Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), [vacated, 417 U.S. 156 (1974)]

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Both Kras and Ortwein emphasize the Court's final comment in Boddie—that in deciding Boddie the Court was going "no further than necessary to dispose of the case before" it, and that it was not deciding "that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment." Although the Kras-Ortwein Court has demonstrated that Boddie is to be given a very narrow and restricted application, the right of free access to the courts should not be considered foreclosed. A person asserting a constitutional right to proceed in forma pauperis under Boddie, however, has a heavy burden of establishing the existence of both a fundamental interest and state monopolization. Many future cases may involve such an interest, but the strict monopolization requirement stands as a barrier to the expanded recognition of free access to the courts.

Class Actions—Federal Rules of Civil Procedure—Rule 23(b)(3)
Class Action Requires Personal Notice to All Identifiable Members of the Class.—Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), aff'd 42 U.S.L.W. 4804 (U.S. May 28, 1974).

In 1966 Morton Eisen brought an antitrust treble damage suit in federal district court1 on behalf of himself and all others who had purchased or sold stock in odd-lots2 on the New York Stock Exchange

64. 401 U.S. at 382.
65. It has been suggested that actions for paternity, custody and adoption of children, as well as actions for annulment or legal separation of marriage, may involve both elements of the Boddie two-prong test. Comment, The Heirs of Boddie: Court Access for Indigents After Kras and Ortwein, 8 Harv. Civ. Rights-Civ. Lib. L. Rev. 571, 575-76 (1973). See also Grissom v. Dade, No. 44,178 (Fla. March 27, 1974) (state law requiring adopting party to pay costs of notice by publication in adoption proceeding constitutes denial of equal protection and due process as applied to indigents).

2. The district court described odd-lot trading as follows:
   [T]he normal trading units on the stock exchanges are in multiples of 100 shares, sometimes called 'round-lots'. Odd-lots, thus, are units of stock less than 100, the established unit of trading. For odd-lot transactions, in addition to the normal brokerage commission, an additional fee known as the 'odd-lot differential' is charged. At the time this suit was commenced, the differential was 1/8 point (12 1/2 cents) per share when the price per share was 39 7/8 or below and 1/4 point (25 cents) per share when the price was 40 or above. Effective July 1, 1966,
from 1962 through 1966. Pursuant to rule 23(c)(1) of the Federal Rules of Civil Procedure defendants moved to dismiss the suit because of its unmanageability as a class action. The court held that the suit was not maintainable as a class action, since three preliminary requirements of rule 23 were not satisfied: (1) the plaintiff did not adequately represent the class, primarily because all odd-lot traders were not individual investors, as was Eisen; (2) the plaintiff did not appear able to provide the notice required by rule 23(c)(2) and by the general requirements of due process; and (3) there was no showing that common questions of fact or law prevailed over questions affecting only individual members of the class.

Although the initial order dismissing the action as a class suit was interlocutory, it was held appealable. Subsequently, that order was

however, this 'break point' of §40 was increased to §55 under specific approval of the Securities and Exchange Commission. The execution price of an odd-lot includes the differential. On a customer's order to buy an odd-lot, the differential is added to the price of the effective offer or sale; on a customer's order to sell, the differential is subtracted from the price of the effective sale or bid.

Id. at 148.


4. The rule provides that
[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

FED. R. Civ. P. 23(c)(1).

5. 41 F.R.D. at 152.

6. Id.

7. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1085 (1967). In allowing an appeal as of right under 28 U.S.C. § 1291 (1970), the court took the position that for all practical purposes dismissal of the action as a class suit was a "final" judgment, even though, theoretically, the class representative individually could pursue his cause of action. Commentators have labelled this approach the "death knell" doctrine. See Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969); 3B J. Moore, FEDERAL PRACTICE ¶ 23.50 (2d ed. 1969). Other jurisdictions have rejected the doctrine as an exception to the final judgment rule of 28 U.S.C. § 1291. See Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972). But see Miller v. Mackey Int'l, Inc., 452 F.2d 424 (5th Cir. 1971).

The general rule regarding appealability of orders dismissing class actions is that such orders are interlocutory and therefore controlled by 28 U.S.C. § 1292(b) (1970). Appeal under § 1292(b) is permissive rather than as of right and is granted when the court
reversed and the case was remanded to the district court with instructions for further proceedings. In particular, the court was directed to review the issue of adequate representation in light of the "sweeping changes" to rule 23. Following a discussion of adequacy of representation, notice and commonality of questions of law or fact, the Second Circuit decided to retain jurisdiction, but to remand for an evidentiary hearing focusing on those issues.

As the size of the class (approximately 6 million members located throughout the world) and the potential amount of damages (at least $22 million) became clear, the district court recognized the difficulty it faced in ensuring that the manageability and notice criteria of rule 23 were met. Nevertheless, the Second Circuit opinion feels the cause of judicial efficiency would be served by early resolution of the issue raised by the order. The question of whether an appeal from an order denying class action status should proceed under § 1291 or under § 1292(b) was answered in favor of § 1291 by the Supreme Court in Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804, 4808 (May 28, 1974).

