In the

Supreme Court of the United States

ORTON EISEN, etc.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 73-203
	)	
RLISLE & JACQUELIN, et al.,	)	

Washington, D.C.
February 25, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

MORTON EISEN, ETC., Petitioner	:	
v.	:	No. 73-203
CARLISLE & JACQUELIN ET AL.	:	

Washington, D.C.

Monday, February 25, 1974

The above-entitled matter came on for argument at 11:07 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

AARON M. FINE, ESQ., 1700 Market Street, Philadelphia, Pennsylvania 19103 Attorney for the Petitioner

DEVEREUX MILBURN, ESQ., New York City, N.Y.
WILLIAM ELDRED JACKSON, ESQ., New York City, N.Y.
Attorneys for the Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-203, Morton Eisen against Carlisle and Jacquelin.

Mr. Fine, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF AARON M. FINE, ESQ.,

ON BEHALF OF THE APPELLANT

MR. FINE: Mr. Chief Justice, and may it please the Court:

This case is before the Court on a writ of certiorari to the Court of Appeals for the Second Circuit to review its decision dismissing the action as a class action.

The grant of certiorari requested the parties to brief and argue, in addition to the questions presented, the question of the jurisdiction of the Court of Appeals.

The other questions include the manageability of the large class action, who must be given notice, who should pay for the notice and the scope of discretion of the District Court.

Turning first to the jurisdiction of the Court of Appeals, jurisdiction was asserted on two grounds. First of all, the Court, in 1968, and reversing the District Court, said that it retains jurisdiction and, secondly, the

Defendants say that it has jurisdiction, anyway, under the Collateral Order Doctrine.

Originally, jurisdiction was assumed in the Court of Appeals under what became known as the "Death Knell Doctrine" when the class action in the first instance was dismissed by Judge Tyler in the District Court and on the Plaintiff's appeal, the Court of Appeals held that to dismiss the class action and, in effect, bring it to an end, the class would never get any chance of review.

Now, if the Death Knell Doctrine, if incorrectly decided, later when the case was decided on the merits by the Court of Appeals in what became known as Eisen II, when it said, "We retain jurisdiction," it would, obviously, have had no jurisdiction to retain. The Defendants concede that.

We, however, adhere to our view originally expressed in our position to their petition for certiorari before this Court when the Death Knell Doctrine came up for review and that petition was denied, that it was soundly decided by the Second Circuit.

Now, it has been considerably eroded since then. For example, the Third Circuit in Hackett against General Host Corporation rejected it entirely. But what happened in Hackett, I think, shows how wise the Second Circuit was in adopting the Death Knell Doctrine because after Hackett refused to hear the appeal in that consumer antitrust case

brought by and on behalf of purchasers of bread following the conviction for price-fixing in the Philadelphia area.

The case was dropped by the Plaintiff because it couldn't proceed without having a class action to support it and, consequently, the question of the class never got to be reviewed.

Our submission is different. We submit that, while the Court of Appeals said, in reversing the District Court, when the District Court dismissed the class action, that it retained jurisdiction.

What it actually did was to relinquish jurisdiction because it reversed. This is unlike cases where a court of appeals may remand the record for further findings because the record before it is insufficient to enable it to render its decision and, meanwhile, no decision is rendered.

Here a decision was rendered so that the court said it retained jurisdiction but it really didn't.

In fact, the Defendants were so confused about their role that when they came up before the Court of Appeals for the final time, this time trying to reverse the District Court because the District Court had sustained the class action in every respect, they didn't know who they were, and they designated themselves as "Appellees," even though they had lost.

So there is a complete paradox and anomaly in the Court of Appeals having rendered its decision saying, in fact, that it retained it.

Turning to the Collateral Order Doctrine under Cohen, that has no application for a number of reasons.

First of all, the class action determination is, in the language of Cohen,"but a step toward final judgment in which it will merge." Rule 23(c) prescribes that judgment will be entered for or against the class, as the Court recently noted in its opinion in American Pipe against the State of Utah and it is a step which has to be taken in every class action because under Rule 23 (c1), the Court is required, as soon as practicable after the class action is brought, to make the class action determination.

QUESTION: What you are saying, is there any suggestion or are you suggesting that a circumstance can arise where the determination of the District Court on the class action is unreviewable because of the way it is moved back and forth between the District Court and the Court of Appeals?

MR. FINE: I think it is unreviewable at this stage of the case and as a matter of fact, the Court of Appeals reached out to decide all sorts of questions that were only tentatively decided by the District Court that were not right for decision and that should have awaited a

complete record in the District Court in the same way as many decisions of the District Court are not reviewable in initial stages of the case and, in any event, as Mr. Justice Blackmun pointed out in his concurrence in the State of Utah case, Rule 23 specifically provides that the order of the District Court sustaining the class or even denying the class may be altered or amended prior to decision on the merits and Judge Powell, in fact, said, in his opinion in which he was reversed here, that the response to the kind of notice that he had ordered might prompt him to change his mind and disallow the class so that this is the kind of order that Cohen certainly doesn't contemplate will be reviewed now because it might be changed.

QUESTION: Mr. Fine, was Cohen the basis for the Court of Appeals holding in Eisen I that it had jurisdiction to review Judge Tyler's original order?

MR. FINE: Yes, your Honor, Cohen and Gillespie in effect, they held there that this was/something that would irreparably harm the class because this was the only way the class could get review.

It's like a case where an attachment is released and unless there is immediate review, the object of the attachment may be gone.

But here, the converse is that the Defendants preserve their right to review which the Plaintiff didn't have

in Cohen and wouldn't have had, if the Death Knell Doctrine had not been applied. The Defendants at the end of this case, when judgment is entered, will have the right to review on all of these questions and at that point it could very well be that Judge Tyler will have modified his order or will have reduced the class, might have eliminated the class entirely, changed it in many possible ways.

QUESTION: What about the payment of the order requiring payment of costs or notice?

MR. FINE: Well, that is no different, your Honor, from discovery orders, for example in TWA against Hughes, the Defendant there was ordered to comply with discovery, which the Defendant said would cost, in the petition for certiorari filed in this Court, $5 million but nevertheless, the discovery order, as all discovery orders are held to be, was held to be interlocutory and not appealable.

QUESTION: Do you think that is quite the same as requiring the Defendant to advance the costs for notice?

MR. FINE: I think it is, your Honor, because the rule doesn't impose the burden of costs on the Plaintiff. It says, "The Court shall direct notice to the class," and so it obviously, unless the Court is the one that is supposed to pay for notice under that specific language, it obviously gives the Court the power to decide who should pay for the

notice and here, just like in a case where the Defendant may be subjected to the cost in preparing to try an antitrust case, have to pay for the transcript, have to pay for discovery, but under the antitrust laws, the Plaintiff isn't required and cannot be required to put up any security for those costs.

The Defendant there, as the Defendant here, has to look to whatever judgment is entered at the end of the case in its favor -- if such a judgment is entered -- and collecting that judgment, if it gets a judgment for costs.

QUESTION: Your security for costs, Mr. Fine, is traditionally when the costs are taxed at the end of the case is really expenditures that you have incurred to your own travel or your own pay to a court reporter. You may be able to tax against the opposite party, but it strikes me that there is something to what the Chief Justice says. This is not quite the same thing as that.

MR. FINE: Well, your Honor, I think there are some instances, for example, where a master is appointed and the parties are required to advance the expenses of the master before the end of the case and there may be a division, I think, under the equity powers under Rule 54(b) to allocate those costs.

But in any event, just this is no different from the discovery cases from the standpoint of finality on

appeal because you may recall that Hickman versus Taylor came before this Court because Mr. Fortinbore, the Philadelphia lawyer, who was asserting the privilege against producing his work-product papers there, had to undergo a citation for contempt before he could get review.

We are not at this stage in this case. The Defendants have not said whether they will comply with the order or they won't comply with the order and, certainly, this is no different from the discovery cases.

