useful goods or services, subjecting him to a sudden economic hardship in this manner would deprive society of the products he supplies, perhaps resulting in greater damage than was occasioned by his original wrong.[88] A possible alternative to the large price reduction is to decrease the prices of the goods of all suppliers in the relevant market, including those of innocent suppliers. The defendant could then be required to pay a direct subsidy to the innocent suppliers to compensate them for the difference between the profit margin under their usual prices and the margin earned under the court-ordered prices. This avoids

82. *See* Comment, *supra* note 49, at 463.
83. *See id.* at 462-63.
84. *See id.*
85. Comment, *supra* note 9, at 447 n.119.
86. Comment, *supra* note 49, at 463.
87. *See id.* at 461-63.
88. *Cf.* H. FRIENDLY, *supra* note 74 (noting probable hardship to innocent stockholders of defendant corporations caused by massive class recovery).

any adverse competitive effects by maintaining equality between the relative prices of the goods, and, if implemented over a sufficiently extended period of time, avoids forcing the defendant out of business.[89]

In any event, the potential for the creation of competitive disadvantages through ordering price rollbacks depends upon the nature of the market for the particular type of good involved, as well as the extent to which the product acts as a substitute for other types of goods. A court, in determining whether it is appropriate to order price distribution must therefore consider each case on its facts, taking into account such factors as the responsiveness of purchaser demand for the same product as between different sellers, the responsiveness of demand for the product to changes in the relative prices of other commodities, the number of suppliers of the product or its substitutes, and the defendant's ability to subsidize any price reductions required of innocent suppliers. In addition to these market factors, the court must, of course, evaluate the administrative burden which might be imposed upon it,[90] as well as the possibility that the administrative expense of price distribution may swallow up the potential benefit to the class. If, on balance, the court determines that the benefits to be derived from price distribution are outweighed by its expected adverse market effects and the potential supervisory burden it poses for the court and litigants, then another form of distribution must be developed.[91] Clearly, the solution to the problems of recovery disposition is in the hands of the courts, and they must recognize that difficulties in distribution cannot justify adopting a judicial policy which permits a wrongdoer to retain the fruits

89. It has also been argued that court-ordered price distribution may cause producers to reduce the quality of the goods or services they offer, and that the court might be unduly burdened by overseeing the defendants' operations to guard against quality cutbacks. *See* Comment, *supra* note 49, at 462. If these quality reductions result from the inability of a producer to cover increased or rising costs, a possible alternative to price distribution is to establish a reserve account in the amount of the restitutionary recovery and offset against the account any future cost increases in order to maintain prices at a given level until the fund is depleted. *Cf.* Bebchick v. Public Utils. Comm'n, 318 F.2d 187, 204 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963) (order directing that transit overcharges be placed in account to be utilized in future ratemaking proceedings for benefit of transit users).

90. *See Developments*, *supra* note 76, at 1523 n.354; Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 370 (1971).

91. One suggested alternative to price distribution is distribution of any uncollected damages recovery by allowing the funds to escheat to the federal, state, or local government, whichever is best able to effectuate constructive distribution to the class of injured persons. *See* Comment, *supra* note 49, at 453-58 & n.29.

Another possibility would be to determine first the total amount of unlawful overcharges. If the overcharges were imposed for a commodity such as milk or bread, a per unit (half-gallon or loaf, for example) overcharge could be calculated. The fund could then be distributed by means of direct mailing of coupons to households in the geographic area affected by the unlawful activity entitling the holders to per unit discounts substantially equal to the unit overcharges. This technique has the advantage of compensating the injured class more directly than the escheat method, while perhaps being preferable to a proof of claim procedure because it enables the court to avoid the onus of processing individual claims.

of his illegal conduct.[92] Even though an efficient means of disposing of classwide relief may be developed, however, it cannot be utilized unless a class representative is legally permitted to obtain restitution. In this regard, statutory construction is of great importance, and will now be explored.

Statutory Implications of Restitution

Since most class actions brought in federal court will necessarily be based upon violations of rights secured by statute,[93] a prospective class representative must ascertain whether restitution is available under the particular statute involved. Restitution is recognized as being primarily an equitable remedy, and although the equity jurisdiction of federal courts may not be limited in the absence of an unambiguous statement in or inference from the statute in question,[94] the reach of an equity court is permissible only if consistent with the purposes of the legislation under which relief is sought.[95] In the context of the hypothetical posed herein, it is therefore necessary to ascertain whether classwide restitution is available under the federal antitrust laws.

Federal Antitrust in General. The federal antitrust laws[96] are designed to provide, in the most comprehensive way possible, protection

92. *See* Blue Chip Stamps v. Superior Court, 18 Cal. 3d 381, 387, 556 P.2d 755, 759, 134 Cal. Rptr. 393, 397 (1976) (Tobriner, J., concurring). As was stated by the Ninth Circuit: "The day is long past when courts . . . will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages." *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

The court's basic task when confronted with a claim for classwide restitution is to analyze the economic pros and cons of whether, and how, to award relief. This is nothing more than the balancing of equities and hardships in which equity courts have traditionally engaged in determining the propriety and form of equitable relief. *See* D. DOBBS, *supra* note 51, § 2.4, at 52-55.

93. The United States Supreme Court, in Zahn v. International Paper Co., 414 U.S. 291 (1973), held that each class member in a rule 23(b)(3) class action for damages must satisfy the $10,000 jurisdictional amount requirement, 28 U.S.C. §§ 1331(a), 1332 (a) (1970), and that any plaintiff who does not must be dismissed from the case. 414 U.S. at 301. In view of this holding, and the Court's previous conclusion in Snyder v. Harris, 394 U.S. 332 (1969), that aggregation of class members' claims to reach the jurisdictional amount is ordinarily impermissible, small claimants will be limited to seeking class relief pursuant to statutory schemes containing provisions eliminating the jurisdictional amount requirement. *See* Clayton Act, § 4, 15 U.S.C. § 15 (1970) (authorizing private treble damage actions without regard to the amount in controversy).

94. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

95. *See* Moody v. Albermarle Paper Co., 422 U.S. 405, 417 (1975) (in the field of legislative remedies, equity does not vary merely with the length of "the Chancellor's foot," and equitable remedies must be granted in a manner consistent with Congress' purpose in enacting legislation).

96. The main provisions of the federal antitrust laws are the Sherman Antitrust Act, 15 U.S.C. §§ 1-11 (1970), and the Clayton Act, 15 U.S.C. §§ 12-27 (1970). The price-fixing agreement hypothesized in this Note, see text & notes 70-74 *supra*, is prohibited by Sherman Act, § 1, 15 U.S.C. § 1 (1970). An agreement to fix prices is a per se violation of section 1, regardless of the reasonableness of the prices agreed upon or the ability of the defendants to control the market. *See* United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940). Hence, the hypothetical agreement posed herein is, by itself, violative of the statute.

against combinations and conspiracies in restraint of trade.[97] These statutes, which express a federal public policy of fostering free competition,[98] were aptly described by one court as "almost an economic constitution for our complex national economy."[99] They are designed not merely to prohibit and remedy wrongs to individuals, but also to prevent economic harm to the general public.[100] Because of this design, private remedies furnished by the antitrust laws are applied not only to compensate those directly injured by antitrust violations, but also to preserve, in the public interest, free competition in the marketplace.[101] Private enforcement of the antitrust laws plays a significant role in protection of this public interest by penalizing wrongdoers and deterring violations.[102] Indeed, the private action is a necessary part of antitrust enforcement since, although the government has broad investigatory and enforcement powers, the limited resources of the Department of Justice cannot be relied upon to ferret out all antitrust violators.[103] Moreover, perhaps the most significant deterrent to violations of the antitrust laws lies in the spectre of a potential multimillion dollar recovery by private plaintiffs.[104] With these factors in mind, it is clear that a private antitrust plaintiff sues not only in his own behalf, but as a "private attorney general."[105]

Private Relief Under the Antitrust Laws. Private parties may seek two types of relief under the federal antitrust laws: treble damages under section 4 of the Clayton Act,[106] and injunctive relief under section 16

97. D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 173-74 (1915).
98. Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1075 (9th Cir. 1970).
99. N.B.O. Indus. Treadway Co.'s v. Brunswick Corp., 523 F.2d 262, 279 (3d Cir. 1975), *vacated and remanded on other grounds sub nom.* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 97 S. Ct. 690 (1977).
100. *See* D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 174 (1915).
101. *See* Fortner Enterprises v. United States, 394 U.S. 495, 502 (1969).
102. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 97 S. Ct. 690, 696 (1977) (discussing section 4 of the Clayton Act). *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 246-253 (1977) (excellent general treatment of private enforcement issues).
103. *See* Rashid, *A Government Perspective*, 8 SW. U.L. REV. 515, 515-18 (1976); Tunney, *A View from the Senate*, 8 SW. U.L. REV. 510, 510 (1976). *See generally Symposium—The Effectiveness of the Treble Damages Action as an Antitrust Enforcement Mechanism*, 8 SW. U.L. REV. 505-76 (1976).
104. A significant comment in this regard was made by Mr. Justice Black, writing for the majority in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968): "[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Id.* at 139; *see* Real, *Some Remarks from the Judiciary on the Private Enforcement of the Antitrust Laws*, 8 SW. U.L. REV. 525, 530 (1976).
105. Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276, 279-80 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2651 (1977). Although the Supreme Court regards section 4 of the Clayton Act as an essentially remedial provision, it nevertheless recognizes that the treble damages available thereunder play important penal and deterrent roles in enforcing the antitrust laws. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 97 S. Ct. 690, 696 (1977).
106. 15 U.S.C. § 15 (1970).

of the Clayton Act.[107] For either or both of two reasons, treble damage relief may be unavailable to consumer classes. First, if the class consists of injured consumers who have not dealt directly with the alleged wrongoers, the class is not injured within the meaning of section 4, and is barred by *Illinois Brick Co. v. Illinois*[108] from recovering treble damages.[109] Moreover, even assuming the plaintiff class is composed of direct purchasers entitled to sue under section 4, courts have repeatedly concluded that antitrust class actions on behalf of large consumer classes are unmanageable and not suitable for class treatment.[110] In the case of class actions by indirect consumer purchasers, treble damages are doubly unavailable. The question presented here, therefore, is whether private parties may, consistent with *Illinois Brick*, obtain restitution on behalf of large classes of small consumer claimants under section 16 of the Clayton Act, thus avoiding the manageability problems facing antitrust damages claimants.

