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administrative claim.[35]

The *Kielwien* decision is in accord with a number of cases[36] which hold that the burden of proving "newly discovered evidence" or "intervening facts" is on the plaintiff, and, absent a clear showing of such facts or evidence, the plaintiff will be limited in recovery to the amount of his administrative claim. The rationale underlying this requirement of strict compliance with the Tort Claims Act is that the United States should be sued only on its own terms when it has waived sovereign immunity.[37] Those terms are jurisdictional; where they are not strictly complied with by the plaintiff, the federal courts have no jurisdiction over the action.[38] The court must therefore require the plaintiff to prove the intervening facts or newly discovered evidence which entitles him to recover more than his prior administrative claim. The Fourth Circuit indicated in *Kielwien* that § 2675(b) should not be construed liberally. Where the plaintiff fails to make a clear showing of intervening facts or newly discovered evidence, he will be limited in his recovery to the amount in his administrative claim.

JOHN C. PARKER

I. TRADE REGULATION

A. No Expansion of Collateral Estoppel for Administrative Hearing

The doctrine of collateral estoppel prevents a party to a lawsuit from retrying issues which have already been litigated and determined in a previous suit in which it was a party.[1] In early applications

[35] 540 F.2d at 681.

[36] *See, e.g.*, Schwartz v. United States, 446 F.2d 1380, 1381 (3rd Cir. 1971); DeGroot v. United States, 384 F. Supp. 1178, 1181 (N.D. Iowa 1974); Bonner v. United States, 339 F. Supp. 640, 650 n.5 (E.D. La. 1972); Smith v. United States, 239 F. Supp. 152, 154 (D. Md. 1965); Rudd v. United States, 233 F. Supp. 730, 734 (M.D. Ala. 1964).

[37] *See* Rosario v. Am.-Export-Isbrandtsen Lines, Inc., 531 F.2d 1227, 1230-31 (3rd Cir. 1976); Childers v. United States, 442 F.2d 1299, 1303 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971); Mayer v. Wright, 251 F.2d 178, 179 (9th Cir. 1958); Story v. Snyder, 184 F.2d 454, 456 (D.C. Cir. 1950).

[38] *See* United States v. U.S. Fidelity & Guar. Co. 309 U.S. 506, 514 (1940); Mayer v. Wright, 251 F.2d 178, 179 (9th Cir. 1958); Simon v. United States, 244 F.2d 703, 704 (5th Cir. 1957).

[1] Collateral estoppel refers to the res judicata effect which a law suit has on a second suit based on a different cause of action but involving issues necessarily decided

of the doctrine, federal courts refused to bind a litigant to the findings of an earlier suit unless his opponent were also bound.[2] This rule of mutuality,[3] however, has been substantially overruled in recent years.[4] In applying the doctrine of collateral estoppel, the courts now inquire whether the litigant to be estopped had a "full and fair opportunity"[5] to be heard on the issue.[6] If the litigant has had this opportunity, he may be estopped from litigating the issue again.

Application of this "full and fair opportunity" test to administra-

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in the prior action. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971); Cromwell v. County of Sac, 94 U.S. 351 (1876); Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973); 1B MOORE'S FEDERAL PRACTICE, ¶ 0.412[1], at 1805-1808 (2d ed. 1974); RESTATEMENT OF JUDGMENTS § 68(1) (1942); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942); Note, *Developments in the Law Res Judicata*, 65 HARV. L. REV. 820 (1952).

[2] *E.g.*, Triplett v. Lowell, 297 U.S. 638 (1936); Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464 (1918); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912).

[3] Where one party to an action moves for collateral estoppel to bind the other party to an issue determined in a prior action, the doctrine of mutuality would mandate that both litigants would have to have been parties or in privity with a party to the prior action in order for collateral estoppel to apply. The practical result is that neither party is bound unless both are bound.

[4] Courts discarded the mutuality requirement due to recognition that it wasted judicial effort to relitigate an issue previously decided in a full and fair trial. *E.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 328 (1971); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); Bernhard v. Bank of Amer. Nat'l. Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

[5] Under the "full and fair opportunity" test, the court must decide if a certain issue was determined in a prior action which provided all procedural safeguards and definitively ruled on the issue. The courts look to several different areas to test what is a "full and fair opportunity" to be heard on an issue. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 333 (1971) (no opportunity to choose defendant, forum, and time of suit is unfair); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 461-62 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971) (lack of initiative in bringing suit, defending relatively small claim, no opportunity to choose or change forum may be considered); Brightheart v. McKay, 420 F.2d 242, 245 n.4 (D.C. Cir. 1969) (litigating small claim, lack of initiative in bringing suit). Although collateral estoppel was originally applied only defensively, several jurisdictions now apply it offensively as well. *E.g.*, Zdanok v. Glidden Co., 327 F.2d 944, 954-56 (2d Cir. 1964); United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-30 (E.D. Wash. 1962), *aff'd as to res judicata sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379, 404-05 (9th Cir. 1964); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S. 2d 596 (1967); King v. Grindstaff, 284 N.C. 348, 200 S.E.2d 799 (1973).