For example, United States versus IBM, which is before you on petition for certiorari, until the Defendants have taken some irrevocable step with respect to the order of the District Court, suppose they say, "We won't put up the costs"? Well, there are all sorts of alternatives.

They might be held in contempt, in which case, depending, I suppose, on whether it is civil or criminal contempt under the IBM case, they might have a right to review.

On the other hand, the Court might say, "Well, if they won't put up the costs, we are going to say that this would have the effect of a Rule 23 class action even without notice to the class for certain results.

For example, for binding the Defendants as against the prospect of Walmly intervention and so on so that this is no different, certainly, from the discovery cases,

even if it were thought to be slightly different from the standpoint of the Defendants advancing costs at this point, from the standpoint of finality.

QUESTION: Mr. Fine, what if we not only agree with you, but went further and came to the conclusion at this late date that the Death Knell Doctrine, as developed in the Second Circuit is wholly inappropriate and improper and that there was no right to appeal whatsoever in Eisen I from the District Court's first disposition of this case?

What would be the result? Would this move us all back to square one, do you think?

MR. FINE: I doubt it, your Honor. I think it would move us back to the District Court and under his powers expressly given under Rule 23, Judge Tyler, hopefully, would then say that he was wrong the first time, he was right the second time, and would reinstate his second decision upholding the class.

QUESTION: Well, yes, but what you would have, then, is his first decision and with an opportunity for you to try to convince him that he was wrong.

MR. FINE: I think that's --

QUESTION: Having erased everything that the Court of Appeals has done in the meantime. Is that right?

MR. FINE: That's right.

Now, I would like to point to another

distinction in Cohen. That involved the general applicability of a statute. The question in Cohen as phrased by another panel of the Second Circuit in the Weight Watchers case, was whether a decision will settle a point once for all, as it did in Cohen, or will open the way to a flood of appeals concerning the propriety of a District Court's ruling on the facts of a particular suit.

Now, the Court of Appeals here has held that in some cases, costs can be imposed on the Defendant, cases where they may have a duty -- for example, a corporation's duty to its stockholders. But here, the Court of Appeals has said that in some cases the District Court may impose costs and in others, particularly in this case, that it is inappropriate.

So what they are really doing is interfering with the District Court's discretion depending on how they view the facts of a particular case.

Furthermore, turning, really, not to the question of appealability but advancing somewhat to the question of the propriety of putting the costs on the Defense, here the District Court found -- and these findings were not upset by the Court of Appeals because the Court simply said the District Court did not have jurisdiction to make them, that the New York Stock Exchange had violated its duty under the Exchange Act to protect the odd-lot investors who are the

class in this case and the violation of that duty in which it was aided and abetted by the other defendants certainly is no different from the kind of duty, or no less in scope, than the duty which the Court of Appeals said could be the basis for putting costs on the defendants in another kind of case.

So for that reason, Cohen doesn't apply because this is really a decision on a case-by-case basis and many district courts have routinely, since Rule 23 was amended, allocated the costs between the parties without any thought that they were doing anything wrong. And the Court of Appeals here says in some cases they should be able to do that so that I submit that a general rule which this Court would be asked to apply that in no case can costs be allocated, should not be adopted and since the question of a general rule is not involved, the Defendants had no right of appeal.

Now, turning to the issue of manageability --

QUESTION: Just before we leave that --

MR. FINE: Yes?

QUESTION: -- question of appealability, I understand that the Death Knell Doctrine was originally developed in the Second Circuit and is adhered to there, that it has been given some sort of halfway recognition in the Ninth Circuit, but explicitly disagreed with in the Third Circuit and what is the other? What is the state of

the law in the other circuits?

MR. FINE: I think in the Fifth Circuit it is recognized. I believe there are a number of cases in the Fifth Circuit where it has been recognized but I think that the two circuits which have definitely ruled on it --

QUESTION: You mean, the Second and the Third.

MR. FINE: -- for and against, are the Second and Third, yes, your Honor.

QUESTION: Umn hmn.

MR. FINE: On the issue of manageability, it is not an issue at all on class actions maintained under 23(b)(1) or (2) which would be, for example, actions for an accounting for a trust fund or, here, an action for injunctive relief.

The Second Circuit just summarily, in its first decision, where it reversed dismissal of the class action, said that this can't be a (b)(2) action because the advisory committee note says that doesn't apply to situations exclusively or predominately for the recovery of damages.

Now, this case isn't exclusively or predominately for the recovery of damages. This case seeks and has sought from the very first in the complaint requests, very substantial injunctive relief.

For example, the SEC Special Study of the Odd-lot markets, which was the basis, really, of this case,

found that an engineering firm, Ibasco, had concluded in 1955 that very large cost savings could be put into effect if the odd-lot defendants automated their operations and Judge Tyler found, in July of 1972 that as of that date, those recommendations had not only not been implemented, they hadn't even been considered, so there is still a substantial need for injunctive relief here to reduce the cost of the odd-lot defendants because, as the Court found, reduction of those costs would necessarily have a beneficial result for the class because it would mean that the odd-lot differential, which is the basis of this case, had charged that it was inflated and fixed in violation of the antitrust laws, would necessarily be affected and reduced.

Yet the Court of Appeals ruled out a (b)(2) action as a matter of law but manageability enters into the rule only under (b)(3) actions, those that are what were formerly known as "spurious class actions," but since your decision in the Utah case, are known as "truly representative suits," like all of the others.

And manageability in (b)(3) actions, under the language of the rule, is only one fact to be considered in deciding whether the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Now, here, the Court of Appeals said, both in

the Death Knell opinion and in the second opinion, that the class action was the only feasible method for adjudicating this controversy because the individual class members, like Eisen, have such small stakes that they are not going to come forward with individual suits and yet, having held twice that this is the only feasible method and the rule saying that manageability is only to be considered in the light of whether the class action is superior to other available methods, the Court of Appeals dismisses the class action.

Aside from the language of the rule itself, however, the difficulties of management which the Court of Appeals perceived in this action, are just not so.

First of all, it didn't even consider what the Rule specifically provides and that is, that you can have a class action on the common question of liability. That part of the class action is certainly sound.

But here the District Court also found that gross damages can be determined on the basis of a common formula and estimated for the entire class.

As a matter of fact, the odd-lot defendants know exactly what they charged to the class as a whole because the charge was their income and if the District Court is right that a formula can be adopted, then we know what part of that total charge, that aggregate charge, was an over-charge.

Now, certainly, as to the two million and a quarter class members whose individual transactions, the defendants stipulated, are recorded on computer tapes and can be derived from those computer tapes, constituting 56 percent of the transactions of the class as a whole, what is the difficulty in managing that if you have a formula that you can apply across the boards?

This is no different from the utility cases where refunds are routinely ordered when some rate is found to have been too high and, in fact, in the Panhandle Eastern Pipeline case, the Court pointed out that refunds were made to over a million ultimate consumers with reasonable promptness and without serious controversy under the supervision of a master.

Similarly, in the Illinois Bell Telephone case, in the days when people had to copy records like Bob Cratchett sitting on a stool before the days of the computer, refunds were made of $17 million to over a million people entitled to the refunds.

So, if you have a formula, there is really no great problem in managing, especially with the assistance of data processing and from personal experience I know that these burdens do not fall necessarily on the Court. They are assumed by counsel, by accountants and by data processing firms and here, you have two and a quarter million class members who stand to receive and recover a tangible amount

without undue difficulties of management, but they have been put out of court because the Court of Appeals erroneously concluded and held that Judge Tyler had said that the only way that this class could be managed would be by the so-called "fluid recovery," that is, the future reduction of the odd-lot differential.

QUESTION: Mr. Fine, as a procedural, practical matter, you say these burdens are largely assumed by accounting firms or data processing firms. How are they compensated? Prior to final judgment or afterwards?

MR. FINE: It comes up in two contexts, first in the settlement or after final judgment.

Now, in a settlement context, they are usually compensated out of the fund. If it comes up after the final judgment, then the Defendants, under such decisions of this Court as Mills against the Electric Auto-Lite Company, are liable for the costs.