Restitution under Section 16 of the Clayton Act. Section 16 provides that any person may obtain injunctive relief "against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity."[111] Although this provision is designed not merely to provide a private remedy, but also to encourage private enforcement of the antitrust laws,[112] the extent to which private parties may utilize section 16 to obtain restitution in consumer class actions is yet unclear.

A case which gives an instructive analysis of the problem is *In re Multidistrict Vehicle Air Pollution*,[113] in which the Ninth Circuit considered the possible uses to which section 16 of the Clayton Act might be put. In *Air Pollution*, suits were brought against the country's four largest auto manufacturers, alleging a conspiracy between the defendants, through their trade association, to suppress and eliminate competition among themselves in the development, patenting, and installation of automobile pollution control devices.[114] As part of the relief re-

107. 15 U.S.C. § 26 (1970), *as amended by* Pub. L. No. 94-435, tit. III, § 302(3), 90 Stat. 1396.
108. 97 S. Ct. 2061 (1977).
109. *See* text & notes 15-25 *supra.*
110. *See* text & notes 31-34 *supra.*
111. 15 U.S.C. § 26 (1970), *as amended by* Pub. L. No. 94-435, tit. III, § 302(3), 90 Stat. 1396. The 1976 amendment gives private persons an additional incentive to enforce the antitrust laws by directing the court to award costs and reasonable attorneys' fees to a plaintiff who "substantially prevails" under section 16.
112. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969). The Court noted in *Zenith Radio* that section 16 should be construed with this purpose in mind, and with an awareness that it envisions a flexible equitable remedy whose availability should vary directly with the needs of the public interest Congress intended the antitrust laws to protect. *See id.* at 131.
113. 538 F.2d 231 (9th Cir. 1976), *noted in* 10 LOY. L.A.L. REV. 237 (1976).
114. 538 F.2d at 233. Appellants (22 states, and various counties, cities, and indi-

quested, plaintiffs sought "restitution" of the cost of installing pollution control equipment to those persons who had fitted their vehicles with such devices,[115] and an order requiring defendants to install pollution control equipment on cars that were produced without such devices.[116] Both requests were denied.[117] The claim for restitution was denied for two reasons. First, the court noted that section 16 of the Clayton Act limits the equitable remedies available to those against "threatened loss or damage," and that the reimbursement sought was for losses already incurred—the amount the owner paid to retrofit his vehicle.[118] Recovery for past losses was said to be "covered under § 4; it comes under the head of damages."[119] In addition, the court concluded that the remedy sought was not restitution, since restitution is appropriate only to compel repayment of wrongfully acquired funds, and defendants had received no money to which they were not entitled.[120]

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viduals) claimed that the result of the conspiracy, alleged to have continued from 1953 into 1969 (when it terminated in a consent decree with the United States, *see* United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd per curiam sub nom.* City of N.Y. v. United States, 397 U.S. 248 (1970)), was that millions of automobiles were driven without effective emission control devices, thereby producing the country's most serious air pollution problem. 538 F.2d at 233.

115. 538 F.2d at 234.

116. *Id.*

117. *See id.* at 234, 236.

118. *Id.* at 234. "Retrofit" was defined by the court as installation of pollution control devices on cars not already so equipped, and as updating other devices to present day technological levels. *Id.* at 234 n.3.

119. *Id.* at 234. The Ninth Circuit took a more restrictive view toward the meaning of "threatened" than did the district court, which viewed the language of section 16 as referring not only to a threat of future unlawful conduct, but also as encompassing injunctive relief against continuing loss or damage resulting from conduct already terminated. *See In re* Multidistrict Vehicle Air Pollution, 367 F. Supp. 1298, 1302 (C.D. Cal. 1973), *aff'd*, 538 F.2d 231 (9th Cir. 1976); *accord*, Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 488 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966) (once violation of antitrust laws found, court is not limited to prohibition of illegal activity; rather, court may prohibit other actions if necessary to prevent retention of the fruits of defendant's violation and to discourage future illegal activity). *Cf.* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969) (section 16 plaintiff "need only demonstrate a significant threat of injury from an impending violation . . . or from a contemporary violation likely to continue or recur").

The Ninth Circuit in *Air Pollution* was not presented with a consumer class action like those upon which this Note is based. As the court noted, the action did not involve accrual of unlawful benefits to the defendants at plaintiffs' expense; hence, the case was not a proper one in which to seek restitution. *See* 538 F.2d at 236-37 n.7; see also discussion note 137 *infra*. *Id.* at 234. Consequently, the court may have assumed the availability of a workable treble damages action when it reached its conclusion on this point. Nonetheless, in view of the Ninth Circuit's demonstrated hostility toward consumer class actions, *see* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 238-39 (9th Cir. 1974) (Duniway, J., concurring), *cert. denied*, 421 U.S. 963 (1975); *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974), it may be that pursuit of any monetary recovery for consumers injured by antitrust violations in the Ninth Circuit is a futile tilting at windmills. Regardless, the position adopted by the district court in *Air Pollution* seems to be the preferable one. This is so since, given the response of the courts to consumer class actions, see text & notes 8-11 *supra*, it is necessary to devise a construction of section 16 which prevents unjust enrichment of antitrust violators.

120. *See* 538 F.2d at 234.

In denying the request for compulsory retrofitting,[121] the court enumerated three functions which injunctive relief under section 16 might serve: (1) termination of illegal conduct; (2) depriving violators of the benefits of their illegal conduct; and (3) restoration of competition in the marketplace.[122] It concluded that compulsory retrofitting under section 16 would not serve any of these purposes and was, therefore, unavailable.[123] Despite this apparently expansive interpretation of the extent of section 16 relief, the court left uncertain whether affirmative injunctive relief is available under the section.[124] The Ninth Circuit in *Air Pollution* indicated that affirmative equitable relief, of which restitution is one type, might be granted under section 16 where its effect is to eliminate the anticompetitive results of an antitrust violation.[125] This statement was based upon several United States Supreme Court cases approving or requiring affirmative injunctive relief against antitrust violations in actions brought by the United States under section 4 of the Sherman Act[126] or section 15 of the Clayton Act.[127] The *Air*

121. *Id.* at 234, 236.

122. *Id.* at 234 (citing Schine Chain Theaters, Inc. v. United States, 334 U.S. 110 (1948)). *Schine Chain Theatres* was an action by the United States against a theatre chain, alleging a conspiracy in the acquisition and operation of theatres in violation of the antitrust laws. The Supreme Court held that the district court could properly enjoin future violations and order the defendant to divest itself of wrongfully acquired theatres. 334 U.S. at 126-29. The Court reasoned that an injunction against future violations would be inadequate to protect the public interest; merely to forbid the continuation of the illegal conduct would permit the defendant to retain the wrongfully acquired fruits of his anticompetitive activity. *Id.* at 128. Since this result would render the antimerger laws ineffectual, divestiture and dissolution were held to be essential elements of the decree of injunction. *See id.* The Court noted that, like restitution, dissolution and divestiture deprive the wrongdoer of his ill-gotten gains, thereby protecting the public interest by undoing what might have been prevented had the violation been discovered sooner. *Id. See also In re* Multidistrict Vehicle Air Pollution, 367 F. Supp. 1298, 1302 (C.D. Cal. 1973), *aff'd on other grounds*, 538 F.2d 231 (9th Cir. 1976); Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 488 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966). Similarly, when an antitrust violation results in accrual of monetary benefits to the violators at the expense of consumers, injunctive relief seeking solely to prevent repetition of the offense will result in permitting retention of the ill-gotten profits. To avoid this result, restitution under section 16 should be made available.

123. 538 F.2d at 236.

124. *See id.* at 235-37. Injunctive relief is of two types: Negative or prohibitory injunctions order a defendant to discontinue and refrain from repetition of a certain practice; affirmative or mandatory injunctions, rather than restraining conduct, compel a defendant to perform some affirmative act. *See* D. DOBBS, *supra* note 51, § 2.10. Restitution of wrongfully obtained funds may constitute mandatory injunctive relief. *See* discussion note 136 *infra*.

125. 538 F.2d at 236.

126. 15 U.S.C. § 4 (1970).

127. *Id.* § 25. The cases cited in *Air Pollution* are: United States v. Glaxo Group, Ltd., 410 U.S. 52, 60-64 (1973) (violations of section 1 of Sherman Act may be remedied by prescribing patent licensing rates); Ford Motor Co. v. United States, 405 U.S. 562, 578 (1972) (affirming decree requiring, *inter alia*, that Ford divest itself of wrongfully acquired spark plug company and purchase one-half of its annual requirement of spark plugs from the divested plant for a period of 5 years); United States v. United States Gypsum Co., 340 U.S. 76, 93-94 (1950) (prescribed royalty rates and other terms in patent licenses for violations of sections 1 and 2 of Sherman Act); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 126-29 (1948) (district court may properly require divestiture in action by justice department for wrongful acquisition and operation of theatres). *See* 538 F.2d at 235-36.

Pollution court noted that, because all these cases were actions brought by the government, it is not clear what affirmative equitable remedies available to the government under the Sherman and Clayton Acts are also available to private persons under section 16.[128]

The Ninth Circuit had previously held in *International Telephone & Telegraph Co. v. General Telephone & Electronics* [*ITT*],[129] that dissolution and divestiture were not available to private parties under section 16.[130] The court in *Air Pollution* stated, however, that *ITT* could be interpreted as limiting relief under section 16 to "traditional negative injunctions," and as barring affirmative injunctive relief.[131] This interpretation is undesirable for at least two reasons: First, the decision in *ITT* was not founded on a distinction between affirmative and negative injunctive relief, but rather on the House Judiciary Committee's rejection of proposed amendments to section 16 which would have granted a private right of action for dissolution or divestiture.[132] More important, however, there is no reason to distinguish government cases from private actions based upon the language of the statutes involved. Section 4 of the Sherman Act and section 15 of the Clayton Act both grant federal district courts jurisdiction "to prevent and restrain" antitrust violations.[133] Although this language arguably empowers the court only to prevent future action, the powers provided by the statutes have been construed as not so limited. Indeed, in *United States v. United States Gypsum Co.*,[134] the Supreme Court concluded that the trial court is not limited under section 4 of the Sherman Act