8. 391 F.2d 555 (2d Cir. 1968). In order to facilitate recognition of the most significant of the numerous decisions in the Eisen case the following is utilized: the decision which allowed appeal of the original interlocutory order dismissing the class suit, 41 F.R.D. 147, is referred to as Eisen I; the Second Circuit decision following immediately thereafter, which reinstated the action as a class suit and remanded it to the district court, 391 F.2d 555, is referred to as Eisen II; the main opinion on the latest remand, 52 F.R.D. 253, is referred to as Eisen III; the opinion of the Second Circuit, which dismissed the action as a class suit, 479 F.2d 1005, is referred to as Eisen IV.

Following remand under Eisen II the district court rendered a memorandum opinion calling for additional information from the parties on the issues of notice and manageability. See 50 F.R.D. 471 (S.D.N.Y. 1970). The information subsequently provided was utilized by the district court in its ruling that a class suit could be maintained. See 52 F.R.D. 253 (S.D.N.Y. 1971). The issue of cost of notice was finally resolved by allocating 90% of such costs to the defendants. See 54 F.R.D. 565 (S.D.N.Y. 1972).

9. 391 F.2d at 562. Before rule 23 was completely revised in 1966, class actions based on common questions of law or fact ("spurious class suit" under the old rule) could obtain judgment binding only upon the original parties and subsequent intervenors. Under the new rule the judgment will adjudicate the rights of all the members of the class, so it is felt that courts should more closely examine the adequacy of representation.


13. 391 F.2d at 570. Although the Second Circuit later chastised the district court for going beyond the scope of the remand instructions, the exact language of the circuit court in remanding was:

[W]e retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper.


15. Id. at 265.

16. Id. at 261, 265.
in *Eisen II* had urged a liberal interpretation of rule 23,\(^{17}\) and upon remand the district court reacted accordingly. The district court first looked for a way to satisfy the requirements of notice without jeopardizing the suit's class action status.\(^{18}\) After deciding that the notice required by rule 23(c)(2) could be met through a combination of personal notice and publication,\(^{19}\) the court ruled that the cost of notice could be allocated to, or at least shared by, the defendants if a "preliminary hearing" on the merits indicated that plaintiffs had a substantially valid case.\(^{20}\)

To overcome problems of manageability the plaintiff proposed that the court utilize the concept of fluid recovery, pursuant to its discretion under rule 23(b)(3).\(^{21}\) Through fluid recovery, the court could substitute "the class as a whole" for the individual claimants,\(^{22}\) litigating on the basis of estimated damages caused to the class at large. After judgment individual class members would be permitted to file their claims with the court for payment; unclaimed damages would be utilized in a manner benefiting the majority of class members.\(^{23}\) Influenced by the plaintiff's argument, the court ultimately adopted the fluid recovery proposal.

On appeal from the decision on remand the lawsuit was deemed unmanageable as a class action "on the basis of the new evidence [apparently the substantially increased number of identifiable class

\(^{17}\) The court stated:

> But to dismiss a class suit in its incipiency before claimants have been given an effective opportunity to join would be a disservice to the class action as envisioned in the new rule. Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation . . . .

391 F.2d at 563.

\(^{18}\) See 52 F.R.D. at 265-70.

\(^{19}\) Id. at 267, 268.

\(^{20}\) Id. at 271.

\(^{21}\) The guidance given by rule 23 for determination of the maintainability of a class action is limited to the following:

> The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3).

\(^{22}\) 52 F.R.D. at 264.

\(^{23}\) 479 F.2d at 1010-11. The plaintiff further suggested that damages not awarded could be used to pay the differential charges on odd-lot stock transactions for a future period of time. Assuming a large number of the class members were still active in the odd-lot market, such an approach would redress the damages caused to them earlier. The fact that non-injured parties would also benefit from such an approach was not viewed as a serious defect since the goal was to ensure that the guilty defendant pay for his illegal gains.
members] now before [the court]." Moreover, the circuit court was unpersuaded by the district court's three suggested methods of surmounting the manageability obstacle. The innovative preliminary hearing and fluid recovery concepts were found unauthorized by the "text or by any reasonable interpretation of amended Rule 23." Additionally, and of the greatest significance for future large consumer class actions, the combination of limited personal notice and general publication, sanctioned by the district court, was repudiated for its failure to satisfy the demands of procedural due process. Each of the three proposals rejected by the circuit court will be reviewed in the limited light provided by judicial experience under amended rule 23.

The preliminary hearing was first introduced in Dolgow v. Anderson as a method for overcoming the barrier posed to class suits by the requirement that notice of the action be given to potential class members. The primary purpose of the preliminary hearing was to determine whether the class action had merit. If, after preliminary review, the trial judge believed that the plaintiff's case was sufficiently meritorious, the burden of notice costs could be shifted to the defendants. This procedural step in support of class action status was justified as "[a] pragmatic approach [needed] in order to overcome the numerous difficulties that are likely to arise in the course of a lawsuit of this magnitude."