QUESTION: Then you don't have to worry about it until either you have agreed on a settlement or until after final judgment?

MR. FINE: That is right. That only comes up at the time of distribution, which is after settlement or judgment.

Now, it is true that the Plaintiff's counsel suggested in the District Court that if six million class

members had to go through their ancient records -- and he said, in that narrow sense it would be impracticable, so he suggested what became known as the "fluid class recovery," that is, equitable relief, fashioning a remedy for future reduction of the odd-lot differential and that would benefit, certainly, odd-lot investors as a whole and those who overlapped the class who had paid the overcharge during the period in suit.

The District Court didn't adopt that, saying only it merited consideration, that individual claims could be satisfied to the extent filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainders.

And if you have the formula kind of distribution for those whose identities are on tape, then you may even be able to cut out a large part of the claims procedure.

QUESTION: Mr. Fine, you said the District Court hasn't taken the position as to what would be done with the unclaimed remainder. What would you suggest be done with it?

MR. FINE: Well, I think there are many alternatives, your Honor. First of all, the Defendants could say it should go back to them and they will have the opportunity to argue that after judgment is entered, as the Rule contemplates, for the total amount of damages for the

class as a whole.

Secondly, it could be applied to reduce the odd-lot differential in the future. It could be done under the general equity powers of the Court, which it certainly has under Case against Borak to fashion any remedy to make the Securities Act effective, and that is the kind of thing that was done in the Bebchick case.

QUESTION: But Bebchick was quite a different kind of a case, wasn't it? It wasn't a class action.

MR. FINE: It wasn't a class action, but you have class actions where the same approach was taken. The Metro Homes case in Michigan was a class action where there had been an illegal exaction of a tax then held to be unlawful and there the Court upheld that the taxing authority had to pay over the entire amount and couldn't get back any part of the amount illegally collected, even though individuals didn't come forward to consume the entire amount.

So that what I am saying is that, although Bebchick was a different case, it provides part of the substantive law, the equitable principles on which the Court can rely in fashioning a remedy; whether the action is a class action or not a class action, it really makes no difference.

Further, Mr. Justice Powell, to make another

answer to your question, suppose notice goes out to the two million and then there is a judgment of liability and a fund is created, they can then be told you have a refund due to you and the same notice can be published for those who can't be identified, assuming they will read the notice, and if you like, you can assign your claim for the benefit of future odd-lot investors.

That is exactly the kind of thing that was approved by the Second Circuit in the Pfizer case.

So there are all sorts of possibilities, but, certainly, at this point we don't have to go into them because that --

QUESTION: What you are saying is, you are saying that somebody has such a small claim that he won't bother to file at all. If that is so, just his silence is rather an insecure, insubstantial way of saying that he has waived his claim.

MR. FINE: Well, people with small claims --

QUESTION: Or that he has made an assignment to somebody.

MR. FINE: That is just one of the possibilities to be considered and I have had experience in class actions where people with claims of as much as $10 in a class where some people had claims of thousands of dollars, the Plumbing Fixtures antitrust case, pursued their claims for

the $10 just as diligently as those with the bigger claims. It meant a lot to them and just because these claims are small doesn't mean that it doesn't mean a lot to these investors.

As a matter of fact, these Defendants have taken full-page ads saying, they are addressed to the odd-lot investors as the "little guys." These are the little guys, the people who do not have, by and large, enough money to invest very much and so these small amounts do mean a lot to them.

But in any event, that is all tentative and not necessarily to be decided and, certainly, not to be ruled out by the Court of Appeals on a sort of advisory opinion basis.

Now, turning to individual notice, it is not required in (b)(2) actions for an injunction and under the decisions like Hansberry and Lee and Ben-Hur against Cauble, adequacy of representation is the hallmark of due process in class actions, not individual notice.

For example, those precluded by the judgment in Ben-Hur never had notice of the prior class action which precluded them.

Under (b)(2), individual notice is not required by the rule and the Defendants concede it.

Now, under 23(c), the Court is directed to

direct the members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

It does not mandate individual notice where it is not practicable or where identification entails more than a reasonable effort and here the Court of Appeals, in effect, held that the claims of the silent members of the class are more theoretic than real. They are not going to want to have an opportunity to opt out to conduct their own litigation. They are going to rely on the class and the results of the class so that the kind of notice ordered by the District Court here certainly conforms to a language of the rule which is the rule of reason, that it is the best notice practicable under the circumstances because to have a requirement of any other kind of notice in a case where the class consists of small claimants would mean that the class action rule could never be used if you had a stringent notice requirement to protect their interests.

QUESTION: Does the Court of Appeals look at this case as a (c)?

MR. FINE: (b)(3) action --

QUESTION: (b)(3).

MR. FINE: -- with the kind of notice required of (b)(3) actions, has to be given. Now --

QUESTION: What about (b)(2)?

MR. FINE: Well, it could be looked [at] as a (b)(2) action, and there are --

QUESTION: The Court of Appeals says it wasn't.

MR. FINE: It says it wasn't. I say it was. I say it is (b)(2) and (b)(3) and where it is hybrid, that is, where it --

QUESTION: You'd say it is (b)(1), wouldn't you?

MR. FINE: (b)(1). Where it is hybrid --

QUESTION: But the Court of Appeals didn't --

MR. FINE: It said no, no (b)(1), either.

QUESTION: Let us assume it is either (1) or (2) but it is (3).

MR. FINE: Well, then there are --

QUESTION: Then what about the notice requirement?

MR. FINE: There are a number of decisions that say, if it can be viewed as (b)(1) or (b)(2), view it as (b)(1) or (b)(2) even if it is also (b)(3).

QUESTION: I understand, but let us assume that it is not?

MR. FINE: It is not?

QUESTION: Let's assume you must look at it as a (b)(3). Then what about the notice?

MR. FINE: That is a (b)(3) action. Then the question is what reasonable notice,within the intendment of the rule, and what are the interests to be servied by notice?

Now, one of the interests to be served by individual --

QUESTION: Doesn't the rule just say that you serve notice -- or what?

MR. FINE: No, no. No, no. It says, "The Court shall direct to the members of teh class the best notice practicable under the circumstances," and in Mullane, this case has --

QUESTION: It goes on. It says --

MR. FINE: Well, it says, "Including individual notice to all members who can be identified through reasonable effort."

QUESTION: Right.

MR. FINE: But --

QUESTION: How do you read that? The Court of Appeals read that as the kind of notice that must go in any event.

MR. FINE: Yes, whatever the effort and whatever the circumstances.

QUESTION: Right.

MR. FINE: First of all, we say, "The best notice as practicable under the circumstances" qualifies the rest of the Rule but on the record here, even if it does not, the Defendants' evidence was that generating the individual names and addresses could be very laborious. The

witnesses so testified, very expensive, certainly beyond any reasonable effort on the Plaintiff's part and they offered to furnish the names and addresses, undertaking an unreasonable effort, only to make the Plaintiff pay for individual notice.

In other words, they were trying to get the key to their own salvation by saying, "Well, we don't care what the effort, we'll generate these names and addresses and that will be the end of the case."

So that if you simply take the second part of the rule, I submit that it really doesn't require individual notice in this case and the best notice practicable under the circumstances of this case is exactly the kind of notice that the District Court ordered and this isn't a case like Mullane or Schroeder, where individual notice was really important at that stage of the case because persons were about to be deprived of their property interests.

Here in Eisen what is involved at this point is the effort to create a common fund and later, when the fund is created, notice will go out to everyone who can be individually identified because then they will have a stake in what is done with the distribution of the fund.

QUESTION: Well, there is a very specific purpose for a (c)(2) notice, though, Mr. Fine, isn't there? And that is to give the member of the class an opportunity to

opt out, as it is put.

MR. FINE: That's right, but --

QUESTION: Or to hire his own lawyer if he wants to. It is all spelled out in the statute --

MR. FINE: That's right, but --

QUESTION: -- and it is quite unlike (b)(1) or (b)(2) -- (b)(2), which is primarily an injunctive action.

