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COMMENTS

CLASS ACTIONS AND THE ILLINOIS CONSUMER

"Resort to the court is at best cumbersome, but if the damaged consumer is faced with inefficient procedures when he does go to the court, he is essentially without any rights." 1

INTRODUCTION

Many observers of our legal system are concerned with the plight of consumers defrauded by both large and small businesses. 2 Justice is being denied many defrauded consumers because their claims are so small compared to the costs and fees of a law suit that recourse to the courts in individual actions is not practicable. 3 The equitable concept known as the class action or representative suit 4 would appear to be a method capable of

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1 Reed, Legislating for the Consumer: An Insider's Analysis of the Consumer Legal Remedies Act, 2 PAC. L.J. 1, 8 (1971). This article discusses new changes in California's class action law with respect to consumers.


3 Deceptive advertising, price gauging, usurious interest rates and similar wrongs are often below $200.00 and hardly sizeable enough to justify an individual action. The consumer has no choice but to absorb the loss. In many instances fraudulent operators carefully avoid cheating individuals out of large sums of money because they realize that no one bilked out of $50 is going to pay a lawyer to get his money back. Thus the only cases lawyers are willing to handle are those brought either by the unusual individual who will pay more than the amount of his claim in order to see justice done, or by those defrauded out of amounts large enough to justify the expenditure for legal fees. The number of consumers having no redress because the amount lost is not commensurate with attorney's fees constitutes the vast majority.

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4 The terms representative suit (or action) and class suit (or action) are used interchangeably. An action is representative in that the named persons represent all those in the class and it is a class action in that all persons in the class are before the court by representation. South E. Nat'l. Bank v. Bd. of Educ., 298 Ill. App. 23, 115, 18 N.E.2d 584, 583 (1939). Briefly, the class action permits a group of persons having a common interest in the enforcement of their rights to enforce their remedies in a single litigation at a minimum of expense and inconvenience.
providing consumers with a remedy for fraud, as well as a deterrent to its perpetration.\(^5\) The purpose of this comment is to examine the state of the law concerning class actions in Illinois insofar as they may be a vehicle for the redress of the grievances of defrauded consumers.\(^6\)

Historically, class actions began because of convenience and expediency. Equity evolved to escape the technicalities and rigidity of the law courts.\(^7\) It was equity's departure from the rigid common law requirement that all parties whose interests may be affected be named and before the court\(^8\) that gave birth to the class action.\(^9\)

\(^5\) In the leading case of Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), the Second Circuit Court of Appeals stated that class actions could:

serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.

\(^6\) While the scope of this comment is limited to the plaintiff's side of the litigation, the rules are equally applicable to a case involving a defendant litigating in a representative capacity for others similarly situated. The area of patent infringement lends itself to the use of defendant class action. For a discussion of problems unique to defendant class actions in this area, see Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968); Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969); See generally Starrs, Part II, 507, 508; Comment, Damages in Class Actions, 10 B.C. IND. & COM. L. REV. 615, 619-21 (1969).

\(^7\) "Equity has been said to be 'the correction of that wherein the law, by reason of its universality, is deficient.'" State Life Ins. Co. v. Bd. of Educ., 401 Ill. 252, 260, 81 N.E.2d 877, 881 (1948). The law courts had numerous rigid rules that required strict compliance. The sole remedy at law was for damages; hence a plaintiff seeking any other relief was "without his day". The equity courts, on the other hand, sought to do complete justice in the adjudication of rights in controversy between litigants. On the origin and history of equity jurisprudence, see generally J. Story, Equity Pleadings §§38-58 (14th ed. 1918); Pomeroy, Equity Jurisprudence, §§1-42a, 68-88 (5th ed. 1941); Z. Chafee, Some Problems of Equity (1950); Serverns, Equity and "Fusion" in Illinois, 18 CHI.-KENT L. REV. 333 (1940).


\(^9\) Class suits began as an offshoot of bills of peace with multiple parties. A common law action soon came to be a two-sided affair, usually with only
The class action is available in every jurisdiction in one form or another. It is codified by statute or court rule in some jurisdictions and remains a matter of judicial decision in others. The typical words of description are:

Where the question is one of common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Illinois uses common law equity rules and precedents to determine the propriety of class action proceedings. There are no provisions in the Illinois statutes or court rules providing for the institution of a class action. However, Section 52.1 of the Illinois Civil Practice Act controls compromise or dismissal of a class action. This section prohibits compromise or dismissal except with court approval and upon notice to absent class members. Therefore, the maintenance of a class action in Illinois is one plaintiff and one defendant but sometimes with several plaintiffs or defendants tightly bound together as joint obligees or obligors, etc. Except in such joint situations, however, a dispute of one person against many persons usually had to come before the law courts, if at all, in the form of many separate actions. Hence it was far cheaper and more convenient to have a single suit in chancery, which was accustomed to handle polygonal controversies. Z. CHAFEZE, SOME PROBLEMS OF EQUITY, 200-01 (1950). The Illinois Supreme Court, in White v. Macqueen, 360 Ill. 236, 195 N.E. 832 (1935), said:

To this rule [that all persons interested in the subject matter of the suit should be named parties] there are, however, two well-established exceptions. The first is where the absent parties are properly represented. In such a case it is sufficient to make such representatives parties to the suit. A trustee under a trust deed represents the interest of the bondholders, and when he is made (sic) party to a suit affecting such interest they are as much bound by the decree rendered in the suit as if they were individually made parties thereto for the reason that their interests receive actual and efficient protection. Another exception to the general rule arises where the beneficiaries are very numerous, so that the delay and expense of bringing them in becomes oppressive and burdensome. In such case they will not be deemed necessary parties where the trustee representing them is made (sic) party.

Id. at 243, 195 N.E. at 835. For an excellent synopsis of the development of class actions, analyzing the principles behind the equitable rules, see South E. Nat'l Bank v. Bd. of Educ., 298 Ill. App. 92, 115-24, 18 N.E.2d 584, 593-97 (1938), quoting at length from J. Story, EQUITY PLEADINGS (9th ed. 1918).

10 For a survey of class actions and their variations in each state jurisdiction, see Sturrs, Part II, 425-96. Sturrs categorizes all state jurisdictions and their treatment of the class action, into four types: (1) the common law (e.g., Illinois), (2) the 1948 Field Code (e.g., New York and California), (3) the 1938 Federal Rule of Civil Procedure 23 (e.g., Michigan), and (4) the 1966 revision of Federal Rule of Civil Procedure 23 (e.g., Arizona).

11 E.g., Illinois.

12 CLARK, CODE PLEADING §63 (2d ed. 1947).

13 See generally Fox, Representative Actions and Proceedings, ILL. L.F. 94-99 (1954); Sturrs, Part II 425-33.

14 ILL. REV. STAT. ch. 110, §52.1 (1969), providing that:

An action brought on behalf of a class shall not be compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct. Compliance with this statutory guideline also requires the court to retain jurisdiction to supervise the execution of any compromise agreements between the parties. The court will scrutinize the representative's performance
a matter of judicial decision and is handled by the courts on a case-to-case basis.

The Illinois courts' approach to the maintenance of a class action can be thought of as involving three requirements: (1) the requirement of equity jurisdiction, (2) the requirement of due process of law under the state and federal constitutions, and (3) the requirement that all members of the class have a community of interest in the subject matter and the remedy. Although a reading of the Illinois decisions indicates these requirements are interdependent and not distinct, it is felt that separate consideration of each requirement is an aid to analysis.

The courts have taken divergent views with respect to the interpretation and application of each requirement. While the rules stated by earlier Illinois courts would seem to indicate that consumer class actions could not be maintained, recent courts, influenced by the need to provide an effective remedy for consumer frauds, have found the requirements more easily met. Yet, at this writing the requirements still present great obstacles for consumer class actions in Illinois.