Although the defendants in Dolgow ultimately succeeded at the
trial level on their motion for summary judgment, the Second Circuit did not have the opportunity to address itself to the propriety of the preliminary hearing procedure on appeal from that decision. In Eisen IV, however, the Second Circuit condemned preliminary hearings in general and noted that in this instance the preliminary hearing violated remand instructions as well.

The Second Circuit's rejection of the preliminary hearing as a method of determining whether a class suit may be maintained is supported by decisions from other jurisdictions. In Lamb v. United

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32. See 479 F.2d at 1016, stating:

While Judge Weinstein's oral order not only granted summary judgment for defendants but also held the case not to be a proper class action, the posture of the case on the appeal to our Court was such that the Court had no occasion to consider the propriety of the preliminary mini-hearing . . .

33. Id. at 1015-16. The rejection of the preliminary hearing was based primarily on the lack of explicit support for such a procedure in rule 23. In addition, however, there was mention of the irreparable harm that could result from use of a procedure that did not apply the "salutary safeguards" found in "full scale trials on the merits." This discussion was not developed further and it is difficult to envision the specific horrors the court must have felt the preliminary hearing might cause. The analysis used in the Fifth Circuit in regard to the preliminary hearing was cited with approval:

In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427 (5th Cir. 1971).

34. 479 F.2d at 1016, stating:

In this case we did not in our disposition of the prior appeal intend to relinquish to the District Court any jurisdiction to pass on the merits of the case but only to decide if the requirements of amended Rule 23 had been met. Accordingly, we are constrained to hold that the whole preliminary mini-hearing on the merits proceeding, including the findings of fact and conclusions of law, was conducted and made without jurisdiction.

The Second Circuit then took the position that class action determination can only be made by literally applying the provisions of rule 23 to the facts before the court. There is no room for judicial discretion in this analysis. If the case does not meet the specific provisions of rule 23 it may not be continued as a class suit. See id. at 1007 n.1.

35. See Gosa v. Securities Inv. Co., 449 F.2d 1330, 1333 & n.2 (5th Cir. 1971) (judge may refuse to permit suit to proceed as a class action without an evidentiary hearing on the class action question); Kahan v. Rosenstiel, 424 F.2d 161, 169 (3rd Cir. 1970) ("The determination whether there is a proper class does not depend on the existence of a cause of action."); Lamb v. United Security Life Co., 59 F.R.D. 25, 35 (S.D. Iowa 1972) (determination whether to allow parties to proceed as a class should not incorporate rule 12 motion for summary judgment); Katz v. Carte Blanche Corp., 52 F.R.D. 510, 513 (W.D. Pa. 1971) (plaintiff does not have to preliminarily demonstrate merit to maintain class action); Fogel v. Wolfgang, 47 F.R.D. 213, 215 & n.4 (S.D.N.Y. 1969) (merits not relevant in a class action motion). But see Milberg v. Western Pac. R.R., 51 F.R.D. 280, 282 (S.D.N.Y. 1970) ("[B]efore litigation can proceed as a class action, the parties seeking to have it so designated must make a preliminary showing that there is a substantial possibility of success."). The hearings called for in these cases addressed the existence either of a class or of a cause of action, not, as in Eisen,
Security Life Co.,\textsuperscript{36} for example, a preliminary hearing was rejected because "Rule 23 simply does not call for [this] sort of inquiry."\textsuperscript{37} Nevertheless, the court noted that in some cases it might be appropriate to require the defendant to bear all or part of the cost of notice.\textsuperscript{38}

The validity of a preliminary hearing on the merits, and its attendant feature of allocating or apportioning the costs of notice, hinges upon interpretation of rule 23(c)(1).\textsuperscript{39} In Eisen IV the determination of class action status involved a literal application of the relevant portions of rule 23.\textsuperscript{40} This approach was justified as the only sure way to provide the parties with the procedural safeguards required in all litigation.\textsuperscript{41} Professors Wright and Miller disagree, suggesting that the rule 23(c)(1) motion should be decided on "more information than the complaint itself affords."\textsuperscript{42} Wright and Miller also note that although the need for a preliminary hearing may exist only in exceptional cases, when the court does rule in favor of the class action "the judge eventually can apportion the cost of notice."\textsuperscript{43}

The court's rejection of the approach suggested by Wright and Miller was based on the fact that rule 23 does not expressly allow for a preliminary hearing on the merits.\textsuperscript{44} The court also observed

the question whether societal interests and equity would warrant apportionment of the cost of notice.

\textsuperscript{36} 59 F.R.D. 25 (S.D. Iowa 1972).

\textsuperscript{37} Id. at 35.

\textsuperscript{38} Id. at 39, stating:

Apportionment, or requiring defendant to bear the cost of notice, on the other hand, may be desirable since in many actions the defendant stands in a fiduciary relation with those allegedly defrauded, . . . since defendants have an interest in seeing all members of the class bound by \textit{res judicata} (especially if they prevail on the merits or settle), and since defendants are benefited by the preclusion of 'one-way' intervention or collateral estoppel if liability is established against them.