[6] The interests of judicial economy are subordinated in cases where precluding relitigation of issues would be unfair to the party estopped. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 328 (1971); Ritchie v. Landau, 475 F.2d 151, 155 (2d Cir. 1973).

tive proceedings is unsettled, however, especially in the area of antitrust. Section 5(a) of the Clayton Act[7] governs the estoppel effect of prior antitrust suits brought by the government. The section provides that a final judgment rendered in any civil or criminal proceedings brought by or on behalf of the United States under the antitrust laws shall be prima facie evidence only, and not res judicata, against the defendant in any action or proceeding brought by any other party as to issues decided in the prior case.[8]

The Federal Trade Commission Act, (FTCA), governing unfair trade practices,[9] has been held not to be an antitrust law.[10] As a result, the courts have denied prima facie effect to an FTC judgment under the Federal Trade Commission Act.[11] Nevertheless, an FTC order entered under § 2(a) of the Clayton Act,[12] an antitrust law, has been deemed to have prima facie effect.[13] Presumptively, an FTC order under the Clayton Act must be accorded only prima facie effect while FTC orders under the FTCA may carry no weight in subsequent proceedings.

In *North Carolina v. Chas. Pfizer & Co.*,[14] the Fourth Circuit ruled that an FTC determination under § 5 of the FTCA that a patent was

[7] 15 U.S.C.§ 16(a) (1970). *See* Shores, *Treble Damage Antitrust Suits; Admissibility of Prior Judgments Under Section 5 of the Clayton Act*, 54 Iowa L. Rev. 434 (1968). Comment, *Section 5(a) Of The Clayton Act And The Use Of Collateral Estoppel By A Private Plaintiff In A Treble Damage Action*, 8 U.S.F.L. Rev. 74 (1973).

[8] Section 5 defines the term estoppel narrowly in identifying the circumstances in which the decree is to be admissible as prima facie evidence. The judgment is admissible only if it would be an estoppel if the government were bringing the subsequent suit. *See* Comment, *The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial*, 43 U. Chi. L. Rev. 338 (1976).

[9] In 1938 Congress enacted the Wheeler-Lea amendment to the FTCA which officially legitimatized the FTC's authority to regulate deceptive practices regardless of anti-competitive effect. Clayton Act, ch. 49, § 3, 52 Stat. 111 (1938) (Current version at 15 U.S.C. § 45 (1970). Later, 15 U.S.C. § 45(a) (1958) (current version at 15 U.S.C. § 45 (1970)) provided that unfair methods of competition in commerce and unfair deceptive acts or practices in commerce are unlawful. *See* Millstein, *The Federal Trade Commission and False Advertising*, 64 Colum. L. Rev. 439 (1964).

[10] *See* Nashville Milk Co. v. Carnation Co., 355 U.S. 353, 376 (1958); Y&Y Popcorn Supply Co. v. ABC Vending Corp., 263 F. Supp. 709, 712-13 (E.D. Pa. 1967). Section 5 of the Clayton Act, which empowers the FTC to proscribe unfair competition and deceptive acts in commerce, is by statutory definition not an antitrust law. 15 U.S.C. §§ 12, 44 (1970).

[11] *E.g.*, Y&Y Popcorn Supply Co. v. ABC Vending Corp., 263 F. Supp. 709,713 (E.D. Pa. 1967).

[12] 15 U.S.C. §§ 13-13b, 21a (1970).

[13] Farmington Dowel Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 67 (1st Cir. 1970).

[14] 537 F.2d 67 (4th Cir.); *cert. denied*, 97 S. Ct. 183 (1976).

fraudulently obtained would not have collateral estoppel effect in a subsequent private antitrust action against the same party. The court reasoned that although the prior FTC adjudication was fair, the procedural requirements of an FTC hearing and a court trial were sufficiently different to justify not applying collateral estoppel effect to the FTC order.[15] The court further noted that the two actions arose under different statutes concerning enforcement of different policies[16] and that § 5(a) limited the effect of the prior action under the antitrust laws to rebuttable and not a conclusive presumption.[17]

In *Pfizer,* the state of North Carolina[18] brought an antitrust damage action against defendants[19] alleging that defendants had entered into combinations, agreements, and conspiracies unreasonably to restrain trade and commerce in the broad spectrum antibiotic market by using a patent obtained through fraud.[20] The plaintiff moved for summary judgment on the issue that the patent had in fact been issued because of defendant's fraud, arguing that a prior FTC determination[21] on the issue brought under § 5 of the FTCA should now estop the defendants from denying this charge.

The plaintiff argued that the holding of *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*[22] was dispositive of the

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[15] *Id.* at 74.

[16] *Id.* at 71.

[17] *Id.* at 70.

[18] North Carolina institued the action on behalf of itself, its governmental subdivisions and all citizen consumers who had purchased broad-spectrum antibiotics manufactured and sold by the defendants in North Carolina during the period 1952 to 1966. *Id.* at 68.

[19] The defendants were Chas. Pfizer & Co. (Pfizer), American Cyanamid Company (Cyanamid), Bristol-Myers Company (Bristol), Olin Mathieson Chemical Corportion (Squibb) and the Upjohn Company (Upjohn). *Id.* at 69.

[20] The enforcement of a patent obtained by intentional fraud upon the Patent Office may be a violation of § 2 of the Sherman Act, 15 U.S.C. § 2 (1970), if all other elements of a § 2 offense are proven. *See* F.T.C. v. Motion Picture Advert. Serv. Co., 344 U.S. 392 (1953); Union Circulation Co. v. F.T.C., 241 F.2d 652 (2d Cir. 1957). If the violation is established, an injured private party has a treble damage action under the Clayton Act. 15 U.S.C. § 15 (1970). *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Co., 382 U.S. 172 (1965); Smith, *Fraud Upon the Patent Office As a Violation of the Sherman Antitrust Law,* 53 J. PAT. OFF. SOC'Y. 337, 360 (1971).