THE REQUIREMENT OF EQUITY JURISDICTION

It would appear that there is no longer a distinction between law and equity in Illinois by virtue of the 1934 Civil Practice Act, which merged certain legal and equitable procedures, and the 1964 Judicial Article, which eliminated the legal and equitable sides of the Illinois Circuit Courts for jurisdictional purposes. However, the historical differences between law and

in behalf of the class in order that all interests will be adequately represented.


17 The courts did not discuss the consumer class action although the restrictive holdings would preclude the maintenance of a consumer class action as well as other types of class actions. E.g., Fetherston v. Nat'l Republic Bancorporation, 280 Ill. App. 151 (1935), see text between notes 35 and 43 infra; Newberry Library v. Bd. of Educ. 387 Ill. 85, 55 N.E.2d 147 (1944), see text between notes 81 and 87 infra; Kuehn v. Bismarck Hotel Co., 52 Ill. App. 2d 321, 202 N.E.2d 52 (1964), see text between notes 87 and 93 infra.

18 ILL. REV. STAT. ch. 110 (1934).

19 The merger was one of form and to the extent of venue, process, parties, pleadings, pre-trial motions, and discovery. Id. For a brief discussion of the 1934 changes, as being procedural not substantive, see O'Shaughnessy, Suits in Equity Contrasted with Actions at Law, 11 Ill. L.F. 2, 3-4 (1954).

20 The recently adopted 1970 Constitution retains the same language.

21 The 1870 Constitution provided: "The Circuit Court shall have original jurisdiction of all causes in law and equity . . . ." The 1964 Judicial Article provides:
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equity have not been obliterated for all purposes. It is fundamental that the jurisdiction or power of a court to act differs from the manner in which the court proceeds with its power. Presently, a Circuit Court judge has the power to hear and determine any justiciable matter before him, but the underlying principles of law and equity still control the way he exercises his power. The judge must still apply equitable principles to equitable rights and legal principles to legal rights. To illustrate this important distinction, if a judge grants specific performance of a contract which does not meet with the equitable requirements for specific performance, the reviewing court should predicate its reversal on reversible error, not want of jurisdiction. The judge's power to render a determination is in no way dependent on the correctness of his determination.

One of the differences between law and equity not obliterated by the Civil Practice Act and the Judicial Article is the equitable concept of the class action. The equitable rules and precedents govern the maintenance of the class action and control the manner in which the judge proceeds with his jurisdiction. Thus, in addition to a class action being justiciable, it must have a proper equitable basis before the court can correctly proceed to adjudicate.

The Circuit Court shall have unlimited original jurisdiction of all justiciable matters, and such powers of review of administrative action as may be provided by law.

(Emphasis added.)

24 Id. The fact that the Circuit Court has unlimited jurisdiction of all justiciable matters does not affect the rule of equity jurisdiction. People ex rel. Williams v. McDonald, 44 Ill. 2d 349, 255 N.E.2d 400 (1970).
25 The enactment of the Civil Practice Act has greatly modified the procedures in civil actions where both legal and equitable claims are involved, but the constitutional guarantee of trial by jury in actions at law still requires that certain distinctions between law and equity be retained.
27 Beginning with the 1964 Judicial Article, the circuit court judge has powers of both equity and law. See note 43 infra.
28 East Side Health Dist. v. Village of Caseyville, 38 Ill. App. 2d 438, 187 N.E.2d 534 (1963). See Z. CHAFEE, SOME PROBLEMS OF EQUITY (1950). Equity jurisdiction technically equals the reasons for coming into equity. A justiciable dispute can be present, but what the court does depends on its exercise of power. Id. at 306. The exercise of jurisdiction "... is simply a bundle of sound principles of decision, delimiting the judge's duty but not his power". Id. at 303.
29 The Civil Practice Act expresses an intent that common law should apply in the absence of coverage in the Act. Section 1 provides:
The provisions of this Act apply to all civil proceedings, both at law and in equity, .... As to matters not regulated by statute or rule of court,
Inadequacy of the Legal Remedy as a Requisite of Equity Jurisdiction

The condition precedent of showing an equitable basis often creates an insurmountable barrier for defrauded consumers and their need for an expeditious remedy. In the typical consumer fraud situation, numerous consumers desire recovery of their losses and seek the legal remedy of damages.\(^2\) Fraud, such as perpetrated on them, can be a proper equitable basis.\(^2\) However, it is well settled that where an adequate remedy at law exists (i.e., damages), equity jurisdiction will not be invoked.\(^3\) Thus, some Illinois courts have held that a class action based on fraud, seeking damages as its sole remedy, is a case at law and will not lie.\(^4\)

A consumer class action based on fraud and seeking solely damages would appear to have a proper equitable basis not-the practice at common law and in equity prevails. ILL. REV. STAT. ch. 110, §1 (1969).

\(^{28}\) E.g., where a consumer is deceived into buying a product through deceptive advertising.

\(^{29}\) See generally Starrs, Part I.

\(^{30}\) See Johnson v. North Am. Life, 100 Ill. App. 2d 212, 241 N.E.2d 332 (1968). Equity jurisdiction may be invoked when trusts are involved. This is peculiar to equity and jurisdiction is not denied on the basis of an adequate remedy at law.

An entire absence of a remedy at law is not necessary but the inadequacy and impracticability of the remedy is equally effective to furnish a ground for equity jurisdiction. The jurisdiction of equity for the enforcement of trusts is another ground . . . . The enforcement of trusts is peculiarly within the province of a court of equity, and a case which has for its object the enforcement of a trust is a case in equity. Equitable jurisdiction is not taken away by the fact that the complainant has a remedy at law.


\(^{31}\) Fetherston v. Nat'l Republic Bancorporation, 280 Ill. App. 151 (1935), discussed between notes 35 and 43 infra; Langson v. Goldberg, 373 Ill. 297, 26 N.E.2d 111 (1940); the court in People ex rel. Aramburu v. City of Chicago, 73 Ill. App. 2d 184, 219 N.E.2d 548 (1966) stated:

Inasmuch as the nature of class representation is essentially equitable, the representative party being regarded as a quasi-trustee for the represented parties, the use of the class representation technique is limited to court of chancery and there can be no class or representative suits in law actions. . . .

Id. at 194, 219 N.E.2d at 553. The court held that mandamus cannot be brought as a class action in Liquor Dealers Ass'n v. Schreiber, 382 Ill. 454, 47 N.E.2d 462 (1943) where it stated: "Mandamus is a law action in which representative suits are unknown." Id. at 459, 47 N.E.2d at 464. Likewise, a defendant class action is a case unique to the equity side of the court. See Arthur Rubloff & Co. v. Leaf, 347 Ill. App. 191, 196, 106 N.E.2d 735, 737 (a damage class action against defendant in representative capacity for all holders and owners of capital stock of a corporation) Chafee remarks:

Suits of a legal nature to recover damages for or against a class of unnamed persons are a recent development, although representative suits involving money claims were adjudicated in equity as a matter of course . . . . and courts were long inclined to keep them there.

Z. CHAFEE, SOME PROBLEMS OF EQUITY, 206-16 (1950). Chafee went on to
withstanding the strong influence of this historical equitable rule.\textsuperscript{32} First, the remedy at law is grossly inadequate to the defrauded consumer. An inadequate remedy at law has been defined to be one "... not so speedy, practical, and efficient to the ends of justice and its prompt administration as the remedy in equity."\textsuperscript{33} Moreover, one of the grounds advanced as rendering the legal remedy inadequate is that a multiplicity of actions would be necessary at law. Second, in light of the jurisdictional merger of law and equity in Illinois, if a class action is filed on the equity side of a Circuit Court and it develops that there is an adequate remedy at law, no dismissal should follow since the Circuit Court under its merged powers may give relief called for by the issues.\textsuperscript{34} Both of these reasons would appear to make a consumer class action based on fraud and seeking solely damages attractive for equitable adjudication. However, the Illinois courts' apparent inclination to keep the class action in equity as well as their strict construction of equitable rules have led to the opposite result.