\textsuperscript{39} See note 4 supra.

\textsuperscript{40} 479 F.2d at 1016.

\textsuperscript{41} Id. at 1015, stating:

In most cases the so-called tentative findings and conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable.


\textsuperscript{43} 7A C. WRIGHT & A. MILLER, supra note 42, at 136. \textit{See also} Berland v. Mack, 48 F.R.D. 121, 131 (S.D.N.Y. 1969), in which defendants Great American Industries (GAI) and its officers sought to have 18 consolidated stockholders' actions maintained as class actions. The court declared: "The decision as to how the cost of notice is to be allocated between the parties appears to be an appropriate area for exercise of our discretion . . . ."

\textsuperscript{44} See note 38 supra.
that the procedural safeguards inherent in a full trial on the merits would be absent from a preliminary hearing.\(^4\)

Rule 23 does allow the court to use its discretion in several areas. Arguably, the court is within the spirit, if not the letter, of the rule if it sanctions a preliminary hearing in the exercise of that discretion. Just as the rule allows the court to direct the manner in which notice will be given, the rule appears to allow the court discretion in reaching its decision regarding continuance of an action as a class suit. Although Dolgow accepted this sort of discretion as mandated by the intent of rule 23,\(^6\) it has not been utilized by other courts.

In essence, Eisen IV took the position that, where an action cannot meet the specific requirements of rule 23, the public interest issue is probably so insignificant that as a policy matter any remedy should be left to private, rather than judicial actions.

The second innovation introduced by the district court in Eisen III —the concept of fluid recovery—failed on appeal for two reasons. Litigation on the basis of estimated class size and average injury was rejected as beyond the scope of rule 23,\(^4\) and the use of the fluid class was characterized as a denial of due process because rights of some class members would be adjudicated without notice and an opportunity to be heard.\(^8\) Rule 23 was “intended to facilitate the judicial dis-

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45. See note 33 supra.

Defendants misconceive the court's role in actions of this sort. The Rule 23 class action "as a way of redressing group wrongs is a semi-public remedy administered by the lawyer in private practice"—a cross between administrative action and private litigation. . . . Once the court is convinced that there is substantial merit to plaintiff's claims and that the class action device is the practicable method of vindicating these claims, it will not let procedural difficulties stand in its way.

43 F.R.D. at 481.
47. 479 F.2d at 1018. In the district court opinion Judge Tyler cited three cases as precedential authority for use of the concept of fluid recovery. Judge Medina, speaking for the Second Circuit, distinguished all three of them. The three cases were Bebchick v. Public Util. Comm'n, 318 F.2d 187 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971); Daar v. Yellow Cab Co., 433 F.2d 732, 63 Cal. Rptr. 724 (1967). Bebchick was not a class action case at all but involved reversal of a bus fare increase and use of the funds already collected under the illegal increase in a manner to benefit bus riders as a class, at the discretion of a regulatory commission. The Pfizer case involved disbursement of settlement funds, which was not the case in Eisen IV. Daar was an action brought under California, rather than federal, class action procedure. See 479 F.2d at 1012.
48. 479 F.2d at 1018. See p. 380 infra, suggesting that a new rule based on the decision in Hansberry v. Lee, 311 U.S. 32 (1940), could overcome any such constitutional deficiency.
position of the individual claims of the separate members of a class of persons so numerous that joinder of all members is impracticable."\textsuperscript{49} As precedent for its rejection of fluid recovery the court pointed to language in Snyder v. Harris\textsuperscript{50} denying aggregation of claims in order to meet the jurisdictional amount requirement.

The rejection of fluid recovery is in harmony with the Second Circuit decision in Zahn v. International Paper Co.\textsuperscript{51} After reviewing the specific limits of Snyder's prohibition against the aggregation of claims, Zahn held that a class action alleging diversity jurisdiction could not be maintained where some members of the class had claims not amounting to $10,000. Jurisdiction in Eisen IV was not based on diversity. Zahn and Eisen IV may be taken together with Snyder, however, to require that, when a large group attempts to bring a class action, each class member must overcome all established procedural barriers. The class, in other words, is only as strong as its weakest member.

If Eisen IV is limited to its facts, the court's position concerning the preliminary hearing and the concept of fluid recovery should not mean that large consumer class actions will no longer be possible. However, the third element of the court's ruling—the requirement of personal notice for every "reasonably identifiable" member of the class—could signal the end of such class actions. The district court in Eisen III accepted a combination of personal notice to 7,000 of the 2 million identifiable class members and general publication in major newspapers\textsuperscript{52} as satisfaction of rule 23(c)(2), but Eisen IV rejected

\textsuperscript{49} 479 F.2d at 1014 (emphasis added).