MR. FINE: But you still have to look at the purpose to be served by the notice when it talks in terms of the best notice practicable under the circumstances.

The Advisory Committee note says that in many cases, the interests of the class members to whom that notice would be directed are more --

QUESTION: Mr. Fine, what if you lose your case?

MR. FINE: Well --

QUESTION: When you talk about a fund and "once we win the case," then you can give people notice, what if you lose? The people you didn't give notice to are burned.

MR. FINE: That is right, but the Court of Appeals found that their interests, because their claims are so small, are more theoretic than practical, anyway. They would not bring individual suits any more than Eisen could bring an individual suit without the class.

QUESTION: And yet you say their interests are substantial enough that their failure to respond should be

interpreted as a waiver, or something?

MR. FINE: Well, that is only one possibility, your Honor, that may or may not be adopted, depending on the circustances at that stage of the case. But --

QUESTION: But they are barred --

MR. FINE: They are barred, your Honor. They are barred.

QUESTION: Well, isn't that one of the purposes of the notice, to make sure that they have a chance not to be barred?

MR. FINE: Although, whether they are barred as the, I think, Advisory Committee and decision points out, is something that they could litigate subsequently.

In other words, it is not decided in the first case, the res judicata effect of the judgment. That is something that they would have a chance, if they wanted to, to litigate later.

QUESTION: Well, you can always have a chance at litigating but I thought that one of the major aims of amending a rule was to --

QUESTION: Make it reasonable.

QUESTION: -- bar people --

MR. FINE: That's right, but --

QUESTION: If it's right, where is it wrong?

MR. FINE: Well, it's right, but res judicata

depends, under Hansberry and Lee and such cases as that, on adequacy of representation.

QUESTION: So the rule really didn't accomplish it?

MR. FINE: I don't know whether the rule was necessary. I don't think there is any decision of this Court that the Defendants point to, to the effect that in what were previously known [as] "spurious class actions," if you had adequacy of representation but not complete notice, that that wasn't res judicata. Perhaps it was. Perhaps it should be, like the Ben-Hur case where everyone's interests are really common, just as they are when they are going after a common fund.

Now, on the cost of notice, I think I have covered that to some extent already. The Court is said to have to direct notice. If the parties have to direct notice, I submit that that can be decided on an equitable basis and here, even without the evidentiary hearing, the District Court would have been justified in taking judicial notice of the fact that the SEC's own special study had found that the defendant exchange had reached its duty to these odd-lot investors and what is really so wrong about making the exhcange, which is supposed to protect investors, and which didn't, pay for notifying them that they have an opportunity to get some kind of recourse, if that is the only recourse that they have -- and perhaps, the whole question of

individual notice, Mr. Justice White, would be eliminated as a problem if you would hold that the Defendants can be made [responsible] for the entire individual notice here.

QUESTION: Let's assume you lost your case again.

MR. FINE: Yes.

QUESTION: Horrible thought. Say you lost it. Then, what about costs of notice then? Who is going to pay in the long run?

MR. FINE: Well, under Rule 54(d) I think, equitable principles could be applied. It depends on the equities of the situation.

QUESTION: Well, wouldn't they be taxed to the Plaintiffs?

MR. FINE: Not necessarily, your Honor.

QUESTION: But probably.

MR. FINE: No, not even probably. There is a case --

QUESTION: I guess you would have to say that, otherwise, you would have to put up a bond in the first place.

MR. FINE: No, I say -- well, there is no bond provision for any plaintiff under the antitrust laws. Suppose you are put out of business by an antitrust violator and he has taken away your opportunity to make any money and you just have enough money to pay for, say, your

own transcripts but you certainly don't have enough money to pay for the defendants costs, taxable costs, that they incur in defending the suit.

Does it mean that if you are put out of business but for some reason you lose your antitrust suit, you have to put up a bond? The law is to the contrary.

QUESTION: In your suit, presumably you were not put out of business by those defendants.

MR. FINE: Well, that is something that may depend on the jury. I don't think you can --

QUESTION: But that is the way we resolve those questions. If a jury says the defendants win, the plaintiffs didn't have an antitrust case.

MR. FINE: There is a case where a plaintiff established that the defendant had violated the Robinson Patman Act, but the jury found he had not been damaged and so the judgment was entered for the defendants, but the court still taxed the costs to the defendants, because they had violated the law and I think in principle and in equity, it is no different from what the special study of the SEC shows here, that is,the Exchange reached its duty to investors and perhaps this cost should be put on the Exchange simply on that basis alone and never made a taxable cost. Why shouldn't the Exchange pay for it? They are supposed to protect investors and the SEC has found that they did not and

perhaps it won't be held to be an antitrust violation.

Even then, I say, the costs are equitably to be imposed on the Defendants in this case.

I'll reserve some time for reply, if I may.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Fine.

Mr. Milburn.

ORAL ARGUMENT OF DEVEREUX MILBURN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. MILBURN: Mr. Chief Justice and may it please the Court:

Mr. Jackson and I -- Mr. Jackson represents the Stock Exchange and I represent the odd-lot houses -- are dividing our time basically equally and just to give you a plan of what we intend to do, I will deal with the question of jurisdiction. I will deal with the question of expanding and correcting some of the facts. I will deal with manageability and with notice.

Mr. Jackson will deal with the substantive aspects of Rule 23. He will deal with fluid recovery, minihearing and the costs of notice and policy considerations.

I would like to commence with the arguing briefly as to jurisdiction which was requested in the grant of certiorari in this case.

We believe that we, at the Court of Appeals, had jurisdiction mainly because we have had from us

extracted the sum of $19,000 -- or it is intended to be extracted from us -- to finance a case against ourselves and, if we are successful, by the Plaintiff's own admissions, no chance of recovering it.

We have had inflicted upon us what we consider an illegal and unlawful minihearing, a truncated hearing on the merits, trial after trial and prior to jury trial, which we have requested.

We have been subjected to or we are told that we would be subjected to such inadequate notice that the rights of the class would be denied, that res judicata will be denied to us, that the chance of Plaintiffs opting out -- members of the Plaintiff class opting out -- will be denied to us because of the inadequacy of the notice.

We have also seen a misconstruction of Section IV of the Clayton Act, as it applies to the odd-lot houses and a misconstruction of Section VI of the Exchange Act as it applies to the Stock Exchange.

We submit that because of all of these violent actions taken by Judge Tyler against us that this case comes clearly under the Doctrine of Cohen against Beneficial Loan.

Cohen said that when matters were too important to be denied review, too independent to require postponement until the whole case is decided, that they should be adjudicated at the time.

QUESTION: Mr. Milburn, why isn't Mr. Fine right on the $19,000 business under Hickman against Taylor, that if you want to raise that as an issue on appeal, you don't simply pay when the court tells you to pay, you go to jail for contempt, an appeal of contempt citation.

MR. MILBURN: Well, I think that is a possibility but we feel that we have a right under the Cohen Doctrine to appeal at this time and I would find -- I just am guessing that my clients might have some objection to following the course you suggest and maybe going to jail, pending an appeal.

I haven't discussed it with them, but I am guessing.

Now, I would like --

QUESTION: Mr. Milburn, you didn't, after Eisen I and in this Court, didn't you -- there was a petition for certiorari here, was there not?

MR. MILBURN: Yes, sir.

QUESTION: Which was brought by you or your client?

MR. MILBURN: That is correct.

QUESTION: Which was denied.

MR. MILBURN: That is correct, your Honor.

QUESTION: Your client and is counsel still of the same view that the Death Knell Doctrine is an invalid

doctrine?

MR. MILBURN: Your Honor, we stand by our brief in the petition for certiorari in that case.

However, in this case, if Judge Kaufman is reversed, then -- as I think someone said, we will be back with Judge Tyler, the 1966 Judge Tyler, whom we prefer and I think one could assume from what has happened since that Judge Tyler might -- as he is permitted to by the Rule, he might change his opinion and he might reinstate Tyler II, as I call it and Tyler II(a).