The 1935 case of \textit{Fetherston v. National Republic Ban CORPORATION}\textsuperscript{35} illustrates the courts' inclination to keep class actions in equity, the strict construction of equitable rules, and the affect of a disallowance of the class action on the small claimant consumer.

The plaintiff filed a class action alleging, among other grounds, that the defendant holding bank fraudulently conspired to induce depositors to deposit their money.\textsuperscript{36} Millions of dollars were subsequently lost by depositors. The plaintiffs contended that the corporation, officers, and directors participating in the conspiracy should be held accountable for their acts and made to respond in damages for the losses sustained. The Illinois App...
The appellate Court affirmed the lower court's dismissal of the action and stated:

It is in the nature of an action for deceit. The rule in equity pleading allowing representative suits where the parties are numerous has no application . . . . Representative, or class suits, are allowed only where the question is of a common or general interest, where one sues for the benefit of the whole . . . . We find no cases deciding that mere numerosity of parties alone will confer jurisdiction upon a court of equity in a case that is properly cognizable at law.37

The court cited with approval the New York Federal District Court case of *Michelson v. Penney*,38 which held in response to defendant's contention that the depositors were numerous and common questions of law and fact were present, that:

. . . these considerations do not justify the casting of many actions at law for deceit into one suit in equity, nor do they permit some of the allegedly defrauded depositors to bring a class or representative suit in behalf of all.39

The reason for the court's disallowance of the class action is not easily extracted from the opinion. The court felt it was "obvious"40 that the complaint should fail because, if the plaintiff lost, this "failure could not bind another depositor who could establish all the elements necessary to maintain successfully an action of deceit."41 By this, the court appeared concerned with protecting the interests of the depositors not before the court. However, equity is known to be flexible in its approach to such problems and usually balances the considerations of convenience and fairness in arriving at its determination.42 Furthermore, these considerations created the class action in the first instance

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37 Fetherston v. Nat'l Republic Bancorporation, 282 Ill. App. 151, 160 (1935). The use of the word jurisdiction by the court was proper since the opinion was written before the 1964 Judicial Article. See text between notes 20 and 26 supra.
39 Id. at 540. Similar facts were involved. The plaintiffs charged that the bank remained open almost three years while insolvent. The court in *Michelson* also stated that there was an adequate remedy at law and that the defendant may not be deprived of his right to a trial by jury: There is no escape from the conclusion that the class action for false representations made to depositors is essentially one for which there is an adequate remedy at law and therefore is not of equitable cognizance. *Id.*
41 Id. at 162.
42 Historically, class suits began because of their convenience, and convenience remains the chief factor for determining their desirability. But even though the suit is convenient, it is not always just to bind members of the class in their absence. The question whether this is just or not should be decided by considerations of fairness, the probable operation of the particular suit, the possibility of safeguards, and the fruits of judicial experience. It ought not be decided by technical rules . . . .
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and continued to guide its development and application to new situations. The Illinois consumer, by virtue of such "precedent," is often confined to the "law" side of the court, as his request for damages to remedy the fraudulent acts of the defendant will not satisfy a rigid and technical application of equitable rules.43

In most consumer fraud situations there is a common question of law or fact involved, since usually each victim will have been defrauded by the same person, or in the same transaction, or in a series of similar transactions.44 In such situations there is more than "mere numerosness of parties,"45 and as in Fetherston, the common origin of the fraud would be the common question of law or fact.46

As indicated,47 equity will only assume jurisdiction where the legal remedy of damages is inadequate and the complaint seeks an equitable remedy. Except for recent indications of a departure from the restrictive interpretation and application of equitable rules and precedents,48 the successful maintenance of a class action in Illinois has been considered only in cases involving the equitable remedies of accounting, declaratory judgments, declaration of constructive trusts, injunctions, and restitution.49 It follows that if a consumer files a class action based on fraud, and seeks damages as his sole remedy, a con-

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43 Since it is unlikely that consumers will proceed individually at "law", the disallowance of a class action in "equity" will leave many consumers remediless as well as leaving an open invitation to the dishonest. See generally sources cited in notes 2 and 3 supra.


45 See Fetherston quote, text at note 37 supra.

46 See note 36 supra. For a discussion of class actions that were held maintainable on the basis of the conspiratorial nature of the plaintiff's charges, see text between notes 120 and 128 infra.

47 On the theory of constructive trust, the "common fund" class action has been permitted by the Illinois courts. This enables the class members to receive, in effect, damages for the fraudulent wrongdoings. See note 30 supra for authority on the exercise of equitable jurisdiction when a trust is involved, and text between notes 87 and 148 infra for discussion of the "common fund" class action in Illinois.

48 Typical factual situations employing equitable remedies are: taxpayers' suits to enjoin the collection of illegally levied taxes, People v. Clark,
servative court will not exercise its equitable jurisdiction and the case will be dismissed. If on the other hand the consumer seeks an injunction or restitution for the same wrongdoing, he will have satisfied the equitable rules and precedents and, as to that class action requirement, the court will exercise jurisdiction.50 This distinction, based on the relief requested, while it treats what appear to be practical equivalents, is perhaps explained in part by certain due process of law considerations.

THE REQUIREMENT OF DUE PROCESS OF LAW

One of the distinguishing characteristics of class actions is that all members of the class are bound by the decree.51 Normally one is not bound by a judgment or decree in a litigation in which he is not designated a party and before the court or to which he has not been made a party by service of process.52 A judgment rendered under such circumstances is not entitled to full faith and credit.53 To this general rule there is the exception that the judgment in a class action, to which some members of the class are named and before the court, may bind class members who are named and absent.54 To insure the proper adjudication of absent interests, the concept of due process in

296 Ill. 46, 129 N.E. 583 (1920); Knopf v. First Nat'l Bank, 173 Ill. 331, 50 N.E. 660 (1898); Harrison Sheet Steel Co. v. Lyons, 15 Ill. 2d 532, 155 N.E.2d 596 (1959); suits of bank creditors to enforce the constitutional liability of bank stockholders to creditors, Leonard v. Bye, 361 Ill. 185, 197 N.E. 546 (1938); Babka Plastering Co. v. City State Bank, 264 Ill. App. 142 (1931); suits by members of a voluntary association to restrain the enforcement of a void by-law, City of Chicago v. Collins, 175 Ill. 445, 51 N.E. 907 (1899); People ex rel. Furlong v. Election Comm'rs, 404 Ill. 326, 88 N.E.2d 864 (1949); suits to compel the restoration of funds or property diverted by officers of a voluntary association or a corporation, Gulfoil v. Arthur, 158 Ill. 600, 41 N.E. 1009 (1895); Bayel v. Rango, 304 Ill. App. 203, 25 N.E.2d 1015 (1940); Snyder v. Autna Constr. Co., 272 Ill. App. 591 (1933); suits by property owners to obtain an accounting of unexpended funds collected for the purpose of building or maintaining a public improvement, Planagan v. City of Chicago, 311 Ill. App. 135, 35 N.E.2d 545 (1941).