\textsuperscript{50} 394 U.S. 332 (1969). In Snyder the plaintiff in a diversity case sued as representative of a class of 4000 shareholders of an insurance company. Her individual claim amounted to less than $10,000. She was not permitted to aggregate her claim with the separate claims of other members of the class even though the claims totalled $1,200,000. From that case Eisen IV derived the general rule for all class actions "[t]hat the claims of many may not be treated collectively." 479 F.2d at 1014.

\textsuperscript{51} 469 F.2d 1033 (2d Cir. 1972), aff'd, 94 S.Ct. 505 (1973). In Zahn several lakefront property owners sued as representatives of all individuals who were damaged by the pollution to Lake Champlain allegedly caused by International Paper Company. The trial court had found that the named plaintiffs had each made good faith claims of damage in excess of $10,000, thereby satisfying the diversity jurisdiction amount requirement of 28 U.S.C. § 1332 (1970), but that other members of the putative class did not. The Second Circuit felt this was a violation of the rule against aggregation established in Snyder v. Harris, 394 U.S. 332 (1969), and dismissed the suit as a class action. The court emphasized its belief that the congressional purpose inherent in the requirement of a jurisdictional amount—"to check the rising caseloads in federal courts"—was superior to the "policies underlying the amended rule." 469 F.2d at 1035.

The panel in Zahn was composed of Judges Moore, Smith and Timbers. In both Zahn and Eisen IV the Court of Appeals for the Second Circuit refused to sit en banc.

\textsuperscript{52} 52 F.R.D. at 267-68.
this approach for failure to give "actual individual notice to identifiable members of the class."\(^5\)

By its own terms, rule 23 requires that all class members receive "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort . . ." before a class action is initiated.\(^5\) The language of this requirement lends itself to varying interpretations, as Eisen III and Eisen IV demonstrate. The district court focused upon practicability, while the circuit court emphasized the mandate of individual notice. The district court's inclination toward pragmatism would promote wider access to legal process; however, procedural due process might more adequately be ensured by the approach of the circuit court.

The Advisory Committee,\(^5\) in its commentary on the 1966 amendment of rule 23, did not clearly indicate what type of notice the rule would require when, although personal notice would be impracticable because of cost, the identity of all class members could be determined.\(^5\) But the Committee did state its belief that rule 23 notice must satisfy the requirements of due process articulated by the Supreme Court in *Hansberry v. Lee*\(^5\) and *Mullane v. Central Hanover Bank & Trust Co.*\(^5\) In *Hansberry* the Court was faced with the issue of adequacy

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53. 479 F.2d at 1015.
56. Id. at 104-07.
57. 311 U.S. 32 (1940). A restrictive covenant to exclude blacks from a Chicago neighborhood was to be effective if signed by owners of 95% of the frontage. In defense against an action for breach of that covenant, Hansberry said it had not been signed as required. The Supreme Court of Illinois had affirmed a ruling that a stipulation in a previous case that owners of 95% had signed was res judicata as to Hansberry, even though the stipulation was untrue, because Hansberry (as successor in interest to owner who had signed) was a member of the same "class" as the plaintiffs who had sought compliance with the agreement in the previous suit. The United States Supreme Court reversed, holding that parties with potentially conflicting interests in the same issue could not be part of the same class; therefore, Hansberry was not represented in the previous suit and could not be bound by its stipulated facts.
58. 339 U.S. 306 (1950). Central Hanover Bank & Trust Co., as trustees, petitioned for a settling of accounts of a common trust fund under New York banking laws. Under those laws the decree in each such judicial settlement of accounts was made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund. The only notice to the beneficiaries of this action, initiated by the trustee, was by publication in a single newspaper at least four times. Under the banking laws, the court appointed a special guardian and attorney, in this case Mullane, for all persons who might have any interest in the fund. Mullane objected that the statutory provisions for notice were inadequate to afford due process under the fourteenth amendment. The Supreme Court agreed and directed mailed notice to the known beneficiaries along with publication for those missing or unknown. See generally Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 Md. L. Rev. 199 (1969).
of representation. The Court held that when an individual's interest is not substantially represented through earlier litigation, he is not bound by that prior decision:

"[T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. . . .

It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . ."

Absent parties are not denied due process if the class members present are "by generally recognized rules of law, entitled to stand in judgment for those who are not [present] . . . ."

In *Mullane* the Court focused upon the type of notice necessary to satisfy the demands of due process. Adequate notice was characterized as that which is "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." The Court recognized that personal contact with each potential class member would not always be "reasonably possible or practicable," and added that where parties could not be ascertained "with due diligence" notice by publication would suffice.