128. 538 F.2d at 235 n.6.
129. 518 F.2d 913 (9th Cir. 1975).
130. *Id.* at 922-23.
131. 538 F.2d at 235 n.6.
132. *See* 518 F.2d at 922-23 & nn. 39-53. Indeed, an examination of the legislative history of section 16 relied upon by the court in *ITT* supports the conclusion that while the House Judiciary Committee may have viewed dissolution and divestiture as extreme remedies, not to be made available to private persons, there is no indication that the committee members sought to disallow less drastic forms of affirmative injunctive relief, such as restitution. *Proposed Amendments to the Clayton Act: Hearings on Trust Legislation Before the House Comm. on the Judiciary*, 63d Cong., 2d Sess. 842, 843, 1372-73 (1914). Probably the most that can be said of Congress' intent is that section 16 was designed simply to give private parties a right to sue for injunctive relief, a right which they previously did not possess. *See* 51 CONG. REC. 9261, 16319 (1914) (statements of Congressmen McGillicuddy & Floyd, respectively). See discussion note 136 *infra*. It is therefore necessary only to advert to the general maxim that the purpose of equity jurisdiction is to accomplish complete justice in the face of inadequate legal remedies and to the principle that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1974) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). With these precepts in mind, it is a short step to the conclusion that restitution in equity ought to be available to protect the rights created by the antitrust laws. *See also* MacIntyre, *Antitrust Injunctions: A Flexible Private Remedy*, 1966 DUKE L.J. 22, 38-39 (creative use of permanent affirmative relief under section 16 furthers policy of antitrust laws by encouraging private enforcement in the public interest).
133. 15 U.S.C. §§ 4, 25 (1970).
134. 340 U.S. 76 (1950).

to prohibiting future conduct; since proven wrongdoers should be denied the benefits of their illegal conduct, the court has a duty to compel action by conspirators that will cure the ill effects of their antitrust violations.[135] Since private individuals are treated essentially as "private attorneys general" under the antitrust laws, section 16 should, in the absence of clear legislative intent to the contrary, be similarly construed to permit private actions for restitution.[136]

This conclusion is entirely consistent with the functional analysis suggested in *Air Pollution*. If restitution were granted in a class action

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135. *Id.* at 88-89; *accord*, United States v. Ward Baking Co., 376 U.S. 327, 331 (1964); International Boxing Club v. United States, 358 U.S. 242, 253 (1959).

136. *See* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (full panoply of equity powers available to district court, in absence of clear statement or necessary inference to the contrary in statute); MacIntyre, *supra* note 132.

It is interesting to note that at least four justices of the United States Supreme Court believe that section 16 has a very broad scope. In Vendo Co. v. Lektro-Vend Corp., 97 S. Ct. 2881 (1977), Justice Stevens, joined by three other justices indicated that, although certain types of relief may not be appropriate in private actions under section 16, the enactment of the section conferred on the federal courts "the same broad powers [in section 16 cases] that they possess in cases brought by the Government." *Id.* at 2896 & n.10 (Stevens, J., dissenting in an opinion joined in by Justices Brennan, White and Marshall). Four members of the Court, therefore, appear to support the view that, in a very general sense, section 16 empowers (if not obligates, *see* United States v. United States Gypsum Co., 340 U.S. 76, 88-89 (1950)) the court to order relief designed to remedy the effects of a defendant's wrongful conduct. Such a construction of section 16 might quite properly include the power to compel restitution. *See also* discussion note 162 *infra*.

The court's analysis in *Air Pollution* is defective in one final respect. The court's emphasis on the distinction between affirmative and negative injunctive relief, *see* 538 F.2d at 235 n.6, may, under general principles of equity, be a distinction without a difference. First, differentiating between prohibitory and mandatory injunctions may be of little substantive importance because, although an injunction is negative in form, such as where it orders defendants not to perform a certain act in the future, the injunction may be so phrased as to require the defendant to perform affirmative acts or restore the plaintiff to a former position. *See* D. DOBBS, *supra* note 51, § 2.10, at 105; J. POMEROY & S. SYMONS, A TREATISE ON EQUITY JURISPRUDENCE § 1359, at 970 (5th ed. 1941). For example, in Pacific Coast Agricultural Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1209 (9th Cir. 1975), the court, in a private action under sections 1 and 2 of the Sherman Act, affirmed a district court injunction which, though prohibitory in form, was mandatory in effect. The action involved a conspiracy to restrain trade in and to monopolize exportation of citrus products to Hong Kong, and the injunction enjoined Sunkist from refusing to make oranges available to qualified purchasers. The injunction, of course, required Sunkist to make citrus products available. *Accord*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 346 F.2d 661, 667 & n.8 (6th Cir. 1965) (affirming district court injunction issued under section 16 of Clayton Act which required defendant to sell asphalt-saturated felt to plaintiff at the same price defendant sold to other purchasers in particular geographic area). More importantly, regardless of the form of the injunction, a court may issue effectively mandatory injunctive relief when the necessity arises. *In re* Lennon, 166 U.S. 548, 556 (1897); Bowles v. Skaggs, 151 F.2d 817, 820 (6th Cir. 1945). *See generally* Morrison v. Work, 266 U.S. 481, 490 (1925) (mandatory injunction is extraordinary remedy, granted not as matter of right but in sound discretion of court). In addition, such injunctions may require payment of money. For example, in Houston v. Ormes, 252 U.S. 469, 473-74 (1920), the Court ruled that one who has an equitable right to a fund of money may sue in equity for a mandatory injunction requiring payment of the fund for his benefit. *Accord*, Miguel v. McCarl, 291 U.S. 442, 456 (1934) (directing issuance of mandatory injunction requiring payment of retirement pay by Army Chief of Finance to former enlisted man). In view of the apparent weaknesses in the Ninth Circuit's reasoning in *Air Pollution*, it is not desirable to interpret the court's decision as precluding affirmative section 16 relief in the form of restitution. *See also* text & note 137 *infra*.

under section 16, two of the stated purposes of the antitrust laws would be furthered. Restitution has the effect of requiring a wrongdoer to relinquish his ill-gotten gains, eliminating the harmful residual effect of the illegal conduct.[137] In addition, restitution tends to reallocate resources which were inefficiently shifted by the defendant's wrongful conduct. This reallocation restores competition by rechanneling resources to more efficient uses.

Most important, permitting classes of consumers, where the consumers are also indirect purchasers, to obtain restitution under section 16 is consistent with the principles underlying the holding of *Illinois Brick*.[138] The Supreme Court rested its decision on two grounds: First, to permit indirect purchasers to recover damages by proving that all or part of an overcharge was passed on to them, while precluding a defendant from raising a pass-on defense against a direct purchaser, creates "a serious risk of multiple liability for defendants."[139] Second, the Court feared that allowing recovery by persons who did not deal directly with the defendant would unnecessarily burden treble damage actions with complicated and time-consuming proof of the amount of pass-on which occurred at each of several levels in a chain of distribution.[140] This in turn would decrease the effectiveness of the

137. Although this argument in favor of restitution was not squarely presented before the Ninth Circuit, the court attempted gratuitously to resolve it in *Air Pollution*. The court noted that it might be argued that compulsory retrofitting would deprive the auto makers of the financial gains of the alleged conspiracy. *See* 538 F.2d at 236 n.7. But the court would have decided the case no differently even if the argument had been made. *See id.* The court distinguished cases granting relief designed to force violators to relinquish their gains on the ground that the cases were "concerned with market power or position gained by the illegality [and not] with recovering only financial gains earned entirely in the past." *Id.* Secondly, the court noted that, because the cost of properly equipping cars with pollution equipment would have been passed on to car buyers, the only benefit to the producers resulted from increased sales caused by lower auto prices. *Id.* The amount of this gain was viewed as virtually unascertainable, and far less than the cost of retrofitting. Hence, the court concluded "this quasi-deterrent argument is to [*sic*] attenuated to justify the remedy sought." *Id.* Given a case without the peculiar facts of *Air Pollution*, however, in which loss to the members of an injured class inures directly to the benefit of a violator, the court's apparent rejection of the restitutionary remedy seems inconsistent with its own statements, and with those of the Supreme Court.

If a purpose of section 16 relief or other equitable antitrust relief is to deprive violators of the gains of their unlawful conduct, *see id.* at 234, it should be immaterial whether the gain is a purely monetary one or some form of improved market position. Restitution accomplishes the same end whether the relief ordered consists, for example, of compulsory patent licensing rates, *see* United States v. Glaxo Group, Ltd., 410 U.S. 52, 60-64 (1973), or direct payments of money. Additionally, to the extent that the private right of action under section 16 serves some sort of deterrent function, compelling defendants to disgorge "the fruits of their illegality," Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968), will serve this function regardless of the character of "the fruits." *Cf.* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2075 (1977) (section 4 treble damages are designed in part to deter violators).

138. See text & notes 15-25 *supra*.

139. Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2067 (1977). As the Court noted, if the direct purchaser sues and obtains a full, trebled recovery of all overcharges, double recovery will be inevitable unless the indirect purchaser fails to establish that there was a pass-on. *See id.*

140. *Id.* at 2070, 2074-75.

treble damages remedy as an enforcement device.[141] There is one situation, however, where, if indirect purchasers seek restitution of overcharges, the Court's reluctance to subjecting defendants to a risk of multiple liability is not warranted. Moreover, the pursuit of restitution should alter sufficiently the nature of proof required of an indirect purchaser class to eliminate any risk of double recovery in other situations and mollify the Court's concern about increasing the complexity of antitrust cases.

The Settling or Reluctant Direct Purchaser. If a class suit for restitution is brought by indirect purchasers, the concern manifested by the Court in *Illinois Brick* about multiple liability will only be justifed in two situations: Where a direct purchaser has recovered treble damages equivalent to three times all provable overcharges made by the defendant, or where the direct purchaser has settled a treble damage action against the defendant for an amount at least equal to the total provable excess charges imposed.[142] In these two cases, a suit for restitution would be an attempt to compel the defendants to pay back more than the actual overcharges earned. However, these two outcomes will seldom occur.

If a direct purchaser sues for treble damages caused by a price-fixing conspiracy, the suit will most likely be settled without trial and without the necessity of proving the total amount of overcharges made.[143] If the defendant buys peace with the direct purchaser for less than the total amount he obtained via the conspiracy, he will retain the remainder. The direct purchaser's rights against the defendant are concluded by the settlement, and the defendant, in the absence of some recovery available to indirect purchasers forced to pay unlawful prices, is unjustly enriched. Similarly, direct purchasers will often be reluctant

141. *Id.* at 2074-75. The Court also expressed concern that apportionment of the potential recovery among different levels in the chain of distribution would decrease the benefits to each level, thus possibly diminishing the incentive to sue. *See id.* In consumer class actions, however, the division of a multimillion dollar recovery between different levels should still provide adequate inducements to sue.