50 However, equitable relief may not be sufficiently attractive to consumers who wish to recover damages. Coupled with the difficulties of proving a "common fund" (text between notes 87 and 136 supra), many types of consumer fraud and deception will not be amenable to class action relief in Illinois. Equity can, however, award damages as an incident to equitable relief, under the theory of ancillary jurisdiction or retention of jurisdiction to settle all claims. See Texas Co. v. Hollingsworth, 376 Ill. 536, 31 N.E.2d 944, 947 (1941); Venturelli v. Trovero, 346 Ill. App. 429, 105 N.E.2d 306 (1952); Illinois Minerals Co. v. Miller, 327 Ill. App. 596, 65 N.E.2d 44 (1946); Indus. Natural Gas Co. v. Sunflower Natural Gasoline Co., 330 Ill. App. 343, 71 N.E.2d 199 (1947). For an excellent discussion of the advantages of equity jurisdiction, including its vast enforcement techniques, see generally Starrs, Part I. See also, J. POMEROY, EQUITY JURISPRUDENCE §§68-88 (5th ed. 1941).


53 Id.

54 Id. at 41. See Hartford Life Ins. Co. v. Barber, 245 U.S. 146 (1917); Supreme Tribe of Ben Hur v. Cauble, 265 U.S. 356 (1921).
the state and federal constitutions requires that a party shall not be bound in the litigation unless the requirements of notice, personal jurisdiction and adequacy of representation are satisfied.\textsuperscript{55}

The Supreme Court of the United States in \textit{Mullane v. Central Hanover Bank and Trust Company}\textsuperscript{56} held that:

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.\textsuperscript{57}

The Illinois Supreme Court has reiterated this requirement in \textit{Otto v. Alexander}\textsuperscript{58} and said that where some of the parties were parties by representation only, failure to give notice was a denial of due process of law and in violation of the fourteenth amendment.\textsuperscript{59} The \textit{Otto} Court quoted from \textit{Hansberry v. Lee},\textsuperscript{60} where the Supreme Court stated:

Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more, and with the due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.\textsuperscript{61}

The notice necessary to satisfy due process can present a problem for the court, but a decision on how to effectuate it can be postponed until the propriety of the action is determined.\textsuperscript{62}

\textsuperscript{55} \textit{Hansberry v. Lee}, 311 U.S. 32 (1940).
\textsuperscript{56} 339 U.S. 306 (1949).
\textsuperscript{57} \textit{Id.} at 314. \textit{See also} Millikin v. Meyer, 311 U.S. 457 (1940); Grannis v. Ordean, 234 U.S. 385 (1914); Western Life Indem. Co. v. Rupp, 235 U.S. 261 (1914).
\textsuperscript{58} 333 Ill. 482, 50 N.E.2d 511 (1943). This was a suit by four owners of lots in a subdivision for themselves and others similarly situated. The plaintiffs sought to cancel certain restrictive covenants in the deeds to the lots. The plaintiffs attempted service on all class members of the pendency of the suit, however, only a portion actually were served. The plaintiffs contended that the attempted service was effective.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} 311 U.S. 32 (1940), rev'g \textit{Hansberry v. Lee}, 372 Ill. 369, 24 N.E.2d 37 (1939).
Adequacy of Representation

In addition to notice and an opportunity to be heard, due process of law has been held to require adequate representation of all class members. This essential was enunciated by the Supreme Court of the United States in the landmark case of Hansberry v. Lee. The decision enabled class action to have a binding effect on all members of the class while meeting with the requirements of due process of law.

The plaintiffs in Hansberry contended that a prior decree bound the defendants as class members to a judgment upholding the validity of certain racial covenants. The Supreme Court held that defendants were not bound by the prior class action because the defendants' interests had not been adequately represented. The Court held that a class action can constitutionally bind members of a class only when (1) the plaintiff is a member of the class which he purports to represent and (2) the plaintiff in fact adequately represents absent members of the class.

In summarizing Hansberry, Professor Moore states that, "In order for a party adequately to represent a class, his interests must be wholly compatible with and not antagonistic to those whom he would represent."

Hansberry did not dictate a strict rule regarding class actions but only indicated the protection of interests of absent parties who are to be bound by the decree must be "fairly insured." What the Hansberry Court meant by "fairly insured" was passed upon by the Second Circuit Court of Appeals in the case of Eisen v. Carlisle & Jacquelin. To "fairly insure" the interests of absent members of the class, the court said there

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65 This is, of course, subject to the due process limitations.
66 The persons seeking to enforce the covenant were not in the same class as those resisting performance and the lack of a sufficient identity of interest between the representatives and the absent class members was violative of due process. This violation of due process resulted from Illinois' failure to properly apply the due process requirements. Illinois' reaction to this landmark decision was a restrictive application of class action rules. E.g., Newberry Library v. Bd. of Educ., 387 Ill. 85, 55 N.E.2d 147 (1944), discussed in text between notes 81 and 87 infra. Chafee queries: "Could there have been two classes in Hansberry v. Lee, one seeking to uphold the restriction and the other to make it inapplicable to a proposed use of lots in the tract?" Z. CHAFEE, SOME PROBLEMS OF EQUITY, 237 (1950). Compare Chafee's comments with Cook v. Cohn, 25 Ill. App. 2d 30, 166 N.E.2d 614 (1960), where the court upheld the class action as to only part of the class. See text between notes 94 and 99 infra.
69 391 F.2d 555 (2d Cir. 1968).
must be (1) no hostility of interests, and (2) a qualitative adequacy of representation.\textsuperscript{70} The court relied on \textit{Hansberry} in support of its first requirement:

\ldots [I]t is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that the plaintiff has interests antagonistic to those of the remainder of the class.\textsuperscript{71}

The \textit{Eisen} court stressed adequacy of representation as a qualitative not quantitative test:

\ldots [W]e believe that reliance on quantitative elements to determine adequacy of representation, as was done by the District Court, is unwarranted. If class suits could only be maintained in instances where all or a majority of the class appeared, the usefulness of the procedure would be severely curtailed.\textsuperscript{72}

The important concern for the court is whether there is sufficient similarity between the position of the representatives and the absent class members to assure that all the necessary arguments in behalf of the entire class are before the court.\textsuperscript{73} Adequacy of representation is one of the most important, if not the most important, ingredient in any class action determination by the court. The handling of class actions by many Illinois courts appears greatly controlled by this due process element.\textsuperscript{74}

\textbf{The Requirement of a Community of Interest In the Subject Matter and the Remedy}

While the class action device is firmly established in Illinois case law, there is considerable disagreement as to when the device may be used.\textsuperscript{75} To pass on the propriety of a class action,

\textsuperscript{70} Id. at 562-63.
\textsuperscript{71} Id. at 562.
\textsuperscript{72} Id. at 563.
\textsuperscript{73} Adequacy of representation is a question of fact, to be raised and resolved in the trial court \ldots and assertions in defendants' brief in this court are ineffectual to make a factual issue on plaintiffs' allegation of ability to protect the interest of the class, much less to disprove them. Harris v. Palm Springs Alpine Estate, 329 F.2d 909, 914 (9th Cir. 1964). See also, Warner v. First Nat'l Bank, 236 F.2d 853, 858 (8th Cir. 1956); Ford, \textit{Federal Rule 23: A Device for Aiding the Small Claimant}, 10 B.C. & Com. L. Rev. 501, 509-10 (1969).
\textsuperscript{74} Aside from Section 52.1 of the Civil Practice Act, which controls compromise and dismissal of a class action, the due process requirement is the only present restriction on the Illinois courts. It appears that some Illinois courts over-reacted to the due process requirements as stated by the Court in \textit{Hansberry}. \textit{E.g.}, Newberry Library v. Bd. of Educ., 387 Ill. 85, 55 N.E.2d 147 (1944), discussed in text between notes 81 and 87 infra.
\textsuperscript{75} Two questions that arise concern (1) the necessary degree of unity of interest between representatives and the absent class members sufficient to constitute members as a class, and (2) whether a class action can be maintained at "law." For examples of the types of factual situations class actions have been used in, see note 49 \textit{supra}.
the court must examine the facts involved to determine how unified in interest the representatives and absent members are. The mere fact that there are numerous defrauded consumers seeking redress is in itself insufficient to involve the court's jurisdiction. Moreover, a class action cannot be maintained merely because it is designated as such in the pleadings. There must be a sufficient degree of unity between all class members, present and absent, which will insure adequacy of representation and in turn satisfy the demands of due process of law.