Professor Benjamin Kaplan, Reporter to the Advisory Committee, has interpreted *Hansberry* and *Mullane* to mean that individual notice is not always essential to due process, since representatives of a class may adequately defend the interests of absent class members. Wright

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59. 311 U.S. at 42-43.
60. *Id.* See pp. 380-81 infra, discussing adequate representation as an acceptable due process substitute for individual notice in mass class actions.
61. 311 U.S. at 43.
63. *Id.* at 317.
64. *Id.* The Court did caution, however, that "[e]xceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." *Id.* at 318. The circuit court in *Eisen IV* viewed the use of publication allowed by *Mullane* as limited to the facts of that case, where the parties' names and addresses were neither known nor easily ascertainable. 479 F.2d at 1017 n.21.
In particular cases it may be practicable to give notice under (c)(2) which will reach each member of the class. That will not be possible in all cases, but when large numbers of people are dealt with, perfect notice, while on the one hand hard to
and Miller argue that the determinative consideration should be "whether a majority of those interested in the action will be notified, thereby assuring that the absentees are adequately represented." If the premise is accepted that rule 23 (c) (2) notice need meet only the standards of Hansberry and Mullane, the conclusion reached in Eisen IV—disallowing a combination of individual notice and publication—seems to demand more than due process requires.

The practical effect of the individual notice requirement is to place an impossible procedural barrier in the way of litigation on behalf of a large consumer class. The trial court in Dolgow recognized the formidable nature of such a requirement and, consequently, suggested that notice by publication would be a practical alternative to individual notice. Use of publication was viewed as a viable approach to the question of notice since "the recent amendments [to rule 23] were specifically designed to broaden the usefulness of the class action device." A broadened use of the class action was rejected in Eisen IV, however, for its failure to overcome the due process aspects of Mullane and to prevent a return to one-way intervention.

attain, becomes on the other hand unnecessary because of the probability that some individuals who are representative of differing opinions within the group (if such differences exist) will in fact be reached and will speak up. Notice which is fair in the circumstances of the case is a constitutional requirement.

(Footnote omitted.)

In a recent analysis of notice in class action proceedings it was pointed out that the Mullane and Hansberry doctrines appear to support the position that due process can be met without actual notice if:

(a) there is a direct and compelling state interest that will be vindicated by the proceeding, or
(b) there is adequate representation of the absent party to whom actual notice is not given and if either
   (i) there is an express or implied "consent" by the absent party to be represented by another, or
   (ii) maintenance of the proceeding will further an indirect but important state interest, and the impossibility or impracticability of giving actual notice would otherwise defeat the maintenance of the proceeding.


67. 43 F.R.D. at 500.

68. Id. at 497.


It is true that the whole concept of a large class action might easily be stultified by insistence upon perfection in actual notice to class members; and that
It should be recognized that the rejection in *Eisen IV* of the proposed use of notice by publication was tied to "the fact that Eisen would not pay for individual notice to the members of the class who could be identified . . . ." Had Eisen been willing to notify individually the two million identifiable members of the class it is possible that publication would have sufficed for the remainder under the court's reading of *Mullane*. However, since the cost of individual notice far exceeded Eisen's personal stake in the case, and since the court disallowed the transfer of costs to the defendant pendente lite, the ruling effectively precluded initiation of this or any other large consumer class action represented by only several class members willing to seek redress of injuries both to them and to the class at large.

Judge Oakes, in his dissent to the denial of an en banc rehearing, attacked the positions of the *Eisen IV* majority. Because the case had significant ramifications for future large consumer class actions he felt the issues raised should have received the attention of the entire membership of the Second Circuit:

The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, unhampered

courts should not be deterred from Rule 23 economies in litigation by exaggerating the presumed requirements of due process, or by the specter of an occasional successful collateral attack on the basis of due-process . . . . Nevertheless, courts should eschew applications of Rule 23 so expansive in scope as to permit a return to one-way intervention under a new guise.

*Id.* at 459.

One-way intervention was a threat under the early class action litigation. It occurs when the rules of procedure are such that a party can join an action for the purpose of participating in a favorable judgment without having to place his cause of action before the court at such a time in the proceeding that an unfavorable ruling would also affect him. Thus, the plaintiff, where one-way intervention is allowed, reaps the benefits of litigation without taking any of the risks. Currently, rule 23 prohibits such action on the part of potential class members.

70. *479 F.2d* at 1016.

71. Morton Eisen estimated his own damages to be approximately $70. See *id.* at 1007 n.1.

72. *479 F.2d* at 1021. *Eisen IV* was argued before Judges Medina, Lumbard and Hays on December 12, 1972. A petition for rehearing was filed by the plaintiff-appellee, suggesting that the action be reheard en banc. A poll of the judges in regular active service resulted in a denial of the petition, with the majority expressing the view that a rehearing was unnecessary because of their confidence that the Supreme Court would review the matter under its certiorari jurisdiction. See *id.* at 1020-21. Judge Oakes, who did not sit on the original panel, was joined by Judge Timbers in dissenting from the denial of the en banc rehearing. See *id.* at 1021. Judge Hays, after concurring in the original decision, also dissented from the denial of the rehearing. See *id.*

73. *Id.* at 1022.
by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer.\textsuperscript{74}

The decision also seemed “inconsistent with the flexible, equitable spirit” of amended rule 23.\textsuperscript{75} The majority should have at least considered the option of subdividing the class under the power granted by rule 23(c)(4)(b), and should have cited authority rejecting publication as an acceptable mode of giving notice.\textsuperscript{76}