142. The Supreme Court seemed to believe that any time a case was settled for a sum certain by the direct purchaser, there is an inevitable multiple recovery if indirect purchasers may later sue. *See id.* at 2067 n.11. But this is not so. Assume that the defendant manufacturers in the toilet paper hypothetical posed herein, see text & notes 71-74 *supra*, are sued by retail grocers who purchase directly from them and resell directly to ultimate consumers. If the retailers agree to settle the case for $50 million, the manufacturers will, in effect, be permitted to keep $950 million. A class action for restitution to compel repayment, in some form, of the remaining 95% of ill-gotten gains poses no threat of double recovery.

143. Of 1,341 private antitrust actions terminated in 1975, only 138 were terminated by trial. 1975 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, table C-5a, at 383. Therefore, nearly 90% of the cases disposed of in 1975 were terminated without trial, and of this vast percentage, many cases certainly consisted of settlements. *See generally* Renfrew, *Negotiation and Judicial Scrutiny of Settlements in Civil and Criminal Antitrust Cases*, 70 F.R.D. 495, 498-503 (1976).

to sue their suppliers; they will either be afraid to damage or alienate their source of supply,[144] or have little incentive to sue because much of the overcharge will be passed on to their customers.[145] When this reticence is present, the wrongdoer is permitted to retain all ill-gotten funds.[146] Therefore, if several competitors believe they can conspire to fix prices and, if discovered, either buy a settlement at a profit or expect that the direct purchaser will not sue, the antitrust laws lose much of their deterrent capacity.[147]

In the case of a defendant who settles a direct purchaser action by paying less than the total amount of overcharges he has received, a class suit by indirect purchasers to recover the remainder of the overcharges held by the defendant poses no threat of double or multiple recovery, provided there is only one tier of indirect purchasers in the chain of distribution. The settling direct purchaser cannot later sue the defendant, since his rights were determined by the settlement. The reluctant direct purchaser, on the other hand, presents a different situation,[148] as does the existence of more than one tier of indirect pur-

144. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2075 (1977); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 198 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

145. *See* cases cited note 144 *supra*.

146. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2077 (1977) (Brennan, J., dissenting); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 198 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

The extent to which direct purchasers will be able to pass on any overcharges imposed on them depends upon the price elasticity of demand for their product. If price elasticity of demand is relatively low, then a relatively high portion of the overcharge can and probably will be passed on by the direct buyers. On the other hand, if price elasticity of demand is relatively high, changes in the quantity of the direct buyers' product demanded will be highly responsive to price increases, and a low percentage of the overcharge will be passed on. *See* R. POSNER, *supra* note 48, at 147-49. The direct buyer will ordinarily be able to pass on some, but not all, of any overcharge. *See id.* at 148. The Supreme Court's decision in *Illinois Brick* to allow the direct purchaser to recover to the full extent of the overcharge, *see* 97 S. Ct. at 2075, will inevitably bestow a windfall on the direct purchaser who decides to sue and recovers treble damages.

147. It is, of course, true that there is a possibility that criminal liability may be imposed on conspirators, but the government cannot be expected to locate and prosecute all antitrust violators, *see* text & notes 103-05 *supra*, so there is always a need for private enforcement efforts.

148. The Supreme Court in *Illinois Brick* apparently rejected the contention that no risk of multiple liability was present in the case of a direct purchaser unwilling to sue. Noting that direct buyers may refrain from suing because they are loath to injure relations with their suppliers, the Court stated:

> But on balance, . . . we conclude that the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under section 4, . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2075 (1977). This conclusion was reached, however, as a result of the Court's belief that apportioning damages between different levels in the chain of distribution would make a treble damages action inordinately complex and seriously decrease its effectiveness as an antitrust enforcement mechanism. *See id.* at 2074-75. It is argued in this Note, however, that the recovery of classwide restitution and the apportionment of the recovery among different levels in the chain of distribution is not plagued with the complexity of proving the proper allocation of

chasers. In these latter situations, the possibility of multiple liability persists, and it is, therefore, necessary to determine whether the same spectre of "massive evidence and complicated theories" which spawned the Court's holding in *Illinois Brick* would burden a class suit for restitution by ultimate consumers.

Damages are an individualized remedy, and antitrust claimants are ordinarily required to show the impact on them of a defendant's unlawful conduct before they may recover treble damages under section 4.[140]

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treble damages. See text & notes 149-61 *infra*. If the complexity which troubled the Court in *Illinois Brick* is eliminated, there is every reason to believe that, in the settling defendant and reluctant direct buyer situations, the "private attorney general" policy acknowledged by the Court, 97 S. Ct. at 2075, is better served by allowing indirect purchasers to prove that an overcharge was passed on to them, in whole or in part, and to obtain restitution of this amount. The techniques by which an apportionment of a restitutionary award can and should be made are discussed at text & notes 154-61 *infra*.

149. Even though the antitrust laws are designed primarily to benefit the consuming public, *see* Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 502 (1969), an individual's right to recover damages under section 4 of the Clayton Act depends upon a showing that the individual plaintiff has sustained injury to his business or property. 15 U.S.C. § 15 (1970); *see* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968); Maltz v. Sax, 134 F.2d 2, 5 (7th Cir. 1943). In view of this element of the section 4 cause of action, courts have uniformly refused to permit consumer class actions for treble damages. For example, in Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974), the court denied class treatment of a treble damages action because of the perceived difficulties of proving damage to business or property on an individual basis. *See id.* at 54, 57; text & notes 31-34 *supra*. It therefore seems that a class action on behalf of large consumer classes will be limited, even when brought by direct purchasers, to seeking relief under section 16 of the Clayton Act, 15 U.S.C. § 26 (1970), *as amended by* Pub. L. No. 94-435, tit. III § 302(3), 90 Stat. 1396. Since restitution rather than damages is being sought, the amount of any recovery would not be trebled. *Cf.* Bogosian v. Gulf Oil Corp., 62 F.R.D. 124, 134 (E.D. Pa. 1973), *vacated and remanded on other grounds*, [1977 Transfer Binder] TRADE REG. REP. (CCH) ¶ 61,568 (3d Cir. 1977) (section 4 treble damages cannot be awarded ancillary to section 16 injunctive relief).

Interestingly, two recent cases in a California federal district court held that section 4 of the Clayton Act, which permits any person injured in his "business or property" by an antitrust violation to obtain treble damages, *see* 15 U.S.C. § 15 (1970), only applies to plaintiffs who are injured in some commercial interest, and not to individuals damaged only in their personal, noncommercial property. *See* Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880, 885 (N.D. Cal. 1977); Smith v. Toyota Motor Sales, U.S.A., Inc., No. C-75-0727 SW, slip op. at 9 (N.D. Cal., filed Jan. 11, 1977). *Contra*, Reiter v. Sonotone Corp., [1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 61,360 at 71,268-69 (D. Minn. 1977). In the court's view, the legislative history and judicial construction of the Sherman and Clayton Acts demonstrated that "[t]he phrase *business or property* cannot be read to encompass injuries to pure business interests and also to pure property interests, in the disjunctive. The phrase is a conjunctive reference to interests of a business nature." Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. at 884. This deft bit of statutory construction was made by the court with an awareness that "much room for disagreement [as to congressional intent] persists." *Id.* at 882. Indeed, the district court's view of section 4's legislative history appears directly contrary to the view taken by the Supreme Court in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 97 S. Ct. 690 (1977). In that case the Court examined the legislative history of section 4 and concluded that its predecessor, section 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (current version at 15 U.S.C. § 15 (1970)), was created "primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." 97 S. Ct. at 696 n.10 (quoting 21 CONG. REC. 1767 (1890) (remarks of Senator George)). *See* 21 CONG. REC. 2612 (remarks of Senators Teller & Reagan); *id.* at 2615 (Senator Coke). The Court also noted that House debates concerning the damages provisions of the Clayton Act indicated that private actions were "conceived primarily as 'open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws.'" 97 S. Ct. at 696 n.10 (quoting 51 CONG. REC. 9073 (1914)

Restitution, on the other hand, is a remedy designed primarily to force a wrongdoer to disgorge ill-gotten gains; rather than being determined according to the impact on individual claimants, the amount owing in restitution is measured by the benefits obtained by the wrongdoer.[150] When a plaintiff class has dealt directly with the wrongdoer, its entitlement to restitution from the defendant can be made out by showing the defendant's violation of the law and the amount of enrichment the defendant obtained thereby.[151] The problem presented here is whether indirect purchasers one or more steps removed from the defendant should, in a suit for restitution, be required to submit the same type of proof of a pass-on that would be required if offensive use of the passing-on doctrine were a permissible ground for recovery of treble damages.[152] The policy of the antitrust laws requires a negative answer. Since restitution aims at prevention of unjust enrichment rather than compensation of injured persons, a class of indirect purchasers should be able to obtain a share of a restitutionary fund by showing that the defendant charged unlawfully high prices, and that there is a reasonable possibility that the overcharge was passed on, in whole or in part, to the class' level in the chain of distribution.[153] Once

(remarks of Representative Webb)). *See* 51 CONG. REC. 9079, 9270 (remarks of Representatives Volstead & Carlin, respectively). In view of the remarks of the Supreme Court in *Brunswick*, it is arguable that the results in *Weinberg* and *Smith* will not survive on appeal.

150. *See* text & notes 50-58 *supra.*

151. *See* text & notes 56, 57 *supra.*

152. When the Court denied the pass-on defense to the defendant in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968), its primary reason for doing so was the notion that treble damage actions would become unduly complicated if attempts were made to trace the effects of the imposition of an overcharge on the costs, prices, output, sales, and profits of a direct purchaser-plaintiff. *See id.* at 492-93. In a treble damage action by ultimate consumers against manufacturers, the effects of the overcharge would have to be followed through and apportioned among wholesalers, retailers, and any other intermediaries. Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2072 (1977). Due to the additional complication involved in the latter situation, the Court in *Illinois Brick* concluded that the reasoning of *Hanover Shoe* applied "*a fortiori* to the attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer." *Id.* The Court reasoned that proof of pass-ons by indirect purchasers would burden treble damage actions with "massive evidence and complicated theories," thus hampering the effectiveness of private enforcement of the antitrust laws. *See id.* (quoting Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968)). *But see* text & notes 149-61 *infra.*

153. *Cf.* FTC v. Morton Salt Co., 334 U.S. 37, 47 (1948) (FTC may bar discriminatory pricing on a showing of a reasonable possibility that such pricing will injure competition). The entire amount of unjust enrichment to be disgorged by the defendant will, of course, be determined in the same manner that a direct purchaser would calculate the "actual damages" basis for his treble damage award—by an estimate of the difference in the defendant's costs, prices, sales, and profits with and without the overcharge. If a direct purchaser has previously sued and settled with the defendant, the amount of the restitutionary recovery should be decreased by the amount for which the defendant bought peace with the direct buyer. When a direct purchaser obtains a money judgment against a defendant, the amount recoverable by indirect purchasers should be reduced in a similar fashion.