In Illinois, the successful maintenance of a class action requires all members of the class to have a community of interest in the subject matter and the remedy. In other words, there can be no adequate representation sufficient to meet with due process of law unless there is a community of interest in the subject matter of the litigation and in the remedy sought. As to what constitutes a "community of interest," the courts have taken divergent views. The liberal interpretation of "community of interest" would permit a consumer class action based on fraud because the separate rights of the individual consumers usually arise from a common source (i.e., the fraudulent wrongdoing.) On the other hand, a conservative interpretation and application of "community of interest" would seem to exclude the action based on fraud, since the inherent factual variants of damages, defenses and reliance would create a multi-faceted claim against the defendant. The Illinois decisions have taken both positions; at times in very similar factual situations.

The remainder of this comment will concern itself with the requirement of a "community of interest" as interpreted and applied by the Illinois courts.

77 Oppenheimer v. Cassidy, 345 Ill. App. 212, 102 N.E.2d 678, 682 (1952). There appears to be no formal language required to state a class action in the pleadings, however, the representatives must state facts sufficient to meet the general requirements of (1) equity jurisdiction, (2) due process, and (3) a community of interest in the subject matter and the remedy. These would appear to be the minimum requirements in pleading the class action.
78 For a statement of the general requirements, see Moseid v. McDonough, 103 Ill. App. 2d 23, 243 N.E.2d 394 (1968), discussed in note 132 infra.
79 The elements of a cause of action for misrepresentation are that (1) there be a misrepresentation of material fact, (2) with knowledge of its falsity or reckless disregard for its truth or falsity, (3) to a party with the intention that he rely on it, and (4) that the believing party does so rely, (5) with resultant damages. Bergman & Lefkow Ins. Agency v. Flash Cab Co., 110 Ill. App. 2d 415, 429, 249 N.E.2d 729, 736 (1968).
Distinct Transactions with the Defendant as Affecting "Community of Interest"

The fact that each member of the class had contact with the defendant in distinct transactions may destroy the required "community of interest" in the subject matter of the litigation. Four years after the United States Supreme Court's decision in Hansberry v. Lee,\(^8\) came the Illinois Supreme Court's decision in Newberry Library v. Board of Education.\(^2\) The Newberry Library representatives sought to recover on refunding bonds issued by the defendant. The issue was whether a pending suit, Delevitt v. Board of Education,\(^3\) was a proper class action in behalf of all holders of bonds issued by the defendant. If Delevitt was such a class action, then Newberry Library's action would be dismissed since another action was pending between the same parties for the same cause. Defendant contended that plaintiffs were proper parties by representation in Delevitt and therefore were being afforded due process of law under the state federal constitutions. The supreme court held that Delevitt was not a proper class action because the bonds, although issued simultaneously and identical in terms, were nonetheless purchased in separate and distinct transactions by each holder and that there was not a sufficient joint or common interest in the subject matter to constitute the holders as a class.\(^4\) Thus, it would be violative of due process to hold Newberry Library's right adjudicated in the Delevitt action. The court in Newberry Library would preclude the typical consumer class action based

\(^{81}\) 311 U.S. 32 (1940).
\(^{82}\) 387 Ill. 85, 55 N.E.2d 147 (1944).
\(^{83}\) At the time of the appeal, Delevitt was pending in the Circuit Court. In Delevitt, the plaintiff alleged that he was the owner and holder of a bond and that the board of education refused to pay interest on a coupon attached thereto on the ground that the attached coupons were invalid. The complaint in Delevitt prayed a decree on behalf of the plaintiff and all other owners and holders of the bonds and coupons, for judgment of the amount of interest due, together with costs and attorney fees.
\(^{84}\) Newberry Library v. Bd. of Educ., 387 Ill. 85, 96, 97, 55 N.E.2d 147, 153 (1944). The court stated:

...[W]hile it is true that Delevitt and appellants were all owners of bonds of the same issue, and all were equally interested in the recovery of coupon No. 16 attached to their respective bonds, yet the purchase of bonds by each was a transaction separate and distinct from that of purchase of bonds by the others. There was no joint action or interest in such purchases. In the Delevitt case the plaintiff's sole interest was to recover the amount due upon his coupon No. 16. No other owner or holder of any of the remaining coupons No. 16 joined as party plaintiff in the suit. If it be held under these circumstances that the Delevitt suit is a class or representative suit, and that all owners of coupons No. 16 are to be bound by any order, judgment or decree entered in that suit, then, if a defense of payment, settlement of claim, or any other defense has been made and found good as to Delevitt's coupon, resulting in an order or judgment against him, all members of the class must logically be bound by the order of dismissal and their cause of action disposed of without any of them having an opportunity to be heard.

Id. at 96-97, 55 N.E.2d at 153.
on fraud since each transaction with the defendant would be considered separate and distinct and thus insufficient to constitute the consumers as a class.\textsuperscript{85} One writer has viewed this decision “as a reaction to the due process implications of Hansberry.”\textsuperscript{86} Another has viewed it “as part of a larger pattern of dislike and suspicion toward this type of class action that has marked the attitude of the Illinois court in recent years.”\textsuperscript{87}

A determination by the court of the factual circumstances surrounding each class member’s claim may also destroy the requisite “community of interest.” This was the holding in \textit{Kuehn v. Bismarck Hotel Co.},\textsuperscript{88} where six former employees of the defendant hotel brought suit in a representative capacity seeking declaratory and other relief as a result of an alleged discharge without cause resulting in exclusion from a pension trust. While the court emphasized that “there must be a community of interest not only in the subject matter of the dispute, but also in the remedy,”\textsuperscript{89} the opinion does not reveal any factual issues requiring the application of the emphasized portion of the rule.\textsuperscript{90} In holding the class action improper, the court noted the failure of the complaint in not presenting any factual or legal questions common to the class.\textsuperscript{91} The court stated that “[e]ach discharge would have to be examined by the court in the light of its own peculiar and individual fact situation.”\textsuperscript{92} The trust agreement would seem to present the common question, but the...
court simply refused to entertain the class action without alluding to that possibility.\footnote{This court, as well as the court in Newberry Library, would preclude practically all class actions where members were not in identical positions.}

\textit{The Common Fund Class Action}

The community of interest in the subject matter of the suit can most easily be met by the class members having a joint interest in a fund, trust, or other property.\footnote{"The Illinois decisions have since relaxed somewhat the requirements for the use of class actions, at least where the relief requested . . . must come from a . . . 'common fund'." Starrs, \textit{Part II} at 430.} In \textit{Cook v. Cohn},\footnote{25 Ill. App. 2d 330, 166 N.E.2d 614 (1960).} defendant's retail customers filed a class action seeking to obtain a refund of a sales tax paid on their purchases of carpeting. The tax was declared invalid and the class sought to establish a constructive trust on the refund paid to the defendant by the state.\footnote{The court in Fowley v. Braden, 4 Ill. 2d 355, 122 N.E.2d 559 (1954) stated:

Constructive trusts arise by operation of law from circumstances which stamp the conduct of a person as unfair and wrongful and permit him to take advantage of another. They are divided into two general classes. One, where actual fraud is considered as equitable ground for raising the trust, and the other, where the existence of a confidential relation and the subsequent abuse of the confidence reposed are sufficient to establish the trust.