[21] American Cyanamid Co., 3 TRADE REG. REP. (CCH) ¶ 18,077 (F.T.C. 1967), *aff'd sub nom.,* Chas. Pfizer & Co. v. F.T.C., 401 F.2d 574 (6th Cir. 1968), *cert. denied,* 394 U.S. 920 (1969). The FTC held that the totality of the patentee's actions amounted to a violation of the FTCA because of the fraudulent effect of the misrepresentations to the Patent Office. The Commission remedied the noncompetitive situation by ordering Pfizer to license the patent at a limited royalty to all drug manufacturers.

[22] 402 U.S. 313 (1971).

issue. In *Blonder-Tongue,* the Supreme Court gave collateral estoppel effect to a prior determination of the invalidity of a patent to foreclose a plaintiff from litigating alleged infringement of the patent previously declared invalid.[23] The district court in *Pfizer* rejected this argument,[24] noting the validity of the patent was not directly in issue, and that, therefore, the holding in *Blonder-Tongue* was inapplicable. The Fourth Circuit affirmed this rationale, but ruled nevertheless that the plaintiffs' motion should still be considered in light of the fundamental change and development of the doctrine of collateral estoppel reviewed in the *Blonder-Tongue* opinion.[25]

In its review of these changes, the Fourth Circuit held that the doctrine of collateral estoppel, liberated from the mutuality requirement, was typified by *Eisel v. Columbia Packing Co.*[26] In *Eisel,* the federal district court of Massachusetts ruled that the decisive question when collateral estoppel is asserted against a party is whether that party had a fair opportunity procedurally, substantively, and evidentially to litigate the issue in a prior adjudication.[27]

In considering whether the FTC hearing afforded the defendant in *Pfizer* a fair opportunity to litigate the fraud issue, the Fourth Circuit examined four different areas. First, the court noted that the FTC hearing was brought under the FTCA, a statute broader in scope than the antitrust statute under which this case was brought.[28] Section 57 of the FTCA[29] deals with "unfair methods of competition," while the Sherman Act concerns restraints of trade having monopolistic tendencies. While private causes of action may not be brought under the FTCA, which is concerned with public interest actions,[30]

[23] The issue in *Blonder-Tongue* was the validity of patent *vel non,* challenged on the grounds of 'obviousness,' 402 U.S. at 314-15.

[24] 384 F. Supp. 265, 277 n. 16 (E.D.N.C. 1974).

[25] 537 F.2d at 73. The history of the doctrine of collateral estoppel was discussed in the *Blonder-Tongue* opinion, 402 U.S. at 317-49.

[26] 181 F. Supp. 298 (D. Mass. 1960).

[27] *Id.* at 301. This test jettisoned the previous standard of whether there was mutuality between the parties. *See* notes 3, 4 *supra.* The Fourth Circuit adopted the *Eisel* rationale in Graves v. Associated Transp. Inc., 344 F.2d 894, 900 (4th Cir. 1965), where it held that the plaintiff, having had a full and fair day in court, ought not be permitted to relitigate the issues previously tried and determined.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. V 1975), provides that any combination or conspiracy in restraint of trade or commerce is illegal. Section 2 of the Sherman Act, *id.* § 2, provides that any person found to be so monopolizing trade or commerce shall be guilty of a felony.

[29] 15 U.S.C. § 45(a) (1970), as amended, 15 U.S.C. § 45(a)(1) (Supp. V 1975). *See* note 10 *supra.*

[30] *See* Pep Boys-Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 161 (3d Cir. 1941).

private suits may be brought under the antitrust laws when an individual can show economic harm through monopolistic practices.[31] In keeping with its policy of discouraging practices tending to restrain trade, the FTCA concerns itself with the effects of certain practices, such as misleading statements inducing the issuance of a patent, regardless of intent. In contrast, to base a claim of a violation of the antitrust laws on fraudulent inducement of the issuance of a patent, the plaintiff must show an intent to commit the fraud.[32] The Fourth Circuit concluded that the FTC could have found Pfizer guilty of practices in obtaining its patent that would not be violations of the Sherman Act.[33] The court held that application of collateral estoppel where two cases arise under different statutes[34] with different policies behind them, would violate due process.[35]

Secondly, the court noted that the terms of § 5(e) of the FTCA appeared to be incompatible with the doctrine of collateral estoppel.[36] This section provides that FTC orders under the FTCA will not absolve any party from any liability under the antitrust acts. Since an FTC order under the FTCA could not absolve a party from liability for their acts, the court interpreted this to mean that the government could relitigate under the Sherman or Clayton Acts an issue earlier decided against it in a § 5 FTC proceeding.[37] In view of this interpretation, the court reasoned that to deny a respondent the right to defend on the same issues litigated in a § 5 proceeding in a subsequent antitrust suit brought by a plaintiff who was not even a party to the administrative proceeding would be extremely unfair.[38]

The third reason for the Fourth Circuit's holding was that § 5(a) of the Clayton Act provides that a final judgment tendered in any proceeding brought by or on behalf of the United States under the antitrust laws[39] shall be prima facie evidence against the defendant

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[31] 15 U.S.C. § 15 (1970).

[32] *See* note 21 *supra*. United States v. Huck Mfg. Co., 214 F. Supp. 776, 778 (E.D. Mich. 1963) *aff'd* 382 U.S. 191 (1965).

[33] 537 F.2d at 74.

[34] *Cf.* Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969) (determination by Federal Maritime Commission not collateral estoppel as to Sherman Act violation).

[35] 537 F.2d at 74. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT, § 18.04 (3d ed. 1972).

[36] 537 F.2d at 74. Section 5(e) of the Act, 15 U.S.C. § 457 (1970), provides: "No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts."

[37] 537 F.2d at 74.