Now, looking at the Opinions in the en banc decision and what has gone -- the water that has gone under the bridge -- I cannot see how we would be denied a 1291(b) certification.

So we would be back in the Court of Appeals.

We would be back here and we would have played ring around the rosey for a considerable period of time.

QUESTION: Do you think the question of the validity of the Death Knell Rule is before us here?

MR. MILBURN: I do. I think that this Court has an absolute right and jurisdiction to decide to decide that question. I still think that if they decide against Judge Kaufman and overrule Judge Kaufman, that we have a right to be here under the subsequent activities under Cohen. I don't --

QUESTION: Quite apart from the retained jurisdiction?

MR. MILBURN: Quite apart from that,yes, and I think in Eisen I you have a conflict in the circuits, as you mention, and circuit court as jurisdiction and probably there is a responsibility to resolve it at this time.

But we also feel that we are here under Cohen and under the things that were done to us under Cohen and that this Court should take this case.

Now, I would like to refer in that connection to the case of Schuyenhoff against Holder. In that case, this Court decided that they were deciding Rule 35, a question under Rule 35. It was a matter of first impression at that time but it was a rule promulgated by this Court and this Court indicated that it felt a responsibility to put at rest all the controversy under Rule 35.

Now, I don't think that anybody can deny that the status of Rule 23 below is a mess and I would hope that this Court would assume the responsibility now that we are here before you with this case which has so many facets to it. I would hope that it would assume the responsibility of deciding the case.

Now, if I may proceed to consideration -- brief consideration of the facts. We all know that this case is six million people. The class involves six million people.

Eisen II was decided and there were only 33-million, 500,000 but it has grown to 6 million by just a little investigation and by a stipulation of fact.

Now, the enormity of this class, I know, bothered Judge Medina and I know it must bother every judge in the federal courts.

Now, six percent of those people live abroad and speak foreign languages. The class is diverse. I would refer -- probably I think the best affidavit in our Appendix is that of Mr. Smith of Merrill Lynch on A53 in which he lists 25 different kinds of investors, by no means an exhaustive list, 13 types of orders which can be changed and interchanged in such a way that 13 isn't the figure but it is many times 13.

It must be remembered that at all times in this case Mr. Eisen can sue in his own behalf, that he can obtain treble damages for whatever damages he received and he can receive attorneys' fees.

I submit that the facts show that this class is unmanageable just by size alone but I will discuss that more fully when I get to manageability and to notice.

The Plaintiff in his reply brief states that the Court's finding regarding the Defendant's antitrust violations and Exchange Act VI violations are not before this Court for a review because they were not reversed by the Court of Appeals.

Well, I -- my favorite reading is Judge Medina's Opinion and I am very familiar with it and I have found that in three different places he has said that the findings and the rulings of Judge Tyler as to the merits of the case, in other words, our antitrust liability, the Exchange's Section VI liability, are vacated and he has also pointed out that in his opinion, Judge Tyler had no right to consider the merits and I do think that they are before this Court.

I say that in that they have been vacated and are of no effect.

Now, the only other thing I have is that Plaintiff continues to say, in his brief and in oral argument that the stipulation says that 56 percent of the class members' transactions are on tape.

The stipulation says that 56 percent of the transactions on the New York Stock Exchange are on tape and I think that you will realize that those are two different things when we are dealing with class members, we are not dealing with transactions on the New York Stock Exchange.

But that leads me into the question of manageability. We have a brand-new theory which has been put forth by the Plaintiff in his reply brief.

This has never been argued before. It has never been briefed before and the Plaintiff is asking this Court to ask as a court of first resort and decide this incredibly

complicated subject.

He has suggested that we now mail checks to 2million250,000 people with what they are entitled to. That sounds very simple. But I might point out that --

QUESTION: I don't understand this, Mr. Milburn. He has suggested that you now mail checks before the --

MR. MILBURN: Well, as soon as the formula is arrived at which the Plaintiff says that Judge Tyler has arrived at a formula that he will apply that formula and then will be able to tell what the damages are and what is due to these 2million people who are readily identifiable.

QUESTION: If, as or when you have lost the case.

MR. MILBURN: If, as or when we've lost the case, yes. I'm talking -- Yes, if, as or when we have lost the case and I'm talking on the point of manageability now because it just doesn't stop. When we lose it, somebody has got to receive something.

QUESTION: It doesn't stop, you say, with notice. It stops with --

MR. MILBURN: It stops with distribution.

QUESTION: It never stops.

MR. MILBURN: Yes, if you will, sir.

QUESTION: At the point of ruling.

MR. MILBURN: Right. Now, even Judge Tyler in his second and third opinions envisaged the filing of claims by

members of the class who have been injured. He never applied a formula. He didn't ever invent a formula to apply to the individuals who might present claims.

Now, it is very -- even, I might just add, even in the notice which he suggests might be adequate, at page 224 to 225, he suggests that the claimants will have to describe the type of transactions they have entered into.

Now, it is very easy to say that this can be obtained from the tapes. Well, it is easy to say but it probably can't be done and if it can be done, it can be done only at immense expense.

The odd-lot houses do not deal with customers. We deal with the commission houses on the New York Stock Exchange. We have nothing to do with customers. A great many of the customers don't even know we exist. They order their stock from their broker and their broker deals with us if it's an odd-lot.

Now, we have a tape and that tape has on it all the transactions of the day and all the transactions for the commission houses.

Now, that tape does not have any names or addresses. It does have an account number. The 14 wirehouses are not -- I might point out there are now five wirehouses -- now, eight -- nine wirehouses. Five have disappeared or are ceasing to do business but they have tapes

and we can match our tapes with them and our account numbers with their tapes and we can get the names and addresses and it is a very simple proposition. It is not what the Plaintiff's attorney described. It is simple and we can do it and we have offered to do it and I think that because we have offered to do it in that way, that are obtainable with reasonable effort. It might even be said that anything you get for nothing you obtain with reasonable effort but this requires no effort. We will pay for it and we will hand it to them.

But now, we still have the 2 million people. We have maintained all along that if you put in a market order it costs us a certain amount of money to handle it.

If you put in one of these incredibly intricate orders which are referred to in the affidavits of the brokerage houses, it costs a lot of money th handle -- a "lot of money" I'm using figuratively -- but in some cases we may lose in handling one of those and others we may not and in that way each transaction, we maintain, before we pay anybody, we should have a right to defend ourselves, to say not only was it not excessive, it wasn't enough and we should do that in each individual case.

Who are we, as Defendants, that we should be denied the right to come face to face with people that say we owe them money and say, no, you don't.

Are we required to pay money to people that we don't owe money to? I maintain, your Honors, that we are not.

QUESTION: You are objecting to the formula, then?

MR. MILBURN: I don't think there was a formula.

QUESTION: You are objecting to a formula.

MR. MILBURN: I am objecting to a formula.

QUESTION: If there was one.

MR. MILBURN: If there is one to the application, willy-nilly to 2 million people, a great many of whom we don't owe.

QUESTION: If there was one, if the District Court arrived at one, which you deny, the Court of Appeals did not disturb it, did it?

MR. MILBURN: Well, I don't know what the formula was.

QUESTION: Well--

MR. MILBURN: If they did -- if you are talking about that five percent they talked about? The $3.50 --

QUESTION: Well, what is your opposition talking about in their brief when it says, "Applying the formula to these 2 million." What formula is he referring to?

MR. MILBURN: I've been endeavoring to say I don't know.

QUESTION: I see.

MR. MILBURN: I don't think Judge Tyler reached a formula to deal with these two million people or with individual claims. I think Judge Tyler said if you have an individual claim you have got to come in and file it.

Now, I think I might call attention to the fact that I think the Plaintiff's attorney -- I think I mentioned this briefly -- has misinterpreted the testimony of Mr. Martin who worked for Walston and who -- which is now not doing this kind of business. We never said --

MR. CHIEF JUSTICE BURGER: We'll resume there right after lunch, Mr. Milburn.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:01 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Milburn.