In its determination, the court distinguished between two groups of purchasers within the class: those who had paid their bill without the tax being itemized, and those who had paid the tax as a separate item on their bill.\footnote{25 Ill. App. 2d 330, 166 N.E.2d 614, 616 (1960).} The court permitted the action by the purchasers who had paid the tax separately and held the lower court erred in extending the reach of the plaintiff's class action to those customers who had paid the tax as a part of the purchase price.\footnote{In Smyth v. Kaspar American State Bank, 9 Ill. 2d 27, 136 N.E.2d 796 (1960), the court permitted a class action to proceed by two groups of bank certificate holders, one having refused to surrender their certificates and the other having agreed to a redemption and surrender of their certificates. The \textit{Cook} court distinguished \textit{Smyth} and stated that "[t]he claims do bear upon a common fund as in \textit{Smyth} . . . but it is clear that the claims do not have a common basis as they did there." 25 Ill. App. 2d 330, 334, 166 N.E.2d 614, 616 (1960). While it appears that \textit{Cook} and \textit{Smyth} should have been treated similarly, the court in \textit{Cook} seemed to feel that it would be burdensome and difficult to manage a class action if every "purchaser of carpeting within the relevant dates would be entitled to a refund where a tax was paid as a result of the purchase." \textit{Id. Compare the Cook court's approach with Federal Rule 23.}} Although the rationale for the distinction between the two groups is by no means clearly set forth, it appears the court felt the itemization necessary to the holding of defendant as a constructive trustee for the funds. In any event, the court permitted the class action in part and in treating
the refund as a "common fund," the court found a sufficient degree of unity between all class members with the itemization.99

Conflicting Interests of Class Members as Affecting the Common Fund Class Action

The fact that class members have conflicting interests among themselves does not destroy a community interest in the subject matter where a common fund is involved. This was the point of Smyth v. Kaspar American State Bank.100 There, two groups of bank certificate holders, one having agreed to a redemption and surrender of their certificates and the other having refused to surrender their certificates, together filed a class action against the defendant bank.101 The court held the class action for injunctive relief proper even though the class included some who sought recission for fraud in the surrender of their certificates.102 The court relied on a Federal Circuit Court of Appeals decision103 which stated in part: "The possible situation that the beneficiaries may have divergent views as to their several undivided rights in the distribution of a trust fund which is alleged to be insufficient to pay all in full does not prevent this being a class action."104

The fact that the amount of each member's claim would be different and that some members would be subject to an accord

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99 While the court in Newberry Library did not mention the possibility that a common fund would result from the interest on the coupons, it would appear that the same factual situation could have led to a different result on the theory of "common fund" or constructive trust. In the same type fact situation, a different result was achieved in Fiorito v. Jones, 39 Ill. 2d 531, 236 N.E.2d 698 (1968). The Illinois Supreme Court affirmed a class action procedure to hold unconstitutional amendments to the Service Occupation Tax Act (ILL. REV. STAT. ch. 120, par. 439.101 et seq. 1967) and similar tax acts. The court made it clear that there was a single class of taxpayers entitled to a refund of the unlawfully collected taxes; that the persons coming within the class were those who bore the burden of the tax; that those who bore the burden of the tax would be either the serviceman deemed taxable by the amendatory acts or the purchaser from such serviceman; that the plaintiffs properly represented the class entitled to refund in the action and that all that remained was for the trial court to determine which servicemen or purchasers had borne the burden of the tax and were entitled to a refund. The only factor which was determinative of whether the purchaser was entitled to a refund was whether he bore the burden of the tax and not whether he bore it as a separate item or so-called "hidden charge." The court in Fiorito held that the purchaser who may have borne the tax as a "hidden charge" was in the same class as the purchaser who bore it as a separate charge and was properly represented by the plaintiffs.

100 9 Ill. 2d 27, 136 N.E.2d 796 (1956).

101 The certificates were issued by defendant pursuant to a plan of reorganization. Under the agreement, depositors waived payment of a certain percent of their accounts and accepted, in lieu thereof, certificates of beneficial interest payable upon the written approval of the auditor.

102 The plaintiffs alleged that members of both groups have a preferential right to be paid pro rata the full face amount of their respective certificates before any dividends or returns are paid to the stockholders.

103 Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir. 1944).

104 9 Ill. 2d 27, 136 N.E.2d 796, 805 (1956).
and satisfaction defense was held not to destroy the requisite "community of interest" since the plaintiff showed:

a common interest in establishing the validity of the certificates and the right of the holders to share in the net profits of the defendant bank in accordance with the terms of the certificates of beneficial interest and the waiver agreement.105

_Smyth_ indicates that where a common thread runs through the entire class action litigation, minor variants will not be violative of a class member's right to due process and prevent a balancing in favor of the maintenance of the class action.106 As indicated,107 the crucial question, with respect to the degree of unity required, is whether there is assurance of adequacy of representation of absent class members. If there is, then due process will be satisfied and the class members will be bound by _res judicata_.108

**The Dominant and Pervasive Issue**

The common fund class action has been utilized by taxpayers' attempting to restrain state officials from transferring occupation taxes, paid under protest by retailers, into the state treasury. Many suits were held not maintainable.109 However, in _Harrison Sheet Steel Co. v. Lyons_,110 the action was allowed as a proper class action. The court found the requirement of a "community of interest" satisfied. The subject matter was the refund to the customers and the remedy was a declaration of a constructive trust for the amounts to be transferred into the state treasury.111 The court rejected defendant's con-
tention that *Peoples' Store of Roseland v. McKibbin*,112 was applicable and stated:

In that case, however, there was no common fund and the rights of the members of the alleged class depended upon different factual circumstances, to which different legal principles might be applicable. Here there is a common fund, and common factual and legal issues.113

The court went on to say:

The company also contends that there is a possibility that individual questions may arise between itself and the members of the class. But the hypothetical existence of individual issues is not a sufficient reason to deny the right to bring a class action. Where it appears that the common issue is *dominant and pervasive*, something more than the assertion of hypothetical variations of a minor character should be required to bar the action.114

Although the court in *Harrison* did not overrule any earlier Illinois decision which restrictively interpreted and applied the community of interest requirement,115 it did cast doubt on their value as "precedent." *Harrison* permitted the class action to proceed notwithstanding the separate showing of proof by each member of his *separate* and *distinct* transactions with the defendant.116 This court offers some hope for the maintenance of many consumer class actions insofar as it speaks of a community of interest, not in every issue of the controversy, but only the "dominant and pervasive" issue.117

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112 379 Ill. 148, 39 N.E.2d 995 (1942). There, a suit was brought to enjoin such a collection and its denial was based on a lack of community of interest. The sales for which the tax had been collected were of foodstuffs to hospitals and other similar institutions. The complaint alleged that plaintiffs were a class on the theory that they were all individuals and firms engaged in similar businesses. The court held that while all retailers of food supplies to institutions have a common interest in having such sales exempted from the tax, their common interest stops there. It is unclear what criteria the court considers in applying the community of interest rule. It appears that almost identical issues, between the class members and their adversaries, are required.

113 15 Ill. 2d 532, 538, 155 N.E.2d 595, 598 (1959).

114 *Id.* (Emphasis added.) The court went on to say:

The company's opportunity to defend any individual issues that may arise will not be impaired, and it can hardly be said that it will suffer greater inconvenience by litigating those issues in a single action instead of in separate actions.