[38] *Id.*

[39] *See* note 8 *supra*.

in any other proceeding.[40] The court reasoned that an FTC judgment could not be both prima facie and conclusive evidence.[41] Since a judicial determination in an action under the Sherman Act was limited to only prima facie effect, it would be paradoxical to accord an FTCA § 5 administrative proceeding the absolute effect of collateral estoppel.

Finally, the court considered the differences between the procedural practices of an administrative hearing under § 5 of the FTCA and a judicial proceeding under the Sherman Act.[42] To allow for the greater flexibility required by the practical limitations of the FTC, the evidentiary and procedural rules are more lenient in an FTC adjudication under § 5, and thus the procedures used by the FTC are not the same as those mandated in a judicial trial.[43] The FTC proceeding is similar to a nonjury case where the evidentiary rules are relaxed and a trial judge may admit evidence which would be excluded in a jury trial.[44] However, in judicial proceedings a right to a trial by jury is guaranteed where legal claims are involved, thereby allowing the parties an option as to evidentiary rules. The Fifth Circuit has held that collateral estoppel effect would not be given a finding of fact when in the prior suit there was no right to jury trial

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[40] 537 F.2d at 74. 15 U.S.C. § 16(a) (1970). *See* note 8 *supra.*

[41] 537 F.2d at 74. Section 5(a) does not explicitly state that judgments in government enforcement actions can only be given prima facie effect, but apparently the court concludes that the specification of one standard implies the exclusion of all others. *E.g.*, Continental Casualty Co. v. United States, 314 U.S. 527, 532-33 (1942). (express statutory provision excludes all other alternative actions). *See* Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions,* 85 YALE L.J. 541, 547-54 (1976).

[42] There are two main differences between an FTC proceeding and a civil proceeding before a court. First, the FTC contains both an adjudicative and a prosecutorial branch. But the danger of possible abuses are minimized by the Rules of Practice of the Administrative Procedure Act, 5 U.S.C. § 556 (1970), which provides that investigators and prosecutors never serve as judges in adjudicatory hearings. *See also* 16 C.F.R. § 3.42(a) (1976); Marcello v. Bonds, 349 U.S. 302 (1955).

The second difference is that hearsay evidence is often admissible in a FTC proceeding. *See* 16 C.F.R. § 3.43(b) (1976). A hearing examiner experienced in the law is deemed able to weigh hearsay evidence correctly. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 14.00-.01 (Supp. 1970). Supposedly, a respondent in an FTC proceeding is protected against an undue reliance on hearsay testimony by his right to appellate review. *Cf.* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229-30 (1938) (appeal from NLRB administrative hearing).

[43] *See* 16 C.F.R. § 3.1 (1976). *See* K. DAVIS, ADMINISTRATIVE LAW TEXT, § 8.01 (3d ed. 1972); Farmington Dowel Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 73-74 (1st Cir. 1970) (noted that an FTC proceeding includes every major protection provided in the Federal Rules of Civil Procedure).

[44] *See* note 43 *supra.*

on this issue, but there was in the subsequent action.[45] Finally, the burdens of proof are also different in an FTC proceeding.[46] Under the Sherman Act evidence of fraud must be "clear and convincing;"[47] the Federal Trade Commission does not apply this evidentiary standard.[48]

However, this concern with differences in procedure between an FTC proceeding and a judicial trial appears nebulous when cases holding that FTC proceedings under the Clayton Act are admissible as prima facie evidence are considered.[49] Since the same procedures are used by the FTC under both antitrust actions and § 5 actions, it seems arbitrary to say that due process is afforded in one case but denied in the other. Although it would be illogical to accord one order prima facie effect and the other the absolute effect of collateral estoppel as the plaintiffs in *Pfizer* seemed to request, it is equally illogical to give prima facie effect to one FTC order and no weight at all to another depending on what statute it is brought under.[50]

In ruling that the FTC hearing on the fraud issue would not have collateral estoppel effect, the Fourth Circuit stated that it was not holding that an administrative adjudication could never have collat-

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[45] Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), *cert. denied,* 403 U.S. 904 (1971) (first proceeding by SEC had no right to jury trial; the court disallowed collateral estoppel effect in the second action for this reason); *but see* Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973) (jury trial considerations would not limit the application of collateral estoppel principles). *See also* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442 (1971); Note, Goldman, Sachs & Co. v. Edelstein: *The Application of Collateral Estoppel Principles in Derogation of the Right to Jury Trial,* 1974 DUKE L.J. 1970.

[46] In Azalea Drive-In Theater, Inc. v. Hanft, 540 F.2d 713 (4th Cir. 1976), the Fourth Circuit held that a state court determination would have collateral estoppel effect in a federal court antitrust suit even though the burdens of proof were apparently different in the courts. *Id.* at 715. Although the first proceeding in *Azalea* was in a state court rather than an administrative agency, the case seems to indicate a lack of concern over burdens of proof being identical and to place more of an emphasis on the "full and fair" hearing test.

[47] 537 F.2d at 74 n.14.

[48] An FTC examiner has discretion in what weight will be given to the evidence. 3 TRADE REG. REP. (CCH) ¶ 9815.43 (1976). *See* Basic Books, Inc. v. FTC, 276 F.2d 718 (7th Cir. 1960).

[49] *E.g.,* Farmington Dowel Prod. Co. v. Forester Mfg. Co., 421 F.2d 61, 66-76 (1st Cir. 1970); New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 352-54 (3rd Cir. 1964), *aff'd on other grounds,* 381 U.S. 311 (1965); *see also In re* Antibiotic Antitrust Actions, 333 F. Supp. 317 (S.D.N.Y. 1971).