The failure of the court to consider fully the meaning of “representation” (as per Hansberry) in its discussion of notice also weakened the opinion in the eyes of Judge Oakes. He noted further that the Advisory Committee Notes did not support the inference that manageability requires individual notice.\textsuperscript{77} In conclusion, Judge Oakes reemphasized the philosophy behind the rule:

Rule 23 was not looking toward perfect or total notification; it was—and I write of it in the past tense for this purpose—reaching out for a practical result that would permit numbers of little injured people to have their day, too, in court.\textsuperscript{78}

The \textit{Eisen IV} decision affirms its own conclusion that rule 23 is not a procedural device capable of handling the management problems of litigation generated by classes with potential membership in the millions.\textsuperscript{79} Rejection of class action status for such groups makes access to the courts more expensive for individual class members, effectively denying access when their claims are small. Thus, the possibility of civil actions resulting in judicial scrutiny of corporate activities that affect large consumer classes has become very remote. The desirability of such judicial scrutiny, and of civil remedies in the consumer arena, suggests the need for a new procedural rule—a “Rule 23.3.”

This proposed rule would be a procedural vehicle for the efficient adjudication of large numbers of individual claims related through requirements of commonality of fact and law. Under the proposed

\textsuperscript{74} Id.
\textsuperscript{75} Id. at 1023.
\textsuperscript{76} \textit{See} id. at 1024.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 1019-20. The court took the position that Congress should transfer mass class actions to some administrative agency or rule 23 should be amended again to allow mass class actions to proceed but only for injunctive relief or a declaratory judgment as in rule 23(b)(2). \textit{Id}. 
rule, courts would serve a function in addition to mere adjudication of individual claims. Judicial review of alleged commercial misconduct, like judicial review of antitrust and securities violations, could serve to deter businesses and corporations from future transgressions. Thus the rule would be designed to bring large organizations with widespread operations before the courts, even where the injuries they cause to individuals are de minimus.

It is suggested that the horrors of mass class action administration effectively can be eliminated by providing the court specific procedural guidance. The essential element of the new rule would be clarification of due process notice requirements. In some situations, the rule could allow a class action to reach trial on the merits without requiring the individual notice called for by Eisen IV and rule 23(c)(2). To satisfy due process the representative’s complaint would be required to include all questions relevant to the controversy. Arguably, when a court makes the required rule 23(a)(3) determination that “the claims or defenses of the representative parties are typical of the claims or defenses of the class,” and the required rule 23(a)(4) determination that “the representative parties will fairly and adequately protect the interests of the class,” no legal rights will suffer from maintenance of the action. If, then, a court can find, as in Mullane, that the individual interest is identical with that of the class, “notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all.” In such a situation, the opportunity for persons to exclude themselves from the class (thereby avoiding res judicata effects of the judgment) need not be given the consideration which apparently motivated the absolute demand for individual notice that the Second Circuit found in rule 23(c)(2).

Rule 23.3 would settle the issue of damages with distribution in a manner analogous to an interpleader action. The damage award would become, in effect, a “judgment stake.” As a part of court costs

80. FED. R. CIV. P. 23(a)(3).
81. FED. R. CIV. P. 23(a)(4). Emphasis should be on positive protection of interests of the class rather than on mere findings that counsel is adequate and that there is no likelihood of collusion between the litigants. The latter was emphasized in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968).

Combining the requirement of adequacy of representation with the requirement that claims and defenses be typical does not radically change class action analysis. See, e.g., Koehler v. Ogilvie, 53 F.R.D. 98 (N.D. Ill. 1971), aff’d, 405 U.S. 906 (1972).
the defendant who has lost a judgment would be required to pay for the solicitation of claims against the "stake." After a reasonable period of time no further claims would be accepted and the defendant would receive the traditional res judicata benefits of the judgment. In effect this procedure allows for the limited use of fluid recovery. After the issue of liability has been determined, however, there would be no attempt to assess damages to the benefit of the class at large. Individual claims would be validated and paid, and the class at large would benefit from judicial review of corporate activity in the consumer arena. Further development of the specific elements of this proposed rule is beyond the scope of this comment, and is left to the Advisory Committee or other qualified groups.

One reason for accepting a new rule tied to representation as satisfaction of due process is the considerable benefit society would receive if corporate activity affecting large consumer classes effectively is made the subject of judicial review. Moreover, the combination of due process representation at the litigation stage and open solicitation of claims against the "judgment stake" arguably would meet the constitutional due process requirements formulated in Mullane and Hansberry; thus there would be no actual loss of currently recognized constitutional rights. Following judgment the class members would be protected through claim solicitation based on traditional elements of individual notice and publication.