*Id.* On the contrary, it would appear that it would be more convenient and less expensive for the company to settle all claims in one litigation. Moreover, the individual class members would have no effective redress if they would be required to proceed individually. In a more recent decision, the court permitted the plaintiffs’ class action, attacking the validity of the 1967 amendatory acts to Service Occupation and Use Tax Acts, since the issues of the validity of the 1967 amendments were common to the class. The differences between the members were not sufficient to bar the action. *Fiorito v. Jones*, 39 Ill. 2d 531, 236 N.E.2d 698 (1968). See note 99 *supra.*

115 None of the Illinois decisions involving class actions have been overruled. More recent decisions, like *Harrison*, just distinguish the earlier decisions on their facts.

116 Compare *Harrison* with *Newberry Library*, in text between notes 81 and 87 *supra.*

117 See note 46 *supra.*
The Degree of Variation Permitted

The extent to which the Illinois courts have permitted variations between each class member and the defendant, where the dominant and pervasive issue was common to the entire class, is illustrated by the following cases, all involving the common issue of fraud. In each case equity jurisdiction was properly exercised and the court rejected the defendant's attempt to defeat the action by contending that the elements of reliance and damages had to be determined as to each member of the class and therefore there could be no community of interest in the subject matter of the litigation.

The case of Kruse v. Streamwood Utilities Corporation was a class action in behalf of homeowners to have a constructive trust declared for their benefit of the distribution system of Streamwood Utilities used in the rendering of sewer and water service. In the alternative, the representatives requested a damage award to represent the payments made by the homeowners for the distribution system. The defendants, relying on Langson v. Goldberg, contended the action was improper because of the individual factual issues inherent where fraud was involved. The court rejected their contention and stated that it was not the factual variations which are of significance but rather a "community of interest . . . in questions of law and fact involved in the general controversy." The court approved the Illinois case of Wilkinson v. Heberling, where the court, over similar contentions, allowed the action, since defendants were charged with a conspiracy to defraud the plaintiffs. The conspiratorial nature of the litigation enabled the court in Kruse

118 See note 79 supra.
119 In the area of shareholder securities fraud, the cases are similar to consumer frauds and offer some support for a consumer class action for damages based on fraud. In both situations there is a misrepresentation, degrees of reliance and varying damages. The trend seems to favor the class actions in the securities fraud area. See Note, Class Action Treatment of Securities Fraud Suits Under the Revised Rule 23, 36 Geo. Wash. L. Rev. 1150 (1968).
120 34 Ill. App. 2d 100, 180 N.E.2d 731 (1962).
121 The class members allegedly suffered damages due to the unsanitary condition of the water.
122 373 Ill. 297, 26 N.E.2d 111 (1940). There, the Illinois Supreme Court said, "that an action for . . . relief [predicated on fraudulent representations] is personal to the person who suffered by the fraud and can not (sic) be made the basis of a representative suit." Id. at 301, 26 N.E.2d at 113.
124 231 Ill. App. 516 (1928). There plaintiffs brought a suit based upon fraudulent representations and the court permitted the class action to proceed since the defendants were charged with a conspiracy or concerted plan to wrong and defraud the plaintiffs.
125 The defendants moved to dismiss on the ground that the suit was multifarious and that courts of equity will not entertain complaints of that nature merely to avoid a multiplicity of suits.
126 The court in Wilkinson quoted from Hale v. Allison, 188 U.S. 56 (1902):
to find that members of the class shared a community of interest. Thus, the variant issues inherent in fraud did not override the common question of conspiracy.

While Kruse and other recent Illinois decisions do not answer the question whether a class action can be maintained solely for damages, it does indicate that the constructive trust or common fund theory, as an equitable basis, may remedy many consumer frauds. These theories would be available in those cases having the element of conspiracy or concerted action.

In Kimbrough v. Parker, five contestants in a fraudulent puzzle contest were permitted to maintain a class action and impose a constructive trust upon proceeds of the amounts collected. The court permitted the action since:

There was a common fund from which contributions were to be returned. The contributions were of small amounts. The inducements were substantially the same for all contestants since there were no personal solicitations. The issues between all contestants and defendants were the same. There were no actual or potential conflicts of interest. The five plaintiffs were fairly representative and have fairly represented contestants' side of the common issues.

Again, the concept of constructive trust or common fund enabled the court to find the requirement of a community of interest in the subject matter and the remedy met. While the

We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of rights or interest in the subject-matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy.

231 Ill. App. 516 (1923).

The class members' receipt of the proceeds of the common fund will put them in status quo, and, in effect, allow them their "damages."


129 The contest was published in a newspaper and involved only ordinary intelligence.

130 The plaintiffs sought to impose a constructive trust on proceeds of $230,000.00 collected from 3,300 contestants.


132 While the Illinois courts have not overruled earlier applications of the community of interest rule, the strong influence of the "common fund" class action has led recent courts to distinguish earlier decisions on the facts. In Moseid v. McDonough, 103 Ill. App. 2d 23, 243 N.E.2d 394 (1968), the court permitted a class action to challenge the validity of the Library Act of 1961 requiring a defendant in an action in Cook County to pay a $1.00 library fee to the Cook County Court. The court relied on the existence of a common fund, the fact that although the fee was paid in separate transactions the circumstances were identical and raise the same issues of law and fact. The remedy was common in that each plaintiff had an identical claim for a refund and the class sought a declaratory judgment to stop violations of the Illinois Constitution not to be required to "purchase justice." The court distinguished Newberry Library "since here there is a common origin of claim, and a fund from which common recovery for the class may be had."

Id. at 29, 243 N.E.2d at 397. The court also distinguished People Stores in that there was no fund in the fact situation. Id. at 28, 243 N.E.2d at 396.
decision strongly supports the consumer fraud of deceptive advertising,\textsuperscript{133} it does not lend support to those consumer frauds in which there are personal dealings with each consumer thereby creating varying inducements.\textsuperscript{134} However, the allowance of the class action by *Kimbrough* permitted the class of defrauded consumers to receive, in effect, damages. This was permitted despite claims for varying amounts.\textsuperscript{135} In this respect the decision is significant to prospects of a consumer class action. It is indicative of a more liberal interpretation of the "community of interest" requirement in situations involving fraud. This liberal approach is evident when one compares the *Kimbrough* decision to other Illinois decisions which plainly refused to consider any such action.\textsuperscript{136}

A further indicator of Illinois' awareness of consumer needs and the relaxation of the degree of "community of interest" required, is found in a recent decision in the Circuit Court of Cook County. *Holstein v. Montgomery Ward & Company*\textsuperscript{137} was a consumer class action on behalf of approximately 6,000,000 Ward charge account holders against a credit-life, disability, and dismemberment insurance plan. Ward sent out by third-class mail, without return postage, a credit insurance certificate to its charge account holders in virtually every state which would permit the plan. This was accompanied by a solicitation urging customers to take advantage of the plan and obliquely informing them if they did not wish to do so, to notify Ward or they would be contractually bound on the receipt of the insurance contract. The next billing contained a reminder letter concerning the

\textsuperscript{133} Many of the frauds perpetrated upon the consumer occur through deceptive advertising where individual consumers are reached through the same or similar newspaper advertisements. See, Dole, *The Emergence of Deceptive Advertising as a Group Tort: A Possible Consequence of the 1966 Federal Rule Amendment with Respect to Class Actions*, 62 NW. U.L. REV. 661 (1967).

\textsuperscript{134} However, it would seem that if the representatives established the existence of an underlying core of unlawful conduct affecting all class members, the settlement of all claims in one litigation would be advantageous to both the class and the defendant.

\textsuperscript{135} The Advisory Committee Note to new Federal Rule 23 states: [A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. In *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), the Second Circuit Court of Appeals stated that all of these differences among the class members bear only on the computation of damages, a factor which, by itself, does not justify dismissal of the class action. *Id.* at 566. The computation of damages may be thought of as a matter of administrative detail. See also *Kronenberg v. Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966); *City of Philadelphia v. Morton Salt Co.*, 248 F. Supp. 506 (E.D. Pa. 1965).