[50] Arguably, the reason why prima facie effect is specified for antitrust actions only is simply that Congress wanted to further enforcement of the antitrust laws more than the FTCA. *See* note 13 Section C *infra.*

eral estoppel effect.[51] The implicit implication is that the holding of the case should be limited to a § 5 FTCA claim. Arguably, had the FTC hearing been on a claim under the Clayton Act rather than § 5 of the FTCA, the court might have given the FTC hearing greater weight.[52] However, the conclusion may be drawn equally as well that the court would never have given any weight to an FTC hearing as long as it was controlled by its current evidentiary and procedural rules.[53] The *Pfizer* decision has a chilling effect on subsequent cases concerning the weight to be given regulatory agencies' hearings. Further clarification of the Fourth Circuit's position in the *Pfizer* case will be necessary before any other administrative agency's decision will be given prima facie effect.

B. Standard for Injunction Requested by FTC Different From Trade and Eqitable Standards

In declaring unfair methods of competition and deceptive acts or practices in or affecting commerce unlawful the FTC's principal consideration is the public interest.[1] The Commission is authorized to seek preliminary injunctions of potentially unlawful conduct prior to final determination in its proceedings to protect this interest.[2]

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[51] 537 F.2d at 73.

[52] *See* note 46 *supra* for cases according an FTC hearing under the antitrust laws prima facie effect.

[53] The argument that FTC actions do not afford due process of law has been rebutted in recent years. The FTC proceedings, however, have only been given prima facie weight, which cuts off no defense, involves a full consideraion of all issues and allows the jury to determine all questions of fact. *See* Purex Corp. Ltd. v. Proctor & Gamble Co., 308 F. Supp. 584, 589 (C.D. Cal. 1970), *aff'd*, 453 F.2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972).

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[1] Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1970). Conduct which violates the Sherman Act may also be found an "unfair method of competition." FTC v. Cement Inst., 333 U.S. 683, 693 (1948).

[2] Section 13(b) of the FTCA authorizes the Commission to seek an injunction from the federal courts:

> (b) Whenever the Commission has reason to believe—
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> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public . . . . 15 U.S.C. § 53(b) (1970).

In *FTC v. Food Town Stores, Inc.*,[3] the FTC sought an injunction and temporary restraining order[4] (TRO) enjoining the merger of Food Town Stores, Inc. and Lowe's Food Stores, Inc. The FTC alleged that the merger would eliminate competition between Food Town and Lowe's in six cities of North Carolina, increase concentration in those markets,[5] eliminate competition in other markets,[6] and increase barriers to entry into the retail food store business[7] in those markets in violation of § 7 of the Clayton Act[8] and § 5 of the Federal Trade Commission Act.[9] Applying the traditional determinative criteria used in private litigation,[10] the district court denied relief, but

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[3] 539 F.2d 1339 (4th Cir. 1976).

[4] *See* FED. R. CIV. P. 65. A preliminary injunction, FED. R. CIV. P. 65(a), required notice to the opposing party and restrains the defendant from the action sought to be enjoined until the completion of the cause in which it is issued. A temporary restraining order (FED. R. CIV. P. 65(b)) on the other hand, is generally granted *ex parte* and without notice, but only restrains the defendant until the propriety of granting a temporary injunction can be determined. A TRO is valid only for a 10 day period, subject to extensions in the court's discretion. *E.g.*, Lawrence v. St. Louis-S.F. Ry. Co., 274 U.S. 588, 595-96 (1927).

[5] The presidents of Food Town and Lowe's admitted only to some potential concentration in "a very limited number of store locations," including the Winston-Salem, Kannapolis, and Mt. Airy, North Carolina locations, 539 F.2d at 1344.

[6] Under the aggregate concentration theory, a merger that joins together capital resources is presumed to be anticompetitive. Although the market shares of several firms within their individual markets may remain unchanged in the merger, the capital resources of the companies become pooled and concentrated into fewer hands, thus creating an economic power that tends to have monopolistic tendencies. Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); *see* Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555 (1973); Note, *Section 7 of the Clayton Act: Its Application to the Congomerate Merger*, 13 WM. & MARY L. REV. 623 (1972).

[7] Potential competition which can be blocked by increased barriers to entry, is a significant check on the exercise of market power by leading firms, as well as the most likely source of additional actual competition. ANTITRUST ADVISER, § 4.30 (C. Hills ed. 1971). A merger may be challenged based on the effect that a market entry may have on the company resulting from the merger. *See generally* United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); Disner, *Barrier Analysis in Antitrust Law*, 58 CORNELL L. REV. 862 (1973).

[8] 15 U.S.C. § 18 (1970).

[9] 15 U.S.C. § 45 (1970 and Supp. V 1976).

[10] The usual equities weighed in private litigation are considered extensively in Long v. Robinson, 432 F.2d 977, 980-81 (4th Cir. 1970) (private citizen's application for a stay of an order of the district court). A party seeking a stay must show: that he will likely prevail on the merits of the appeal, that he will suffer irreparable injury if the stay is denied, that other parties will not be substantially harmed by the stay, and that the public interest will be served by granting the stay. *See* Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958), *cited with approval* in Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968). A stay is granted

granted a temporary stay to provide the court of appeals sufficient time to consider and act upon the motion.[11]

Acting for the Fourth Circuit,[12] Judge Winter held that the traditional equity standards used to evaluate a motion for a preliminary injunction do not apply to a motion by the FTC under § 13 of the Federal Trade Commission Act.[13] The court noted that since the FTC enforces the antitrust laws in the public sector,[14] the public's interest in maintaining a competitive market should be the standard which controls FTC requests for injunctions. The court relied on the FTCA Conference Committee Report, which stated that § 13(b) was intended to maintain the statutory or "public interest" test as the applicable standard, and not to impose traditional equity standards.[15]

Section 13 codified the decisional law[16] which defined the judicial role in determining the proper showing required for issuing an injunction under 15 U.S.C. § 53(a), as requiring the exercise of independent judgment on the part of the court. Judge Winter construed the statute as prescribing two standards as prerequisites for a TRO to issue.[17] First, the FTC must show a likelihood of success on its action, and second, the action must be in the public interest.