Proving a reasonable possibility of a pass-on from any given tier in the distributive chain to another should be relatively simple. Common sense economic analysis indicates that the price elasticity of demand for any product is rarely, if ever, infinite. When a purchaser buys a product for resale or for incorporation into another product

this reasonable possibility is demonstrated convincingly, the equity court's only task would be to devise an equitable, albeit mathematically imprecise, apportionment of the restitutionary fund.

The Technique of Apportionment. In *Illinois Brick*, the majority and the dissenters acknowledged the availability of methods for bringing potential claimants together in one action to determine the rights of all, and thus protect the defendant against multiple liability;[154] how-

which will be sold to a succeeding level in the chain of distribution, some of the cost increase usually will be passed on to the other level. *See* R. POSNER, *supra* note 48, at 147-49. It is also true, however, that the price elasticity of demand for the direct purchaser's product (or his resale of the defendant's product) will almost never be completely inelastic; that is, the direct purchaser will rarely be able to pass on the entire amount of the overcharge to those persons buying from it. *See id.* To state these ideas more concretely: In the hypothetical case given at text & notes 71-74 *supra*, assume that there is a wholesale level and a retail tier in the distributive machinery between the defendant manufacturers and *A*, the representative of the class of ultimate consumers. Although toilet paper comprises a relatively small part of a consumer's spending, it is a relatively necessary part of a consumer's purchases, and it is probably reasonable to expect that the quantity of the product required is relatively constant. In addition, there are few ready substitutes for toilet paper. Given these facts and assumptions, a court of equity would be justified in finding that the quantity of toilet paper demanded will vary little in response to changes in its price, and that there is, therefore, a reasonable possibility that the bulk of any overcharge imposed by manufacturers on wholesalers was passed on by them to retailers and, in turn, imposed by retailers on *A* and the other members of his consumer class. *See generally* H.T. KOPLIN, MICROECONOMIC ANALYSIS: WELFARE AND EFFICIENCY IN PRIVATE AND PUBLIC SECTORS 43-45 (1971); R. POSNER, *supra*. While the Court in *Illinois Brick* rejected this sort of analysis of particular markets as applied to the offensive use of passing-on, *see* 97 S. Ct. at 2074, that conclusion was reached because "[t]he intricacies of tracing the effect of the overcharge on the purchaser's prices, costs, sales, and profits" would impose an undesirable burden on the litigants in a treble damage action. *See id.* Given the simple type of proof postulated here to obtain restitution and apportion the recovery between distributive tiers, however, the precise "tracing" referred to in *Illinois Brick* will be unnecessary.

154. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2070-73 (1977); *id.* at 2083 (Brennan, J., dissenting).

In the reluctant purchaser situation, or where there are multiple tiers of indirect purchasers, cases are clearly presented for compulsory joinder under FED. R. CIV. P. 19(a). If *A* sues the manufacturers in the hypothetical given above, see text & notes 71-74 *supra*, and the wholesalers refrain from suing for fear of disrupting relations with the manufacturers, the wholesalers and retailers have some interest in the subject matter of *A*'s class action, and adjudication of the controversy in their absence will "leave [the manufacturers] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." FED. R. CIV. P. 19(a). They therefore are persons to be joined if feasible. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2071 (1977) (citing Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330 (1957); Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976, 998 (1975)). If there are so many individuals at a given level in the distributive chain that joinder of all of them via rule 19 is not practical, a representative could be joined to represent them as a class. FED. R. CIV. P. 19(d); *id.* 23(a)(1); *see* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2071-72 (1977). If the representative of the ultimate consumer class joins the reluctant direct purchasers and any other indirect purchasers (whether individually or as classes) and the action proceeds to judgment against the defendant, a proper case for restitution is proven. The only question remaining is how to apportion the restitutionary fund among the various levels of the distributive chain. See text & notes 154-61 *infra*.

One other technique for avoiding multiple liability is statutory or rule interpleader, a device which permits defendants faced with potential double or multiple liability to interplead potential claimants and require them to litigate the proper amount of their respective shares. *See* 28 U.S.C. § 1335 (1970); FED. R. CIV. P. 22(1). *See also* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061 & n.11, 2071 & nn. 19, 20 (1977); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974). But, as the *Illinois Brick* Court noted, 97 S. Ct. at 2071 & n.20, a defendant may not desire to use statutory interpleader if, for example, he does

ever, the majority believed that, if all potential plaintiffs were brought into one action, a treble damage action would become "massive" and "complicated," losing some measure of effectiveness as an enforcement device.[155] This conclusion assumes a precision in determining shares allocable to individual levels in the chain of distribution which, while applicable to claims for treble damages, is unnecessary in seeking restitution. When a restitutionary fund is recovered on behalf of a class, the only condition on its disposition is that it be administered for the benefit of the class generally.[156] A similar rule should apply in making restitution available to individuals, or classes of individuals, located at different levels in the distributive chain: the court should be permitted to make what it determines to be a fair and equitable apportionment based upon an analysis of the market conditions inherent in each case. The methods utilized and the proportions arrived at should be left to the court's discretion, subject to the condition that the ultimate distribution be for the benefit of all levels of the distributive chain. In short, the court should be permitted to make a reasonable estimate in apportioning the fund among different levels; the litigants should not be required to trace precisely the effects of the overcharge on their particular level in the chain of distribution, since to require more rigorous proof would present the same insurmountable burden of complex proof which yielded the Court's holding in *Brick*.[157] An estimative method of ap-

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not wish to post the required bond for the huge amount ordinarily in dispute in large class actions involving multiple purchasing levels. *See* 28 U.S.C. § 1335(a)(2) (1970). Hence, it would probably be up to the plaintiff to utilize the joinder provisions of rule 19 to bring all potential adverse claimants into the suit.

155. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2072 (1977).

156. *See* text & note 75 *supra.*

157. A court might, for example, make a division of the fund recovered into as many equal shares as there are levels of indirect and direct purchasers and distribute the fund on this pro rata basis. *Cf.* Dickinson v. Burnham, 197 F.2d 973, 978 (2d Cir. 1952) (pro rata distribution of recovery in securities fraud action).

The relaxed type of proof suggested here is consistent with the purposes of restitution and might not strike the *Illinois Brick* Court as objectionable. First, restitution aims primarily at compelling disgorgement of ill-gotten gains; once the defendant has been forced to pay out a fund, the principal goal of the action is accomplished and the court may appropriately treat any compensation achievable through distribution of the fund as a secondary or incidental goal. So viewed, restitution need only be used to achieve some rough form of reallocation of resources, and any imprecision in allocating the fund between different levels of distribution should be acceptable. Second, the Supreme Court demonstrated in *Illinois Brick* that it will go very far to ensure that private antitrust actions present an ever-present threat to potential antitrust violators. The Court was willing to hold that the direct purchaser is the only person "injured" within the meaning of section 4 of the Clayton Act by a price-fixing violation, thus bestowing a treble windfall on the direct purchaser solely to preserve the effectiveness of the treble damage action. *See* 97 S. Ct. at 2075. There is a strong possibility that the Court will tolerate a similar laxity and conclude that the deterrent function of section 16 is best served by granting the court broad discretion in the apportionment of a restitutionary fund between various classes of claimants. This seems entirely consistent with the Court's desire to ensure that private antitrust enforcement remain an effective means of deterring violators and depriving wrongdoers of their ill-gotten gains. Moreover, if the Court were presented with the section 16 restitution question, it would not be constrained by the necessity of construing the section in a manner con-

portionment would likewise be consistent with the theoretical underpinnings of restitution,[158] and would further the antitrust laws' goals of deterring violations and depriving wrongdoers of the fruits of their illegality.[159]

Once this simple form of proof is permitted in class suits seeking restitution to direct and indirect purchasers, there is no reason to reject such suits as unmanageable or as unnecessarily complicated; techniques

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sistent with Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968), discussed at text & notes 15-16 *supra*. Without the need for this consistency, the Court might give additional teeth to the antitrust enforcement mechanism by upholding the section 16 restitution claim. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2085 (1977) (Blackmun, J., dissenting).

158. *See* discussion note 157 *supra*.

159. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2075 (1977); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968). The contention that private enforcement of the antitrust laws demands some form of flexible recovery in consumer class actions has previously been rejected. *See In re* Hotel Tel. Charges, 500 F.2d 86, 92 (9th Cir. 1974) (antitrust laws do not authorize private actions to compel disgorgement of treble damages). This rejection occurred in the context of an action seeking treble damages under section 4 of the Clayton Act, however, and should not apply to an action seeking classwide restitution. The court or a defendant can rightly object to generalized proof of a class' entitlement to monetary relief when the recovery sought must be treble the amount of actual damages. When restitution is sought, however, the class seeks merely to compel a refund of any unlawfully obtained funds; there is no trebling and, hence, less reason to deny a claim for classwide relief.

In a similar vein, courts perceive some substantive difficulties in permitting classwide recovery which have resulted in an unfavorable reception of class claims resembling restitution. *See, e.g., In re* Hotel Tel. Charges, 500 F.2d 86, 90 (9th Cir. 1974) (concluding fluid recovery modifies substantive rights, and therefore violates the Rules Enabling Act, 28 U.S.C. § 2072 (1970)); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974) (concluding that fluid recovery violates due process); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43, 55 (D. Del. 1974) (to same effect). In the context of restitution, however, such conclusions must be reconsidered for two critical reasons. First, the elements of a substantive violation of law will remain unchanged when restitution is sought; hence, the mere pursuit of restitution in lieu of damages enlarges no right—the class representative must still show the same facts in order to establish the defendant's liability. *See* Comment, *supra* note 9, at 448-49. Therefore, awarding restitution modifies no substantive rights; it merely recognizes and uses an equitable remedy which has long been available. *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 446 (1946) (procedure does not violate Rules Enabling Act if it relates merely to the manner in which an existing right to recover is enforced); Comment, *supra*. Second, when a class seeks to recover funds in a gross amount, without individual proof of damages, it does not attempt to recover classwide damages. Rather, the class merely calls on a court of equity to recognize that the ordinary legal remedy of damages is unavailable and inadequate, and to exercise its well-established power to do complete justice by requiring a defendant to make restitution of that which he has wrongfully acquired. *See* Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946). That no damage remedy is available is not only an indication of the desirability of seeking restitution, but also is a prerequisite to it, since equitable relief is denied unless a plaintiff's remedy at law is inadequate. D. DOBBS, *supra* note 51, § 2.5; *see* Porter v. Warner Holding Co., 328 U.S. at 399. When class members cannot obtain damages because of an inability to furnish adequate transactional data for proof of damages, their legal remedy is inadequate and a basis for equitable relief is presented. *See* Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 218 (9th Cir. 1974) (dictum) (injunctive relief against threatened conduct may issue under the Clayton Act, 15 U.S.C. § 26 (1970), where damages are only measurable by speculation and conjecture); D. DOBBS, *supra* at 58. Similarly, damages appear to be clearly inadequate if they are unavailable due to a court's belief that individual proof by class members imposes too great an administrative burden on the court and renders class treatment inappropriate. So viewed, restitution appears to violate no due process rights of defendants.

for joining all interested parties or their representatives[160] and for allocating the restitutionary fund among these parties could be utilized without weighing down private antitrust actions with "massive evidence and complicated theories.[161] To the extent private parties are precluded from recovering for price-fixing violations, violators are unjustly enriched, leaving small injuries uncompensated and the harm to the competitive system caused by a possibly huge misallocation of resources goes uncorrected. To avoid this result and ensure effective private enforcement of the antitrust laws, suits for restitution under section 16 should be permitted.[162]

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160. See discussion note 154 *supra.*

161. Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2072 (1977), *quoting* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968).