\textsuperscript{136} For a comparison of class actions in each state jurisdiction, see Starrs, *Part II*, 425-96.

\textsuperscript{137} 3 CCH Pov. L. Rev. ¶9652 (No. 68 CH 275 Circ. Ct. Cook County, March 11, 1969).
merits of the plan and a statement that a customer could cancel coverage if desired. The accompanying bill provided boxes that could be checked depending on whether or not the customer desired the insurance. If the customer did not desire the plan, he had to deduct an indicated insurance premium already included in his monthly statement as well as check the "no" box.

Plaintiff Holstein, individually and in behalf of all other charge account holders, filed a complaint for declaratory judgment for declaration of rights and other relief against Ward. Deceptive merchandising was the gist of the plaintiff's allegations. Judge Nathan M. Cohen, of the Circuit Court of Cook County, Illinois, denied the defendant's motion to dismiss the plaintiff's third amended complaint. He ruled that the complaint stated facts sufficient to sustain the class action notwithstanding the defendant's contention that there:

... is no such dominant and pervasive common issue, rather there are a multitude of issues and interests produced by different factual situations and differing legal standards applicable to each of the factual situations, which preclude a class action. 

138 Plaintiff's third amended complaint contained four counts: COUNT I: that Ward wrongfully imposed a burden upon the plaintiffs and all other Charge-All account holders, to take affirmative action to avoid charges for credit life, disability and dismemberment insurance and charges which have been or are presently being levied against plaintiffs and all other Charge-All account holders similarly situated; that plaintiff does not desire such insurance and has not solicited such insurance in any way nor have they authorized Ward to impose charges for services upon the monthly statements sent to them. Ward has without authorization wrongfully collected monies for the insurance.

COUNT II: charges that Ward's actions as set forth in Count I were done knowingly and that as to those Charge-All account holders who believed that they would specifically have to reject Charge-All insurance in order to avoid being billed for them in subsequent statements received from Ward, that Ward should have known that it was imposing the burden of specific rejection upon such group and further that Ward knew or should have known that such Charge-All account holders did not know that they had to take such affirmative action. That plaintiff Allan and other group plaintiffs undertook the expense of first class postage and mailing and the time involved in order to reject this type of insurance.

COUNT III: that a new billing procedure about to be instituted by Ward will continue to wrongfully impose a burden upon the plaintiff to take affirmative action to avoid credit life and disability insurance and premium charges which have been or are about to be levied against plaintiffs and other class members. Plaintiff contends a further burden will be imposed on the class to take further affirmative action and incur further inconvenience, expense and loss of time to avoid the insurance and premiums charged for it. Plaintiff alleges that this is about to be done with knowledge of its wrongful character, by defendant Ward and asks that preventive relief be granted.

COUNT IV: that defendant Ward violated ILL. REV. STAT. ch. 121½, §311-317, commonly known as the Deceptive Trade Practice Act. Id., Memorandum and Ruling on Defendant's Motion To Strike and Dismiss the Third Amended Complaint and Ruling upon Plaintiff's Motion To Dismiss the Montgomery Ward Life Insurance Company, at 2-4. (Hereinafter cited as Ruling.)

The court held that the "irritant of being covered by and/or billed for insurance without first having affirmatively assented thereto" was the "dominant and pervasive" issue.\footnote{Ruling, 16.}

The court also rejected defendant-Ward's second contention supporting its motion to strike and dismiss. Defendant contended that "many members of the class simply have nothing to gain through this lawsuit: many others are directly harmed,"\footnote{Defendant's Brief, 56.} and that the plaintiff could not adequately represent the class.\footnote{Defendant's Brief, 55.}

Responding to this, the court ruled that the plaintiff did adequately represent the interest of the class and that the notice requirement problem need not be decided "at this juncture" since the matter of notice will be material only when and if the court grants certain portions of the relief prayed for.\footnote{Ruling, 23.} The court looked to the recently amended Federal Rule of Civil Procedure 23\footnote{Ruling, 24-7.} and the federal decisions interpreting it for guidance.\footnote{Ruling, 24-7.}

The need for the class action device as an effective remedy for consumers and other small claimants was well recognized by the Holstein court. The plaintiff's strong appeal for the allowance of class actions as a consumer tool, was approved by the court:

A situation ripe for the unjust enrichment of the overreaching merchant has been created by mass marketing techniques involving millions of consumers residing in many states, lack of effective regulatory enforcement agencies, and ignorant consumer (sic) whose relatively small claims cannot justify the cost of legal action.\footnote{Id. at 23, 25.}

Subsequent to the Circuit Court judge's ruling on Ward's
motion to strike and dismiss the plaintiff's third amended complaint, Ward and the class of charge account holders effectuated a settlement. Therefore, the result of a possible appeal to the Illinois Appellate Court challenging the maintenance of the class action in such situations, will be unknown. Therefore, the Circuit Court decision is at best only persuasive of the modern approach to consumer class actions and will not be binding as precedent in a subsequent consumer fraud suit in Illinois. However, the court in Holstein offers hope for the defrauded consumer since the court recognized that certain compelling situations can only be handled by the use of a class action.

CONCLUSION AND RECOMMENDATION

The successful maintenance of a consumer class action in Illinois depends upon the courts' interpretation and application of the three requirements. Generally, the action will require a proper equitable basis with a sufficient degree of unity between all class members so as to afford all members the protection of due process of law.

The conservative courts may rely on cases like Fetherston, which merely dismiss the action on technical equity grounds, or on cases like Newberry Library and Kuehn, which dismiss the action because each class member was involved in separate and distinct transactions with the defendant to which different legal principles might apply. The courts following this approach would apparently proceed without weighing the common fund and practical impossibility of other adequate relief in determining whether jurisdiction should be exercised.

More liberal courts, like Holstein, are good indications of the courts' treatment of class actions in the future. These courts will utilize the flexible concept of equity jurisdiction, and guided by due process considerations, will liberally apply the requirement of "community of interest." The prime reason for this liberal trend is found in the growing social pressure for an effective consumer remedy.

While there is no clear authority for the maintenance of a consumer class action involving fraud and seeking damages as its sole remedy, a favorable result can obtain where the representatives can prove the existence of a "common fund" or "concerted action." In other situations, the representatives will

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147 The settlement provided that anyone who was a Ward Charge account holder prior to a certain date and who paid premiums on the Charge-All insurance by mistake, without intending to have the benefits of the insurance program, may file a claim for a refund. Holstein v. Montgomery Ward & Co., 3 CCH Pov. L. Rep. ¶9652 (No. 68 CH 275 Cir. Ct. Cook County, March 11, 1969). Stipulation of Compromise of July 9, 1970, approved by the court December 16, 1970.
be confined to purely equitable relief or they must persuade the court to overlook relatively minor differences between the parties, at least where there is a need for the settlement of all claims in one litigation.

As illustrated by the court in Holstein, class actions can be effective tools for remedying widespread consumer abuses. It would serve Illinois well for all courts to approach class actions in this manner. The outmoded and archaic interpretations of the degree of unity required should continue to be relaxed and policy considerations should be balanced in favor of the maintenance of the class action and the defrauded consumers.

It might also serve Illinois well to adopt a more realistic approach to consumer class actions. The conflicting decisions on this subject remain because the legislature has not yet spoken. It is recommended that the legislature look for guidance to the recently enacted statute and court rules of other jurisdictions for a rational framework for judges as well as a proper delegation of discretion to enable tailor-made judgments.148

Hopefully, whether through liberalized judicial application of class action requirements or a new comprehensive statute or supreme court rule aimed at this problem, class actions may be made a more effective vehicle for the redress of consumer fraud in Illinois.

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