The Supreme Court, considering the likelihood of success requirement in *United States v. Philadelphia National Bank,*[18] held that

in the discretion of a court under FED. R. CIV. P. 62, and halts "any proceedings to enforce a judgment pending the disposition of a motion for a new trial." FED. R. CIV. P. 62(b). Subdivision (c) of Rule 62 governs the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal. The threshold criteria for the issuance of a stay or subsection (c) injunction are the same as those in the issuance of a temporary restraining order of preliminary injunction in private litigation.

[11] 539 F.2d at 1341.

[12] Because a full panel of the Fourth Circuit could not be convened in time to hear and decide the motion, Judge Winter decided the case as a single circuit judge. A single judge of a court of appeals, or a single Justice of the United States Supreme Court, may grant a restraining order to preserve the status quo pending an appeal and the power may be exercised even though no appeal has been perfected. *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1007 (D.C. Cir.), *cert. denied,* 377 U.S. 978 (1964).

[13] 15 U.S.C. § 53(b) (Supp. V 1975).

[14] 15 U.S.C. § 45 (Supp. V 1975).

[15] 539 F.2d at 1343. CONFERENCE COMM. REP. No. 93-924, 93d Cong., 1st Sess, *reprinted in* [1973] 2 U.S. CODE CONG. & AD. NEWS 2533.

[16] FTC v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963); FTC v. National Health Aids, Inc., 108 F. Supp. 340 (D. Md. 1952).

[17] 539 F.2d at 1344.

[18] 374 U.S. 321 (1963) (the test for concentration was whether a consumer had alternative sources conveniently available to him).

where a merger results in a significant increase in the concentration of firms in a market, the defendant has the burden of proving that the merger would not have anti-competitive effects.[19] The Court ruled there was a presumption that the merger must be enjoined in the absence of evidence showing the merger is not likely to have such anticompetitive effects.[20]

The Fourth Circuit construed the *Philadelphia National* rationale to mean that FTC success should be presumed when it presents facts indicating an increase in market concentration unless the defendants produced evidence to rebut this presumption. Since the FTC showed the merger between Food Town and Lowe's would increase the market concentration in at least three areas,[21] the burden was on the defendants to prove that the merger would not decrease competition. On defendants' failure to do so,[22] the court concluded that the FTC satisfied the first test.[23]

Next, the court ruled that since the public interest is served by insuring a competitive market in the food retailing business and since the defendants could not prove the merger would not have anticompetitive effects, the second test for issuance of an injunction was satisfied.[24] The court rejected the defendants' argument that the

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[19] *Id.* at 363.

[20] *Id.*

[21] The FTC presented statistical evidence showing that in at least three geographical areas the grocery business would incur a significant increase in market concentration or result in a near-monopoly with substantial increases in the market share controlled by the combined firms. Both firms have been aggressive competitors in the past. Since 1972, Lowe's has opened markets in three cities in which Food Town operated, and Food Town has opened stores in two cities in which Lowe's operated. Food Town's sales have grown by 160% since 1972 and Lowe's sales by 123%, while industry sales advanced only 57% in the same period. If the merger were allowed, the market share of the chain in Winston-Salem would be 11.0%, in Kannapolis it would be 28.6%, and in Mt. Airy, the combined share of the market would increase to 72.5%. 539 F.2d at 1344-45.

[22] Food Town and Lowe's made two countervailing arguments. The court rejected the "failing company" defense. Under this defense, the FTC or the Justice Department will not challenge a merger it might ordinarily have if there is evidence that one of the parties to the proposed merger is in serious danger of failing and that reasonable efforts have been made to find an alternative purchaser without success. *See* United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971). The court found that while Lowe's might have substantial short-term liabilities, its financial statements showed it to be solvent and profit-making. 539 F.2d at 1345.

[23] 539 F.2d at 1345.

[24] *Id.* at 1346. The court rejected the defendant's claim that the competitive overlaps between the two businesses were very slight and could be cured by divestiture. Divestiture refers to liquidation of the illegally acquired market power reflected in certain assets. When a merger has occurred which violates the antitrust laws or tends

merger was in the public interest because it might result in lower food prices.[25] Since Food Town was not required to lower prices, the public interest in lower prices would be better protected through competition. Thus, the court ruled that the TRO should issue.[26]

The injunction in the *Food Town* case was obtained under § 13(b), which was expanded in 1973 to extend the Commission's authority to seek preliminary injunctions against violations of any laws which the FTC enforces.[27] There have been no other district court cases concerning § 13(b) decided since the amendments. This preliminary injunction power was previously applied only to the FTC's regulation of false or misleading advertising now covered by § 13(c). The tests applied by the Fourth Crcuit in *Food Town* appear identical to the tests applied in false advertising cases fomerly covered by § 13(b).