162. There is no question that a private cause of action for restitution may be implied if certain conditions are met. For example, in Kipperman v. Academy Life Ins. Co., 554 F.2d 377 (9th Cir. 1977), plaintiff brought a class action for restitution for those persons who had paid insurance premiums to defendant Academy Life in response to the defendant's unsolicited mailings of certain promotional materials. *Id.* at 378. Kipperman sought this relief under 39 U.S.C. § 3009 (1970) which permits consumers to treat the receipt of unsolicited merchandise as a gift, and keep the item received. The section was designed to "protect recipients of unwanted merchandise from being badgered into paying therefor," 554 F.2d at 379, but does not explicitly grant a private right of action. However, the court concluded that the purpose of the statute could be served by implying a private right of action, and it therefore held that consumers may seek declaratory and restitutionary relief under section 3009. *See id.* at 380. Other cases have found private rights of action for restitution implicit in silent or ambiguous statutes. *See, e.g.*, Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 296 (1960); United States v. Moore, 340 U.S. 616, 620 (1951); Porter v. Warner Holding Co., 328 U.S. 395, 402-03 (1946); Deckert v. Independence Shares Corp., 311 U.S. 282, 287-89 (1940). *See also* J.I. Case Co. v. Borak, 377 U.S. 426, 433-35 (1964).

The Supreme Court, in Cort v. Ash, 422 U.S. 66 (1975), listed four factors to consider in determining whether a private remedy may be implied from a statute not expressly providing one:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law . . . ?

Id. at 78. In view of the fact that section 16 was conceived primarily to give private parties a right to sue for injunctive relief which they previously did not possess, *see* 51 CONG. REC. 9261, 16319 (1914) (remarks of Congressmen McGillicuddy & Floyd, respectively), the first of *Cort*'s factors is no doubt satisfied. Moreover, apart from Congress' rejection of a proposed amendment to section 16 to permit private divestiture actions, *see* International Tel. & Tel. Co. v. General Tel. & Electronics, 518 F.2d 913, 922-23 & nn.39-53 (9th Cir. 1975), there is no indication of any intent to deny a right of action for restitution under section 16. Additionally, the purpose of private suits under section 16 is not merely to provide a private remedy, but also to encourage private enforcement of the antitrust laws. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969). The availability of restitution under section 16 would doubtless encourage private suits and strengthen the federal enforcement scheme. Finally, restitution for violations of federal antitrust laws can hardly be considered a cause of action ordinarily left to the control of state law. In short, all of the factors enumerated in *Cort* weigh in favor of permitting suits for restitutionary relief under section 16.

If, in spite of the arguments presented herein, federal courts refuse to permit restitutionary recovery in large consumer antitrust class actions, plaintiffs in such cases may find relief under state law. For example, Arizona's recent adoption of the Uniform State Antitrust Act, *see* ch. 26, § 1, [1974] Ariz. Sess. Laws 60 (current version at

Procedural and Constitutional Implications of Restitution

Having established a right to seek restitution, the potential class representative faces yet another quandary. The difficulty arises from the Supreme Court's holding in *Eisen v. Carlisle & Jacquelin*,[163] that individual pretrial notice to all class members identifiable with reasonable effort is mandatory in all actions brought under rule 23(b)(3).[164] This holding rang the death knell of the action in *Eisen*, and presented a major procedural obstacle to consumer class actions.[165] However, the

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ARIZ. REV. STAT. ANN. §§ 44-1401 to -1413 (Supp. 1976-77)), may furnish a private action for restitution. Private persons may sue under the Arizona Act for damages, injunctive relief, "or other equitable relief." *See* ARIZ. REV. STAT. ANN. § 44-1408(B) (Supp. 1976-77). The quoted language was added by Arizona, *compare id.*, *with* UNIFORM STATE ANTITRUST ACT, § 8(b), and may fairly be interpreted as permitting an action for restitution. *See* United States v. Moore, 340 U.S. 616, 619-20 (1951); Porter v. Warner Holding Co., 328 U.S. 395, 403 (1946). Therefore, potential consumer class representatives in Arizona should consider seeking relief in Arizona courts.

The antitrust laws are not the only consumer protection devices for obtaining restitution. For example, Arizona's Consumer Fraud Act, ARIZ. REV. STAT. ANN. §§ 44-1521 to -1534 (1967 & Supp. 1976-77) prohibits use of fraudulent or misleading advertising practices, *id.* § 44-1522(A) (1967), and provides that in a suit to enjoin violations of the Act, the court may make such orders as may be necessary to restore to any person any monies acquired by such violations. *Id.* § 44-1528(A) (1967). The Act, although on its face vesting enforcement powers only in the state attorney general, has been held to create inferentially a private right of action. *See* Sellinger v. Freeway Mobile Homes, Inc., 110 Ariz. 573, 576, 521 P.2d 1119, 1122 (1974). It is reasonable to expect that this cause of action would include an action for classwide restitution. *See* People v. Superior Court, 9 Cal. 3d 283, 286, 507 P.2d 1400, 1402, 107 Cal. Rptr. 192, 194 (1973) (under statute providing that fraudulent advertising "may be enjoined," court of equity may exercise inherent power to accomplish complete justice, including power to order restitution to defrauded consumers); State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 82 Wash. 2d 265, 277, 510 P.2d 233, 241 (1973) (restitution is a device to enforce the laws by depriving a wrongdoer of the benefit of violations).

Congress has enacted legislation which would entitle state attorneys general to bring treble damage actions on behalf of injured consumers residing in their states. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, §§ 4C-4H (amending 15 U.S.C. § 15 (1970)). The amendments to § 15 overcome the problems of proof of individual damages by permitting measurement and assessment of aggregate damages in price-fixing cases by statistical or other estimative method, and without resort to separate proof of individual claims. *See id.* at § 4D. *See generally* Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 YALE L.J. 626 (1976), in which the authors argue that parens patriae suits will not aid significantly in achieving consumer redress, due to difficulties of proving classwide damages, *see id.* at 638-49, problems of avoiding multiple liability, *see id.* at 649-55, and due to a belief that price-fixing actions comprise only a small part of antitrust violations. *See id.* at 655-60. The authors suggest a rethinking of government antitrust enforcement policy as well as implementation of an administrative damage claim procedure. *See id.* at 670-76. *See also* Note, *The Proposed Antitrust Parens Patriae Act: Overdue Antitrust Relief for Ultimate Consumers*, 45 U. CIN. L. REV. 219 (1976).

163. 417 U.S. 156 (1974).

164. *Id.* at 173. This holding was based upon the express requirements of FED. R. CIV. P. 23(c)(2). *See* discussion note 176 *infra*.

165. *See generally* Shapiro & Springer, *Management of Consumer Class Actions After Eisen: Notice and Determination of Damages*, 26 MERCER L. REV. 851 (1975); Comment, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426 (1973).

It is important to note that the rule 23(c)(2) notice requirement applies only when class members are identifiable with reasonable effort. In situations where absentees are not identifiable with reasonable effort, some less burdensome form of notice (such as published notice) would be both permissible under rule 23 and sufficient to satisfy due process requirements. *See* Mullane v. Central Hanover Bank & Trust Co., 339

Eisen Court did not reach the question whether such notice was constitutionally required.[166] Hence, the Court did not decide whether the procedural difficulties of a rule 23(b)(3) action also burden class actions under other subdivisions of rule 23. The opinion indicates that the terms of subdivision 23(c)(2)[167] are inapplicable to an action for injunctive or declaratory relief,[168] and the federal courts are in agreement that the terms of the rule do not require pretrial notice in such cases.[169] The fundamental question is whether seeking restitution may avoid the difficulties presented by the procedural requirements of rule 23(c)(2).

The Requirements of Rule 23. A claim for restitution in a class action may be considered appropriate under either subdivision (b)(2) or (b)(3) of rule 23. For example, rule 23(b)(2) allows a class action for final injunctive or declaratory relief where a defendant has acted in a manner generally applicable to the class, thereby necessitating such relief.[170] When one or more defendants have exacted and continue to exact unlawfully high prices for their goods throughout a particular market area, they have acted in a similar manner toward all purchasers

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U.S. 306, 317-18 (1950). *See also* Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 n.14 (1974). See text & notes 176-87 *infra*. Even assuming that individual pretrial notice of some kind is required, whether under rule 23 or as a matter of constitutional mandate, there is some question whether expensive, postal notice is necessary. *Mullane* indicates that notice must be reasonably expected to inform interested persons of the pendency of an action, *see* 339 U.S. at 314, but it is not clear whether some type of notice less expensive than direct mail will satisfy due process requirements. An Arizona district court recently took a very practical and creative approach to rule 23's notice requirements. In *In re* Arizona Dairy Prods. Litigation, [1975] 2 TRADE REG. REP. (CCH) ¶ 60,555 (D. Ariz. 1975), an antitrust class action against four dairy firms, Judge Carl Muecke ordered that notices be printed on the milk cartons of the defendants charged with fixing milk prices. The order, which was stayed pending appeal, was made based in part upon an affidavit submitted on behalf of plaintiffs by Marshall McLuhan, a well-known media expert, indicating that milk carton notice would be much more likely to reach interested milk consumers than would direct mail. The cost of the milk carton notice was approximately $100. 4 CLASS ACTION REP. 484, 487 (1975).

166. *See* discussion note 176 *infra*.