MR. MILBURN: Mr. Chief Justice and may it please the Court:

I left dwelling on Mr. Martin's testimony. I'd like to finish that in regard to one thing, the laborious process which attorney for the Plaintiff referred to is the laborious process of matching transactions to odd-lot customers. It is not the process of identifying names and addresses of the odd-lot customers.

Now, if I could turn briefly to the subject of notice. It seems to me that the District Court's error in this respect was his feeling that Rule 23 and due process, the notice required under those sections, is -- the question is whether a stringent and harsh notice will vitiate the class action device if the Plaintiff is unable to pay the notice.

Now, I would like to divide the discussion of notice into two questions. First, we have the Rule itself and, secondly, we have due process. Every court that has dealt with the subject of notice -- and that is every court -- has said that notice must conform with the rule and with due process.

Now, I would like to submit to this Court that we have here a rule. In (c)(2) we have the requirement which

I am sure you are familiar with, but it is one sentence:

"In any class action maintained under subdivision (b)(3) the Court shall direct to the members of the class the best notice practicable under the circumstances including the individual notice to all members who can be identified through reasonable effort."

I would submit to this Court that we have a question here of the English language. I submit that there is no question as to what that sentence means. There is no question as to what it means insofar as"individual notice to those who can be identified with reasonable effort" means.

There is no way that I can see -- and the attorneys for the Plaintiffs have tried in their briefs and in oral arguments to twist one clause to modify another clause but I submit that if it is read as we all understand our language that it does require individual notice to all members who can be identified through a reasonable effort.

That is what the Rule says and I submit that that rule must be complied with.

The second string to my bow is this --

QUESTION: Notice by publication would not be adequate, you think?

MR. MILBURN: It would not be adequate under this section of the Rule, your Honor. I also --

QUESTION: Because of the use of the word

"individual"?

MR. MILBURN: Because of the use of the clause following "including."

QUESTION: "Including individual notice"?

MR. MILBURN: Yes.

QUESTION: "To all members."

MR. MILBURN: Yes.

Now, the second string to my bow, as I was saying, is that --

QUESTION: The process goes, as you know, the publication in a newspaper is individual notice for some purposes.

MR. MILBURN: Requires individual notices.

QUESTION: Yes.

MR. MILBURN: Yes, sir.

I further submit that due process requires individual notice and, further, that the notice provided by Judge Tyler is hopelessly inadequate. If I might quote Judge Medine, "It's a farce."

Out of the six million people, we are giving notice to 2,000 people who had 10 or more odd-lot transactions. We are giving notice to 5,000 odd-lotters out of six million selected at random. We are publishing in New York, in Los Angeles and in California and in the Wall Street Journal, nothing. Nobody is taken care of in Middle America. Two-thirds

of the six million people, as stipulated,are not in New York, California, or they'll probably not be reached by the newspapers in those localities.

Now, if we have -- I would cite to this Court, I'm sure unnecessarily, Mullane, which sets forth your rules as to due process. Mullane had some what might be called language with loose language and it was tightened by Schroeder almost immediately thereafter and Schroeder said, "If anyone can be very easily identified, he is entitled to individual notice."

QUESTION: What if you know his name but can't find his address?

MR. MILBURN: I would say that we couldn't give him individual notice. We couldn't mail a letter. I would put him with the other four million that can't be identified and hope that he would be served by publication, but not the type of publication suggested by Judge Tyler in his opinion.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Milburn.

Mr. Jackson.

ORAL ARGUMENT OF WILLIAM ELDRED JACKSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. JACKSON: Mr. Chief Justice, and may it Please the Court:

The basic issue in this case, and this was the basic difference between the Court of Appeals and the District Court, is the question whether a rule of procedure may be used to effect changes in substantive law.

The Court of Appeals, we submit, correctly held no and in doing so, it reversed District Court determinations which were based on the premise that in the interests of liberal interpretation of Rule 23 and in the interests of punishing alleged wrongdoers, this case must proceed as a class action at any price and the price which the District Court exacted was the bending and, indeed, the breaking, of established constitutional and legal principles of substantive law all in order to let Mr. Eisen act as the self-appointed champion of the rights of six million class members scattered throughout the United States and the Free World.

Now, Rule 23 was utilized to alter substantive law in this case by the District Court, we submit, under three points of notice. It was woefully inadequate under the Rule and under the Constitution, as Mr. Milburn has said.

Secondly, by the creation of the "fluid recovery device," for the class as a whole.

Thirdly, by the preliminary hearing on the merits followed by an order that the Defendants pay forthwith without recovery 90 percent of the cost of communicating with the class.

And these radical departures from substantive law were decreed by the District Court because, otherwise, the action was plainly unmanageable as a class action, as Plaintiffs' counsel conceded at 196 of the Appendix, when he urged a fluid recovery because he said that if each of the six million class members had to present his own personal claim for damages, the class, indeed, would not be manageable.

Now, we submit, your Honors, that it is really not at all significant that class actions had their origins in equity. They are still procedural devices and that is the whole thrust of Rule 23. Its purpose, as can be divined from its face as appears from the notes of the revisers which are printed at pages 18 and following of the Supplementary Appendix, was that Rule 23 was designed to provide a means of getting together in a single form existing claims, large or small, of actual individual plants for the purpose of achieving judicial economy and efficiency and uniformity of decisions where it is possible to do so without sacrificing procedural fairness.

This rule, I submit, your Honors, confers no substantive rights on any litigant. The intended beneficiaries of this rule are the courts. The purpose is to avoid the multiple litigation of claims which otherwise would be litigated in different forums. The purpose is to

assist the judiciary and, incidentally, to reduce its caseload.

There is nothing in Rule 23 or in its history about facilitating retribution for wrongdoers, alleged wrongdoers.

There is nothing in the Rule that tilts the scales for or against Plaintiffs or Defendants, as is assumed by some commentators and was assumed by the District Court.

Mr. Fine's discourse on flexible remedies and his citation this morning of the Borak case as an example of the creativeness of the federal judiciary in not letting wrongs go unpunished rather misses the point because all of his cases, including the Borak case, didn't each reach the question of creating a flexible or inventive remedy for ill-gotten gains until after liability had been determined on the merits and those cases are not properly considerable in determining, at the outset of a litigation, whether the suit should be permitted to be maintained as a class action or not.

The Rule, of course, as this Court well knows, was promulgated under the Rules Enabling Act which provides, in very specific terms, that such rules may not -- shall not -- abridge, enlarge or modify any substantive right and shall preserve the right to trial by jury.

Now, in the spending of substantive law as to

notice requirements, in that area I'd like to add a few words to what Mr. Milburn has already said.

Mr. Fine has attempted to avoid the notice problem, indeed, the manageability problem, by suggesting that this case could well be a (b)(1) or a (b)(2) case, rather than a (b)(3) case.

Well, I think it is significant that all judges who have considered this case, including Judge Tyler, have agreed that this can only be regarded as a (b)(3) case.

Judge Tyler certainly found to this effect in his first opinion in 1966, that -- 95 of the Appendix -- in which he said that notice was required by the Rule and the Rule, of course, requires notice in (b)(3) actions.

Beyond that, Mr. Fine seeks to put this case into the (b)(1) or (b)(2) category by arguing that it is really an injunctive case.

Well, let's look at that. The injunction, the injunctive claim, claim for injunctive relief, is appended to a claim for money damages and what is sought to be enjoined by this complaint is the odd-lot differential which was established in 1951 and permitted by the SEC.

Now, since that time, that differential has been twice changed, first in 1956 at the express direction of the SEC to the New York Stock Exchange and then, later, in 1972 by a rule of the Exchange itself. So it is evident, I

think, that the claim for injunctive relief in the complaint is now moot.