That these are the same tests which cover misleading advertising is confirmed by false advertising cases decided since the 1973 changes.[28] The discussion of new § 13(b) in these cases upholds the tests applied by the Fourth Circuit allowing the FTC to obtain an injunction. Although there has been no other decision by a court of appeals on § 13(b), since the FTC was created to prevent and prosecute unfair trade practices which might become antitrust violations, the Fourth Circuit's decision furthers congressional antitrust policy by simplifying the prosecution of alleged antitrust violators.[29]

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to have monopolistic implications, the government may seek divestiture of some of the company's assets. *See* United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971). The court further noted that whether the markets in which the firms compete are small is irrelevant under the Clayton Act and does not affect the legality of the merger. Judge Winter ruled that while divestiture might be the ultimate remedy, "under § 13(b) of the FTCA, [the] FTC is entitled to preserve the status quo pending adjudication." 539 F.2d at 1345.

The Fourth Circuit also rejected the argument that private injuries which might result from delaying this merger were proper considerations for withholding injunctive relief under § 13(b). The court reasoned that "public interest" did not include "private interests." *Id.* at 1346.

[25] 539 F.2d at 1346.

[26] *Id.* at 1347.

[27] 15 U.S.C. § 13(b) (1970).

[28] Two cases decided under 15 U.S.C. § 13(c) (Supp. V. 1975) mention the 1973 changes and discuss the applicable tests under both §§ 13(b) & 13(c). FTC v. Simeon Mgt. Corp., 391 F. Supp. 697, 699-701 (N.D. Cal. 1975), *aff'd*, 532 F.2d 708 (9th Cir. 1976) (commission showed insufficient likelihood of success to obtain injunction to restrain weight reduction clinics from advertising their treatments if they used a drug unapproved by the FDA); FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976) (commission showed an injunction would be in the best interest of the public where advertisements were materially misleading).

[29] See note 13 Section C *infra*.

C. Rebuttable Presumption for Class Action Where There is Violation of the Sherman Act

Class actions have two purposes: to allow litigation of multiple claims in a single action, which avoids multiple suits and the possibility of inconsistent individual judgments; and to provide vindication of small claims which might not otherwise be litigated because of the small amount of damages involved.[1] In antitrust suits, class actions are particularly appropriate because they allow similarly situated victims of antitrust violations to pool their claims in a single law suit.[2] This pooling results in a larger recovery and thus permits a case too expensive for one individual to be litigated.

In *Windham v. American Brands, Inc.*,[3] six named growers of tobacco in South Carolina brought a class action against seven defendant tobacco companies and the Secretary of Agriculture alleging a conspiracy in violation of the Sherman Act to lower prices, to monopolize warehouse auction markets,to restrict the amount of tobacco sold from those warehouses per day, and to distribute inspectors disproportionately throughout Georgia and South Carolina.[4] After allowing full discovery and pre-trial investigation, the district judge concluded that the case should not proceed as a class action.[5] Although plaintiffs[6] met the criteria for establishing a class action under Federal Rules of Civil Procedure 23(a), the court held they did not satisfy the criteria of 23(b)(3), because individual issues would predominate

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[1] *E.g.*, Hohmann v. Packard Instrument Co., 399 F.2d 711 (7th Cir. 1968);Buchholtz v. Swift & Co., 62 F.R.D. 581 (D. Minn. 1973); Note, *Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123 (1974).

[2] Not only are the victims assured compensation for their injuries, but class actions allow an antitrust violator to be confronted with the entire amount of the harm he has inflicted. This aggregation of claims against him necessarily increases the deterrent impact of the antitrust laws. *See* note 13 *infra*.

[3] 539 F.2d 1016 (4th Cir. 1976).

[4] *Id.* at 1617.

[5] Windham v. American Brands, Inc., 68 F.R.D. 641, 660 (D.S.C. 1975).

[6] There were six named plaintiffs, growers of flue-cured tobacco in South Carolina, seeking to represent more than 20,000 South Carolinians who, from 1970 through 1974, sold or had an economic interest in the sale of flue-cured tobacco in South Carolina, and whose total claims aggregated amounted to more than $335,000,000. 539 F.2d at 1018.

[7] In holding that this action met the requirements of FED. R. CIV. P. 23(a), the district court found that: (1) there was no question that joinder of all 20,000 members of the class would be impossible, (2) there were common questions of law and fact, i.e. whether the defendants violated the antitrust laws, and (3) the typicality and representativeness of the named plaintiffs could be reconciled without destruction of the class. The court suggested that the provision for subclasses in Rule 23(c)(4)(B) be used to

over common ones.[8] Moreover, there was no theoretical or practical workable formula which could be used to prove damages sustained by each particular class member.[9] The court dismissed all complainants except the six named plaintiffs, entered a final judgment against those dismissed[10] and certified[11] this judgment to the Court of Appeals.

The Fourth Circuit reversed the district court's decision not to allow the suit to proceed as a class action.[12] The court of appeals reasoned that 15 U.S.C. § 16(a) evidenced a public policy to simplify antitrust actions and to aid victims of antitrust violations.[13] This statute provides that a judgment in favor of the government in an antitrust action is available in private litigation as prima facie evidence of a violation of the antitrust laws.[14] The Fourth Circuit concluded that the judiciary, in keeping with this policy, should apply the statute not only in situations expressly covered by the legislative act, but also in analogous situations where the policy considerations

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separate opposing views and eliminate antagonists so the provisions of Rule 23(a) could be met. Although the court noted the availability of the opt-out provisions of Rule 23(c)(2), it specifically rejected application of this rule to remedy the specific problems of this case. 68 F.R.D. at 648-50. *See* Note, 10 IDAHO L. REV. 287 (1974).

[8] The district court found on an evaluation of the relationship between the common and individual issues that the criteria for Rule 23(b)(3) could not be met, 68 F.R.D. at 655. *See generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1778 (2d ed. 1975). This conclusion was based on findings relating to the large amount of evidence which would be required to prove the fact of impact of the alleged conspiracy on each of the 20,000 proposed members of the class and the facts of the specific damage each had sustained. 68 F.R.D. at 653-55.