167. FED. R. CIV. P. 23(c)(2) requires the court to direct to the members of a (b)(3) class the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," advising them of their right to be excluded from the class, that the judgment will include class members who do not request exclusion, and that members not requesting exclusion may enter appearances through counsel.

168. *See* 417 U.S. at 177 n.14. *Accord*, Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975).

169. *See, e.g.*, Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972) (action seeking declaration of unconstitutionality of South Carolina repossession statute and injunction against its future enforcement); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) (action for declaratory and injunctive relief involving constitutionality of police surveillance techniques); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (civil rights class action seeking back pay award and injunction against defendant company's alleged racially discriminatory practices). Subdivision 23(d)(2) does, nevertheless, vest discretion in the district court to direct that some type of notice be given to some or all of the class members for various purposes. *See* FED. R. CIV. P. 23(d)(2).

170. FED. R. CIV. P. 23(b)(2).

of their goods in that area, and the situation fits within the scope of subdivision (b)(2). However, when monetary relief is sought in a rule 23 (b)(2) action, it is essential that the distinction between restitution and money damages be scrupulously acknowledged, since the subdivision does not apply to situations in which the relief sought relates primarily to money damages.[171] On the other hand, several courts recognize that, where a money recovery is integrally related to and flows naturally from a grant of the requested injunctive or declaratory relief, the action may appropriately be maintained under 23(b)(2).[172] Furthermore, it has been recognized that if an action may properly be brought under either subdivision (b)(2) or (b)(3) of rule 23, it ought to be treated as a 23(b)(2) case.[173] In this way, the court may avoid unnecessarily burdening itself and the litigants with the stringent procedural requirements of a 23(b)(3) suit.[174] By so treating the action, a prospective class representative may avoid the procedural obstacles of 23(c)(2) and properly sue for restitution under 23(b)(2).[175] To ascertain whether it is possible in this way to avoid the expense of 23(b)(3) notice, some analysis of the constitutional issues in class litigation is in order.

Constitutional Implications of Restitution Under Rule 23. Quite apart from the requirements of rule 23, there is some disagreement among courts as to whether due process requires individual pretrial

171. Goldman v. First Nat'l Bank, 56 F.R.D. 587, 592-93 (N.D. Ill. 1972) (class action under Truth in Lending Act, seeking injunctive relief and recovery of statutory damages of $100 per class member, could not be brought under rule 23(b)(2) because the relief sought was primarily money damages); *Advisory Comm. Note to Amendments to Federal Rules of Civil Procedure*, 39 F.R.D. 69, 102 (1966).

172. *See* Souza v. Scalone, 64 F.R.D. 654, 658, 660 (N.D. Cal. 1974). *Souza* was a class action seeking a declaration of the invalidity of Teamsters Union pension plan age requirements and an injunction against their further enforcement. The defendants contended that, because the action sought recovery of past retirement benefits, withheld because of the age requirement, it should be brought under subdivision (b)(3) of rule 23. *Id.* at 658. The court rejected this argument, stating that mere inclusion of a claim for monetary relief does not render 23(b)(2) treatment inappropriate. *Id. See also* Robinson v. Lorillard Corp., 444 F.2d 791, 801-02 (4th Cir. 1971) (back pay award in employment discrimination case permissible in rule 23(b)(2) action); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719-21 (7th Cir. 1969). *Cf.* Porter v. Warner Holding Co., 327 U.S. 395, 399 (1946) (nothing is more clearly part of a suit for injunction than the return of what has been wrongfully acquired).

173. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 253 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); BOARD OF EDITORS OF THE FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 1.43, at 42-43 (1975).

174. *See* authorities cited note 173 *supra.*

175. A class claim for restitution also can be treated as arising under FED. R. CIV. P. 23(b)(3). When restitution is sought, the change in focus from measurement of individual injury to assessment of the extent of unjust enrichment should lead to the conclusion that common questions predominate over those questions affecting only individual class members, and that, since classwide restitution is probably the only method of obtaining private recovery for small claimants, the class action is superior to other methods of adjudicating the controversy. Hence, rule 23(b)(3) is satisfied. Treating the action as arising under 23(b)(3) carries with it, however, the potential difficulty of complying with subsection 23(c)(2).

notice to be given in a 23(b)(2) action as a prerequisite to binding absent class members in the event of a final class action judgment.[176] A few courts take the position that due process requires notice in all representative actions,[177] whereas several other courts find due process satisfied and hold that absent class members can be bound by the judgment if their interests were represented adequately by the class representative.[178] Although the United States Supreme Court has not yet expressly decided whether pretrial notice is constitutionally required in all class actions under rule 23, it may have indirectly answered the question.

In *Mullane v. Central Hanover Bank & Trust Co.*,[179] the trustee of a common trust fund petitioned for settlement of trust accounts.[180] The only notice of the petition given to beneficiaries was notice published in a local newspaper, pursuant to the requirements of a state statute.[181] Appellant, who was appointed to appear as special guardian of and attorney for the income beneficiaries of the trust, appeared

176. The Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) did not decide this question. The petitioner in *Eisen*, who had instituted the class action, argued that although the notice requirement of rule 23(c)(2) was designed to comply with due process requirements, the "touchstone of due process in a class action" is not notice, but adequacy of representation. *Id.* at 176. The Court rejected this contention, however, on the ground that, whatever due process might require, rule 23(c)(2) clearly commands that individual notice be sent in a 23(b)(3) action to all members identifiable through reasonable effort. *Id.* at 177. However, the Court did not determine what notice is mandated by due process in a class action. *Id.* & n.14; *see* Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975), wherein the Court noted, without discussion, that the problems associated with a 23(b)(3) action are not present in an action, not seeking monetary relief, under rule 23(b)(2). The Court recently granted review in a case raising the question whether class members can be bound by a 23(b)(2) judgment when they have no notice of the action. *See* Redhail v. Zablocki, 418 F. Supp. 1061 (E.D. Wis. 1976), *prob. juris noted*, 97 S. Ct. 1096 (1977) (three judge court holding that no notice was constitutionally required).

177. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-65 (2d Cir. 1968), *appeal after remand*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974); Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151, 158 (E.D. Va. 1974) (in order for absent class members to be bound by judgment in rule 23(b)(1) or 23(b)(2) class action, due process requires some type of notice); McCarthy v. Director of Selective Serv. Sys., 322 F. Supp. 1032, 1034 (E.D. Wis. 1970) (refused to give previous class action judgment binding effect due to failure to give notice), *aff'd per curiam on other grounds*, 460 F.2d 1089 (7th Cir. 1972); Pasquier v. Tarr, 318 F. Supp. 1350, 1354 (E.D. La. 1970) (to same effect), *aff'd per curiam on other grounds*, 444 F.2d 116 (5th Cir. 1971). *See also* Women's Comm. for Equal Employment Opportunity v. National Broadcasting Co., 71 F.R.D. 666, 671 (S.D.N.Y. 1976).

178. *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 256 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Souza v. Scalone, 64 F.R.D. 654, 658-59 (N.D. Cal. 1974); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), *aff'd in part, rev'd in part on other grounds*, 441 F.2d 704 (10th Cir. 1971). *See also* Gonzalez v. Cassidy, 474 F.2d 67, 75-77 (5th Cir. 1973) (refusing to give prior rule 23(b)(2) judgment binding effect in later rule 23(b)(2) action due to inadequacy of prior representation caused by counsel's failure to appeal from portion of previous judgment). The court in *Gonzalez* stated that, since the notice requirement of rule 23(c)(2) does not apply to 23(b)(2) actions, and since 23(b)(2) class members have no privilege of requesting exclusion from the class, absentees "must necessarily rely on the representative to protect their interests." *Id.* at 74 n.12.

179. 339 U.S. 306 (1950).

180. *Id.* at 309.

181. *Id.*

specially, contending that the statutory notice failed to satisfy due process, and that a final, binding decree, determining any claims which beneficiaries might have against the trustees, could therefore not issue.[182] In answering this argument, the Court announced what might be considered a general constitutional rule, stating: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[183] The Court in *Mullane* then went on to make three specific holdings. First, it concluded that, with respect to those beneficiaries whose interests or whereabouts could not be ascertained with due diligence, published notice satisfied due process.[184] Second, the Court held that as to those beneficiaries whose identities or whereabouts were known, published notice, because it was not reasonably calculated to apprise those beneficiaries of the pendency of the settlement proceedings, violated due process.[185] Finally, the Court concluded that, because of the state's interest in finally determining claims of individuals interested in the trust fund, and the identical, contingent, and uncertain nature of the interests of the beneficiaries, published notice to those identifiable only with due diligence was constitutionally sufficient.[186]

For all practical purposes, *Mullane* was a class action.[187] The special guardian was appointed to represent the interests of absent beneficiaries, in much the same way a plaintiff represents the interests of a plaintiff class. The case seems to require individual pretrial notice to all known class members if they are to be concluded by a judgment. As to unidentifiable class members, published notice suffices to conclude their rights. Similarly, because of rule 23's goal of finally determining the rights of large classes in one proceeding, and the identity of interests of all class members in determining a defendant's liability and establishing a restitutionary fund, the rights of class members identifiable with reasonable effort can also be concluded on the basis of published notice. Although it is probably correct to view *Mullane* as requiring some type of notice in all representative actions, it is nevertheless argued here that a different due process standard should apply in consumer class actions—that of adequacy of representation.

182. *Id.* at 311.
183. *Id.* at 314.
184. *Id.* at 317-18.
185. *Id.* at 319-20. The Court evidently viewed individual notice by mail to this group as being most desirable. *See id.*
186. *Id.* at 314, 317.
187. *Mullane* is viewed by at least one court as requiring some type of pretrial notice in class actions under rule 23(b)(2). *See* Neloms v. Southwestern Elec. Power Co., 72 F.R.D. 128, 131 (W.D. La. 1976).