In any event, Judge Tyler, in basing his estimate of damage claims in this case for the period 1962 to 1966 did so by comparison with the 1966 rate as the proper rate. So that it seems to us that the suggestion at this late date that this is an injunctive case flies in the face of the facts and in view of the obvious problems which this case creates for itself because it is essentially a money-damage case. Let me turn now to the --

QUESTION: There are, Mr. Jackson, are there not, some federal court decisions that have said that if a case was -- is, in fact, for money damages and for an injunction, that notice need not be given? Were we told that by your brother at the bar, here?

MR. JACKSON: I believe he intimated that was the case. I don't know of any such case. I don't think that that result could be constitutionally defended if there were a truly adversarial situation, such as there is here, in which a large class of consumers seeks to, in effect, to recover against the supplier.

QUESTION: Your view would be that the Plaintiff would have to forego his money damage claim?

MR. JACKSON: Or give the notice.

QUESTION: Or give the notice.

MR. JACKSON: Or give the notive, yes, your Honor.

Turning to the next invention of substantive law which we believe to be completely unjustified by Rule 23 and its true purposes, I come to the question of the so-called "fluid recorvery" for the class as a whole.

Now, of course, it is a fundamental principle of our law that money damages are recoverable only by persons who are injured by illegal conduct who can prove damages flowing from such conduct and this principle is, of course, enacted in Section IV of the Clayton Act which is here involved, any person injured in his business and property and so on, and the same principle of compensatory recovery is recognized in the line of cases which have construed Section VI of the Exchange Act, which is here alleged to be the basis for the Exchanges liability.

But the Plaintiff has conceded that this case could not proceed as a class action if this fundamental principle of substantive law were to be observed, if all class members were required to prove their damages.

And it was on this basis, in order to save the class action at all costs, that the District Court ruled that it would make an award of damages to the class as a whole, that class members could file claims and prove their damages and if they did so, they could recover damages.

But for the great bulk of the class as a whole, the differential would be reduced in the future until the total award was exhausted.

Well, now, we submit, your Honors, that there is no such thing as a class as a whole. A class is not an entity which is entitled to collect damages in its own right. A class is a collection of claimants and that, we think, is the teaching of this Court's decision in Schneider versus Harris at 394 U.S.

An award of damages to the class as a whole by reduction of the differential in the future would do two things. First, it would benefit future purchasers and sellers of odd-lots who were not purchasers and sellers in 1962 to 1966 and thus not members of the class and thus not persons who were injured by the Defendants' allegedly illegal conduct and, secondly, such a device would not compensate past traders who may not trade in the future and, furthermore, this device, except as to those who -- class members who might file claims -- would deny the Defendants their constitutional right to a jury trial on damage issues and I refer to this Court's decision in Curtis against Lowther of last week.

In addition, what the District Court proposed here by way of a rate reduction in the future would plainly usurp the exclusive jurisdiction of the FCC under the

Exchange Act.

Courts have no power to fix odd-lot rates in the first instance, under the Congressional scheme of regulation of exchanges expressed in the Exchange Act. That function is confided to the SEC and the statute enacts standards which must be applied for rate-making under its mandate and the court's injection of itself into this area of rate-making is contrary to a long line of decisions of this Court which forbid judicial intrusion into areas reserved by statute for Agency expertise.

Finally, in the catalog of substantive law changes effected in the name of Rule 23, we come to the preliminary hearing on the merits and the resulting order that the Defendants should pay 90 percent of the cost of giving notice.

This, of course, we believe to be a clear violation of the Defendant's Fifth Amendment rights to due process and their Seventh Amendment rights to a jury trial.

QUESTION: I suppose, Mr. Jackson, you'd make that argument if the percentages were reversed.

MR. JACKSON: Yes, an order to pay any part of the costs. Yes, your Honor.

QUESTION: Mr. Jackson, how about the situation where you want to take someone's deposition out of town and your opponent comes in and says, "we just can't, we're poor,

we can't afford." Now, frequently, a court will, as a condition to allowing a deposition, will require the defendant to advance the travel costs to be paid by plaintiffs' attorneys fees. Is that so different from this?

MR. JACKSON: I think it is, your Honor. This is -- in the first place, this is not a poor man's case, even though Mr. Eisen is not going to pay the costs of notice. After all, he is an investor in odd-lots of stock on the Exchange.

But, certainly, the analogy to the in forma pauperis cases is not in point. I am quite aware that on occasion courts do order the opposite party to advance certain costs but those -- I don't believe that this practice is generally reverted to where it is apparent that the costs can never be recovered, as is the case here.

We have a bill of costs in the Court of Appeals of some $11,000 which will never be recovered and I don't think that it is possible to say, as Mr. Fine does, well, this is no worse than discovery costs. Everybody realizes that this is an incident of litigation. I agree that in a litigation every party has to pay his own costs of discovery, whether it is $5 million for TWA or what.

But that is quite different from compelling a party to pay his adversary's costs, the costs of financing the litigation against him and these costs of giving notice

are those which should be borne by the Plaintiff because he has elected to represent this class.In order to be an adequate representative, he surely has to communicate with them. That is his expense and it certainly is no warrant for putting all that expense on the Defendants.

QUESTION: I suppose he can avoid that cost by simply electing to proceed individually.

MR. JACKSON: There is nothing to prevent that. He can proceed individually. In times gone by when there was not such an award for class actions, people did proceed individually as test cases where there was some substantial principle to be vindicated. There is nothing to prevent that here.

Furthermore, he has the prospect of treble damages and more than that, his legal fees will be paid for because they are not limited, under the case law, by the amount of his recovery.

QUESTION: If he wins.

MR. JACKSON: If he wins, yes, your Honor, only if he wins. If he loses, he takes the chance of every litigant.

QUESTION: I suppose when one of the litigants asks to take a deposition in a distant place, faced with the situation that I understood Mr. Justice Rehnquist to refer to, he is asking to use the court's machinery and that

is a distinction. The Defendants here, the odd-lot traders, aren't asking the Court to do anything.

MR. JACKSON: That is right, Mr. Chief Justice. They are not. They are asking to be let alone.

Mr. Fine argued, rather eloquently, I thought, that the Exchange should be made to pay for all of these costs because it failed to protect investors.

Well, now, he's trying to uphold the decision of Judge Tyler but Judge Tyler didn't find any such thing as that, nor is there any SEC determination that the Exchange failed to protect investors.

Indeed, the very differential complained of here was permitted to go into effect by the SEC in 1951 and in 1966 it was changed at the direction of the SEC.

Mr. Fine has also attempted to justify saddling the cost of notice on the Exchange alone by analogizing the case to those involving corporations where Judge Medina rightly said, this may be a situation where the plaintiffs don't have to pay the cost of notice, where they are shareholders in a corporation.

Well, it is perfectly obvious, I think, that there is no proper analogy between shareholders of a corporation who own the corporation and customers of member firms of the Exchange.

Now, the final --

QUESTION: Mr. Jackson, I take it that, even if there isn't a proper class of six million, if the Plaintiff had been willing to put up costs of notice and accept the job of giving notice to two million identifiable people, what should have kept that class action from going forward, if the Plaintiff had been willing to give notice and pay for it?

MR. JACKSON: The costs of individual notice to the readily identificable members of the class, I should say, if that were the case, that notice would not be an obstacle to the class's continuing.

QUESTION: What would have been?

MR. JACKSON: Well, I think it's the question of manageability, your Honor.

QUESTION: You still -- still manageability?

MR. JACKSON: Oh, yes. Consider, the problem is posed by very large class actions where the alleged class is enormous, as is true here, and where each individual member of that class possesses a very small claim.

That is this case and that is the case which is very difficult to manage. Why is that? Because the claims are so small. In this case, the District Court estimated that the average claim, when trebled, would range from $3 or so to $20. That is the average, the range of the averages, after trebling.

As against that, the costs of administration would be very substantial. The District Court said $500,000. That was several years ago, before the effects of recent inflation.

Now, in that kind of a situation, there are bound to be problems of manageability, even beyond the inherent problem of whether you are"going to turn courthouses into coliseums," as the Second Circuit has said, in order to administer two million claims.