[9] 68 F.R.D. at 654.

[10] *Id.* at 660. The court further noted that no expert could qualify to give opinions concerning all the damage issues in the case. Thus, the district court concluded that a great amount of evidence would be required to prove damages for each member of the class. The court rejected the idea of bifurcating the action because the problems of manageability as to determination of damages were such that plaintiffs' claim of a class action should be denied. *Id.* at 658-59.

[11] 28 U.S.C. § 1292(b) (1970).

[12] The Fourth Circuit found that the lower court did not draw a sufficiently sharp distinction between issues of the alleged violation of the antitrust laws and issues concerning damages. The appellate court noted that the antagonisms of interest among the plaintiffs would not prove that defendants did nor did not conspire, but would bear chiefly upon the measure of the impacts of the conspiracies, if any existed. 539 F.2d at 1021-22.

[13] *Id.* at 1021. The basis for the policy of simplifying antitrust litigation appears to be congressional sympathy for the usually small enterprise or individual against the ordinarily large malfactor. *See generally* M. GREEN, B. MOORE & B. WISSERSTEIN, THE CLOSED ENTERPRISE SYSTEM 215 (1972).

[14] *See* note 8 Section A *supra*.

are similar.[15] The court analogized the effect of § 16(a) to the effect of determining the issue of alleged antitrust violations in a "master suit," and then allowing determination of damages in separate trials.[16] Since the plaintiffs' recovery route would be shortened if the defendants' liability was determined in one suit, the court inquired only whether there would be a substantial difference in the quantum or character of the proof necessary for plaintiffs to prove defendants' liability.[17] The court concluded that where only a minimal differernce in the type of evidence required to show defendants' liability exists, these individuals should be permitted to proceed as a class. The issue of damages should not be considered by the court because although the liability issues are identical for all plaintiffs, the damage issues may differ widely in requisite proof and impact.

Other circuits have also recognized that difficulties in calculating individual damages should not defeat class action.[18] These decisions reason that where wrongful conduct has resulted in identifiable loss, differences in damages should not prevent the suit since class actions often provide the only route available for the vindication of small claims.[19] Many courts have been more willing to allow class actions despite individual differences in damages where individual damages may be calculated by a standard formula.

The *Windham* court found that no unusual complexities would be involved in this case so long as only the issues of antitrust violations were before the court and thus certified the case as a class action. The Fourth Circuit held that if the conspiracies could not be proved, the case would be dismissed. If the conspiracies could be proved, however, the district court was then to decide whether there should be one mass trial or several trials with plaintiffs grouped in subclasses which meet the standards of Rule 23(b)(3) to determine each plaintiff's damages.[20]

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[15] 539 F.2d at 1021.

[16] *Id.*

[17] *Id.* at 1019.

[18] *E.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566-67 (2d Cir. 1968), *rev'd on other grounds*, 417 U.S. 156 (1974); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 489 (N.D. Ill. 1969); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda Amer. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

[19] *See, e.g.*, Link v. Mercedes-Benz of N. Amer., Inc., 1975-2 TRADE CAS. (CCH) ¶ 60,534 (E.D. Pa. 1975); *In re* Master Key Antitrust Litigation, 1975-1 TRADE CAS. (CCH) ¶ 60,377 (D. Conn. 1975); City of New York v. General Motors Corp., 60 F.R.D. 393 (S.D.N.Y. 1973), *appeal dismissed*, 501 F.2d 639 (2d Cir. 1974).

[20] 539 F.2d at 1022. FED. R. CIV. P. 23(c)(4)(A) provides that where there is at least

This decision indicates a more liberal philosophy regarding the manageability of a class action where antitrust claims are involved. The Fourth Circuit apparently established a rebuttable presumption that a class action should be allowed in antitrust cases. Support for this presumption is indicated by the recent increase in class actions in the antitrust area. These decisions have consistently been based on the practical realities of the ability of small and dispersed victims of antitrust violations to maintain individual claims.[21]

Although determination of liability in a class action may be less of an imposition upon judicial resources than thousands of individual suits, this reasoning does not consider the practical manageability problems still remaining in any large class action.[22] Recent Supreme Court cases[23] indicate that one of the Court's major concerns is the practical manageability of class actions. Thus, although the Fourth Circuit permitted the suit to proceed as a class action, it may have done so at the expense of manageability, a judicial concern of equal weight with the policy favoring antitrust plaintiffs.

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one common issue appropriate for class action treatment, as long as the other requirements for a class action under Rule 23 are met, a partial class action may be brought as to that common issue despite other individual issues. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1790 (2d ed. 1975).

[21] 529 F.2d at 1021. This same analysis also has been held to apply to securities cases. *See, e.g.,* Grad V. Memorex Corp., 61 F.R.D. 88 (N.D. Cal. 1973); Green v. Occidental Petroleum Corp., FED. SEC. L. REP. (CCH)¶ 94,397 (C.D. Cal. 1974).

[22] Some courts, however, have held that the size of a class does not preclude its manageability. *See, e.g.,* Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).

[23] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (wherever possible,class members are required to be individually notified at the expense of plaintiff class representative); Zahn v. International Paper Co., 414 U.S. 291 (1973) (each member of class of multiple plaintiffs must satisfy jurisdictional amounts for suits in federal court). For a discussion of the impact of these cases, see Shenefield, *Annual Survey of Antitrust Developments—Class Actions, Mergers, and Market Definition: A New Trend Toward Neutrality,* 32 WASH. & LEE L. REV. 299, 301-21 (1975).