The case which has given rise to the "adequacy of representation" view is *Hansberry v. Lee*,[188] a class suit brought to enjoin the breach of a racially restrictive agreement.[189] The Illinois Supreme Court had barred the defendant's attack on the validity of the agreement on the ground that an unfavorable judgment in a prior class action, in which the present defendants did not participate, was res judicata.[190] The United States Supreme Court thus had to decide whether due process had been violated by holding petitioners bound by the prior judgment. The Court stated: "[T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by [the judgment]."[191] The plaintiffs in the prior class suit had sought to enforce the agreement on behalf of themselves and others similarly situated, whereas the defendants in *Hansberry* were attempting to show the invalidity of the agreement and resist its performance.[192] The Court held that, because of this conflict between the interests of the representative parties in the prior suit and the defendants' interests in *Hansberry*, due process was violated against defendants.[193]

Although *Hansberry* did not reach the question, it is consistent with the purposes of class actions to adopt adequacy of representation as the determinative standard of due process in large class suits. The necessity for a single, final adjudication of questions common to large consumer classes demands relaxation of the ordinary requirement that an individual be given an opportunity to appear in court as a condition to concluding his rights;[194] imposing impractical constitutional notice requirements in consumer class actions is simply unnecessary. For instance, in a class action on behalf of small claimants, it will generally be true that their individual stake in controlling the course of litigation will be minimal. Since the amount each person risks is small, it may reasonably be expected that the response of the class to individual notice, either objecting to the adequacy of representation or seeking intervention through counsel, will be quite limited. In such circumstances,

188. 311 U.S. 32 (1940). Although *Hansberry* did not discuss the distinction, the case is believed to stand for the proposition that adequacy of representation, not notice, is the due process element necessary to bind absent class members by a class action judgment. *See* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 593-601 (1974); Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217, 1224-31 (1975).

189. 311 U.S. at 37-38.

190. *Id.* at 38-39.

191. *Id.* at 42 (citation omitted).

192. *Id.* at 45-46.

193. *Id.* at 44-45.

194. *See* Z. CHAFEE, *supra* note 9, at 231.

where representative parties adequately represent the interests of class members, their day in court may quite properly substitute for the day in court of the absent members, and individual pretrial notice to absentees should not be a requirement of due process.[195] Such a rule would, in actions on behalf of large consumer classes, satisfy the admonition of the *Hansberry* Court that the procedure selected must fairly insure the protection of absentees who are to be concluded by the judgment.[196] In short, in view of the potential cost of notice and the minimal benefits likely to be derived from it in an action involving small claimants, the preferable alternative in a rule 23(b)(2) action seeking restitution is to dispense with the requirement of individual pretrial notice as an element of due process,[197] and to demand, as a condition to binding class members by the judgment, that the absentees' interests be adequately represented.[198] Another impediment to the effectiveness

195. *See id.* *See also* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921) (if federal courts are to have jurisdiction over class suits, "the decree, when rendered, must bind all of the class properly represented").

196. *See* 311 U.S. at 42.

197. *See id.* Requiring that prohibitively expensive individual notice be given to absent class members defeats the purpose of rule 23—to provide a means of remedying many individually small injuries in one action, and thereby to make unlawful conduct unprofitable. *See* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 73 (D.N.J. 1971); Z. CHAFEE, *supra* note 9; Ford, *supra* note 9; Pomerantz, *supra* note 2, at 1265.

198. *See* Note, *supra* note 188, at 605.

There is no doubt that the sort of practical consideration discussed here may enter into the determination of the precise requirements of due process. *See* Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) ("The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."). While it is true that "a fundamental requisite of due process" is the chance to be heard, Grannis v. Ordean, 234 U.S. 385, 394 (1914), there is no reason why, in a class action, this opportunity cannot be furnished to a competent, motivated class representative. In addition, if some type of notice to class members is required, it should be permissible, given the practical problems discussed above, to postpone notice until after trial of the case and acquisition of the restitutionary fund, with the expenses incurred in giving notice paid out of the fund recovered. *See* Goss v. Lopez, 419 U.S. 565, 579 (1975) (timing and content of notice depend on balancing of competing interests).

Adequacy of representation consists primarily of three elements. One part of the adequacy test will be satisfied if the interests of the representatives and absent class members are coextensive. Souza v. Scalone, 64 F.R.D. 654, 659 (N.D. Cal. 1974). In the consumer class action for restitution, a community of interests exists since all class members are interested in establishing that the defendant has wrongfully acquired through actions directed at the class, a fund of money, and in attempting to compel the defendant to relinquish the fund.

The second element of the test relates to the adequacy of counsel. If a consideration of counsel's past experience indicates that counsel for the plaintiff class is qualified in the particular field of the proposed litigation and can be expected to vigorously assert and protect the rights of all class members, then counsel should be deemed adequate. Gonzalez v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973); Souza v. Scalone, 64 F.R.D. 654, 658 (N.D. Cal. 1974). A final factor which might be considered to determine adequacy of representation is whether the named plaintiffs have a sufficiently large stake in the outcome of the suit to ensure a diligent and thorough prosecution. *See* Rodriguez v. Swank, 318 F. Supp. 289, 294 (N.D. Ill. 1970).

If during the course of litigation the court determines that some aspect of the representation of the absentees' interests is inadequate, there are a number of alternatives available to the trial judge. He may, for example, require that pleadings be amended so as to eliminate any allegations as to representation of absent persons, FED. R. CIV. P. 23(d)(4), or he may order that the action be conducted in class form only as to particular issues. *Id.* 23(c)(4).

It is also true that notice, under rule 23(d)(2), may be ordered when the court

of the class action device as a consumer redress mechanism can thereby be removed.

CONCLUSION

Federal rule 23 has not proved to be a procedural panacea for the consumer. Many consumer class actions have run aground for both procedural and substantive reasons, being met by the judiciary not with creative assistance, but with hostility. This Note has suggested the availability of an extraordinary equitable remedy—restitution—as an alternative to the traditional type of recovery, and has demonstrated

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determines that the protection of the members of the class or the fair conduct of the action warrant it. *See id.* 23(d)(2). The notice may be ordered to apprise class members of a particular step of the action, the proposed extent of the judgment, or to give class members the opportunity to evaluate the adequacy of representation or to intervene and present claims. *Id.*

A related question is the extent to which the recovery of restitution on behalf of a class precludes litigation of any individual class member's damage claim. Regardless of the subdivision of rule 23 under which a class action arises, the rule indicates that the judgment, whether or not favorable to the class, shall include and describe those whom the court has found to be members of the class. FED. R. CIV. P. 23(c)(3). The court conducting the action cannot, however, determine the res judicata effect of the judgment; this can be ascertained only in later litigation. Gonzalez v. Cassidy, 474 F.2d 67, 74 (5th Cir. 1973); *Advisory Comm. Note, supra* note 171, at 106. However, the court conducting the initial litigation must frame the terms of the judgment at least to communicate its intended extent. *See id.* In order to properly tailor the terms of a judgment awarding restitution to a plaintiff class, the court should distinguish between restitution and damages, indicating that the judgment conclusively determines any damage claims which the defendant has in effect paid by making restitution. For example, if the class of defendants in the hypothetical used in this Note, see text & notes 71-74 *supra*, were required to make restitution by setting up a reserve account equivalent to the amount of illegal overcharges acquired by them, they would effectively be required to pay actual damages. This is because the damages sustained by the class members are equivalent to the overcharges they have paid. In this situation the court should phrase the judgment in order to preclude relitigation of the damage claims of individual class members, preventing double recovery against the defendant. If individual class members do come forward seeking to recover individual damages, their claims may, of course, be satisfied by allowing for payment from the defendants, accompanied by a corresponding charge against the reserve account. *See* SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971). On the other hand, if class members have sustained damages which did not result in the enrichment of the defendants, a decree ordering restitution does not include these amounts. Accordingly, a class action decree should contain a provision limiting the bar of the judgment only to those damage claims which, in effect, have been merged in the restitutionary recovery. Any consequential damages, such as incidental expenses paid to third parties, should expressly be excluded from this merger.

A more difficult question is posed by the following example. Suppose that a binding class action judgment has been rendered and a fund recovered, and, further, that notice of some type has been given proposing a pro rata distribution to all individuals who submit claim forms verifying their class membership. Some class members may have provable claims in excess of the proposed pro rata share, and the question is whether these individuals are limited to the pro rata share or are entitled to prove a claim in a greater amount. Furthermore, if given the option to prove the greater claim, from where shall it be paid? If the fund recovered equals a pro rata share multiplied by the number of individuals in the class, the individual claimant would at least be entitled to the pro rata share. If monies paid by him to the defendant exceed this share, the excess should not be merged in the judgment and the claimant should be permitted to prove and recover the excess amount. *See* Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 432-33 (W.D. Mo. 1973). To the extent that the restitutionary fund is not depleted by other individual claims during the time period set for their submission, the excess might be satisfied from the fund. In the event the entire fund is used to pay pro rata individual claims, the class member seeking to recover an excess amount should be permitted to prove the claim and force its payment by the defendant, in addition to the funds already disgorged.

how it might operate to remove some obstacles to effective consumer redress. There has never been an application of the remedy set forth herein to a fully litigated class action. Nevertheless, the size and complexity of our national economy require that the courts use creativity in applying the flexible principles of equity to new factual contexts. As stated by the leading writer on equity:

> Equity has followed the true principle of contriving its remedies so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated. It has, therefore, never placed any limits to the remedies which it can grant, either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.[199]

It is hoped that the suggestions presented here will lessen judicial hostility toward a useful procedural tool, and evoke thoughtful attempts at solving the dilemma of the consumer class. If, however, in spite of the arguments presented in this Note, courts persist in their refusals to face head-on the problems confronting small consumer claimants, then the burden shifts to Congress and the legislatures of the several states to enact means of ensuring the effective use of the consumer class action.[200]

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199. J. POMEROY & S. SYMONS, *supra* note 136, § 111, at 143-44.

200. Congress has shown itself quite receptive to the adoption of creative solutions to the judiciary's reluctance to fashion new remedies for antitrust claimants. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435 (amending 15 U.S.C. § 15 (1970)), discussed in note 162 *supra*. If an unfavorable judicial reception is given to the construction of section 16 of the Clayton Act proposed herein, see text & notes 111-62 *supra*, then Congress might quite properly amend the section to permit private actions for restitution. *See* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2069 n.14 (1977).

Section 16, 15 U.S.C. § 26 (1970), currently provides that, "Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ." One means of furnishing a section 16 cause of action for restitution is to amend the section to read:

> Any person shall be entitled to sue for and have injunctive relief against threatened loss or damage, or against a threat of continuing loss or damage, when such loss or damage, whether direct or indirect, will result or resulted from a violation of the antitrust laws. Relief under this section may take the form of a mandatory injunction requiring a defendant to perform such acts as the court in its discretion deems necessary to cure the effects of past violations, including, but not limited to, an order requiring a defendant to make restitution of monies acquired through a violation of the antitrust laws.

The suggested amendment would eliminate any question concerning the propriety of ordering restitution under section 16. Likewise, inclusion of the language "whether direct or indirect" would ensure that restitutionary relief could not be denied because claimants did not deal directly with the violator. The proposed amendment would also permit a court to order other forms of affirmative injunctive relief, thus granting a court in a private action a breadth of discretion similar to the powers possessed by the court in government antitrust cases. See text & notes 125-36 *supra*.