The testimony of Deputy Clerk Murphy in the record here as to the experience of what that court and its clerk's office went through in the drug cases where there was a settlement, not a litigation, will show, I think, this Court some of the inherent problems of manageability that are --

QUESTION: What is it that is so inherently difficult of -- let's just take a name out of the two million now. What is so inherently difficult about figuring out what that one person's claim is? Or in deciding it?

MR. JACKSON: Well, as Mr. Milburn has stated --

QUESTION: There isn't any formula?

MR. JACKSON: There is no formula. Now, Judge Tyler did assume, for the purposes of estimating the damage claims and only for the purpose of estimating --

QUESTION: Well, what was --

MR. JACKSON: Well, five percent, five percent

overcharge and it was on that basis that he reached the outlandish figures that he did. That was not based on evidence. It cannot be based on evidence because, as Mr. Milburn said, there is such a diversity of orders, there is such a diversity of expense involved in executing diverse orders that no simple formula of excess is possible.

In each case, you have to see what kind of an order the man put in, how long it took to execute it and to consider all the other factors that are involved.

This case is not susceptible of a simple formula, as has been the case in other situations.

QUESTION: So even if you find that there was an antitrust violation, the damage formulation might be a matter of difference in each individual case?

MR. JACKSON: It would require individual claims and that is another reason why it is unmanageable.

QUESTION: Well, I suppose they have to put forward individual claims?

MR. JACKSON: No, your Honor, they don't have to come in person, but they do have to communicate with the court and with the clerk's office and we know the difficulties from other situations, the mystification that these class members have when they receive a notice. They call up the clerk, as Deputy Clerk Murphy testified, and say, "What does it mean? Explain it to us." And some of

them, sometimes make calls --

QUESTION: He gets paid for that. That's normal court work. He'd do it every day.

MR. JACKSON: Well --

QUESTION: I'm just -- I'm wondering whether you are pushing this manageability point too far by saying that the court building has to be used. They can set up a master or somebody to work this out outside of the court building, outside of New York City, out in Westchester, couldn't they?

MR. JACKSON: Yes, of course, your Honor, it's not a question of --

QUESTION: Where the computers are, the IBM place out there.

MR. JACKSON: It is not a question of the physical space in the courtroom but the court facilities and its auspices and its personnel.

QUESTION: That was all I was quarreling with, was the physical.

MR. CHIEF JUSTICE BURGER: Mr. Fine, you have about eight minutes left.

REBUTTAL ARGUMENT OF AARON M. FINE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FINE: Mr. Chief Justice, and may it please the Court:

First, with respect to the formula at page A212 of

the Appendix, the District Court opinion states that "The Defendants consistently have stressed the number of variations in the type of odd-lot transactions and find that this would necessitate a separate calculation of damage for each individual transaction. Although originally influenced by this argument, in light of the availability of such information and records discussed above, I now reject it as the Court of Appeals has pointed out, moreover, the Defendants make the same charge to all buyers and sellers no matter what the type of transaction."

In other words, the Defendants live by a formula so it is more than likely that the damages can be assessed by a formula.

QUESTION: It is more than likely that he didn't decide what the formula was.

MR. FINE: No.

QUESTION: I couldn't find anything on A211 or A212 that would --

MR. FINE: All that we are suggesting is --

QUESTION: -- help me make out too many checks.

MR. FINE: But in light of the comments of Judge Tyler, it is more than likely that this case will be manageable pursuant to a formula and if you --

QUESTION: Well, you don't suggest, then, that he has already devised a formula?

MR. FINE: No, he hasn't devised one because we have to go through the trial --

QUESTION: Oh, I misunderstood you earlier.

MR. FINE: No, your Honor, we have to go through the trial on the question of damages to find out exactly what the overcharge was.

What we are saying is, it would be applied across the board to every single transaction under Judge Tyler's reasoning.

QUESTION: You think, now, that the evidence would validate that conception?

MR. FINE: That's right and if it isn't clear, that is certainly something that should be made clear by the District Court, and it could be made clear.

QUESTION: There is no evidence on the subject one way or the other right now, is there, really?

MR. FINE: Well, I think the fact that he has found that common questions predominate and this is one of the common questions that he thought predominated and the basis that is used for it is sufficient on which to proceed at this time --

QUESTION: You mean, he did that in the mini-hearing? So-called?

MR. FINE: I think this was before the mini-hearing.

QUESTION: Well, on what evidence did he rely, then?

MR. FINE: On the basis of the SEC special study where they pointed out that exactly the same rates had been charged, that all the members of the class, including those who would otherwise prefer to abide by the status quo will be helped if the rates are found to be excessive.

If the rates are found to be excessive, they will be found to be excessive for everyone who was subjected to them in the past and hopefully if we arrive at the IBASCO study, it means there is still some cushion or fat in the rates for those in the future.

QUESTION: Could the SEC deal with this in the general area of the injunctive relief that was sought?

MR. FINE: No, your Honor, they did not, no.

Now, secondly, Mr. Jackson said that we changed the substantive law by seeking judgment for the class as a whole. Well, judgments for class as a whole are routinely entered in Securities Act cases. In the Gerstle against Gamble-Skogmo case, there was a judgment for the whole class affirmed by the Second Circuit.

The question then is, after the judgment has been entered, who can make claims against the fund and what should be done with any residue? That is something for later determination, as I argued before.

On the question of practicability governing the entire notice rule, our reply brief refers to an article by Professor Kaplan and other authorities who support this kind of notice in this kind of case. In fact, there is no commentary on the notice ordered by Judge Tyler, no scholarly commentary that I know of which says that the notice is insufficient.

Indeed, Judge Medina said that under certain circumstances, publication may amount to the best notice possible, particularly where requirement of a different form of notice would prevent potentially meritorious claims from being litigated.

That is the case here. I think it is particularly ironic that the Defendants say they can get the names and addresses from the tapes but can't get anything else and the cost that they are volunteering to undertake of generating the names and addresses from the tapes is more, according to their witnesses, than the costs which they would have to pay if they went in accordance with Judge Tyler's notice.

In other words, they are willing to pay more so that we can be put out of court.

Now, I do think that public respect for the law must be considered and just because these are small claimants, as distinguished, for example, from the three million shareholders of AT&T who, undoubtedly, if there were

a proxy violation affecting them, could come into court and, presumably, use the class action device to protect their interests. I think that the small claimants' interests have to be satisfied just like those of the large claimants or the claims of large individual corporations that can afford to come in and sue for violation of the antitrust laws and I refer by analogy to what Mr. Justice Stewart said in U.S. versus Students Challenging Regulatory Agency Procedures that to deny standing, which is the analogy I draw here, would mean that the most injurious and widespread governmental action could be questioned by nobody.

We cannot accept that conclusion.

Similarly, here, we can't accept the conclusion that the more widespread a violation of the antitrust or securities laws and the smaller the resources of the victim, the less effective the remedy.

I think the defendants would like to be able to limit all classes to the 19th century class approved by this Court in Smith against Swormstedt, which was described by the Court as consisting of "traveling and wornout Methodist preachers," but in this day of mass frauds, where we have the National Student Marketing case and the Equity Funding case and the Penn Central case, if you affirm the Second Circuit here, you may very well put tremendous obstacles in the ways of cases like that.

QUESTION: Mr. Fine, throughout your brief, there was mention of the fact that the statute of limitations may have run as to many members of this class and that, therefore, that affects the necessity of notice, I gather?

I am not sure I understood that, in your presentation. Doesn't Utah take care of that problem?

MR. FINE: I think, your Honor, in line with your decision in Utah, we have two years left.

QUESTION: I thought so.

MR. FINE: It was in and out of class status here.

QUESTION: Right.

MR. FINE: I think, if we can tackle the different periods of time, we have about two years left.

QUESTION: So American Pipe takes care of that argument?

MR. FINE: I think so.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:38 o'clock p.m., the case was submitted.]