Eisen II and Eisen III were positive and hopeful for proponents of large class actions. It remains to be seen whether the Eisen IV court became too preoccupied with the burdens posed by court administration of large class actions, and with the "in terrorem" effect that can be created when one abuses the class action procedure. At the very least, the court may be criticized for failing to use imaginatively the discretionary powers currently provided by rule 23. As one judge has noted, "[a] rule like . . . [rule 23], with its large grant of judicial discretion, is much more than a test for the judges. It is, in its small way, a test of our claims as a profession." For now, the Second Circuit has effectively blocked the path of large consumer class actions; therefore, if the courts are to respond to the problems of large classes, a revision of rule 23 seems essential.

84. Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295, 301 (1966).
85. The Supreme Court sustained the holding in Eisen IV, requiring individual notice for "those class members who are identifiable through reasonable effort." The standard of "reasonable effort" was not defined, but, clearly, where class members can be identified by registration lists, account numbers or similar means the plaintiff is required to identify those members and provide them with individual notice. See Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804, 4810 (U.S. May 28, 1974).

During the four year period 1968-71, the racial composition of a suburban neighborhood in southwest Atlanta changed from white to predominantly black. A number of real estate firms participated in the transition by servicing the requisite transactions, soliciting listings, making representations to whites that the neighborhood was changing, and by placing and displaying "For Sale" signs. The United States Attorney General brought suit for injunctive relief against five of these firms pursuant to the "anti-blockbusting" section of the federal Fair Housing Act of 1968.¹ The "anti-blockbusting" section of the Act, section 3604(e), provides that

it shall be unlawful . . . [for] profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.²

Following pretrial hearings on motions to dismiss, motions for summary judgment and motions for a jury trial, the trial court³ issued an injunction⁴ against the realty firms involved and against

⁴. The injunction, paraphrased, provided:
   1) The defendants, their agents, employees and successors, and all those acting in concert or participating with them, are permanently enjoined from inducing or attempting to induce sales by explicit representations regarding the entry into the neighborhood of persons of racial minorities.
   2) The defendant firms are to instruct their agents on the content of the Fair Housing Act within 10 days of the decree or 10 days of the hiring of such agents and to obtain from them a signed statement to the effect that they had been instructed and understood the Act.
   3) The defendants are to distribute their listing solicitation activities evenly across
other realtors who had been similarly active in the racial transition. Since the injunction issued after the neighborhood in question had become predominantly black, the court's action could not remedy the illegal activities that already had occurred; thus, the injunction's primary force was prospectively directed at illegal realty activities in other neighborhoods.\(^5\)

Bob Lawrence Realty, one of the enjoined firms, appealed to the Fifth Circuit. Most significant among Lawrence Realty's numerous contentions on appeal was the argument that, on the basis of the facts that had led to the injunction, the Attorney General lacked standing to sue.\(^6\) Judge Goldberg, writing for the court, rejected all of appellant's contentions and sustained the injunction.\(^7\)


5. See note 4 supra.

6. See United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 119 (5th Cir.), cert. denied, 414 U.S. 826 (1973). Lawrence Realty also contended (1) that the anti-blockbusting provision, § 3604(e), as applied to purely private dealings in property, is an unconstitutional exercise of legislative power; (2) that § 3604(e), as applied to the conduct of the individual appellants, violated the first amendment right of free speech; (3) that the issuance of the injunction was improper because appellant's conduct had not violated § 3604(e); and (4) that appellant was entitled to recover the cost of the litigation. See id. at 119-22, 125-27.

7. Id. at 127. The appellate court relied upon Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), in upholding Congress' power to enact the anti-blockbusting provision of the Fair Housing Act. In Jones the defendant, a private developer, had refused to sell a house to Jones, a Negro, solely on account of his race. Pursuant to § 1982 of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (1970), Jones brought suit against the developer, who in turn challenged the constitutionality of § 1982. Section 1982 provides: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” The defendant contended that § 1982 was not intended to reach purely private dealings and, in the alternative, if it was so intended, it unconstitutionally had extended congressional legislative power. 392 U.S. at 422, 437-38.

The Supreme Court upheld § 1982, finding that Congress was empowered by § 2 of the thirteenth amendment to identify the "badges" and "incidents" of slavery, and
to pass appropriate legislation aimed at the elimination of such “badges” and “incidents.” Id. at 439. Thus, since § 1982 is a valid exercise of Congress’ thirteenth amendment power, the Jones Court concluded that § 1982 could prohibit racial discrimination in purely private real estate transactions. Id. at 440. In a similar manner, the Lawrence Realty court reasoned that § 3604(e) was intended to outlaw blockbusting, 474 F.2d at 119; that blockbusting is a major cause of the perpetuation of segregated neighborhoods, id.; and, finally, that it was reasonable for Congress to have identified segregated neighborhoods as a “badge” or “incident” of slavery. Id. at 120-21. Therefore, the court upheld § 3604(e) as a congressional attempt to deter the development of segregated neighborhoods, a valid exercise of Congress’ thirteenth amendment powers. Id. at 121.

However, the thirteenth amendment may not be a viable basis for the constitutionality of § 3604(e). See 23 Cath. U.L. Rev. 138 (1973). Section 3604(e) prohibits representations referring to persons by race, color, religion or national origin. In Jones the Court held that Congress has power under the thirteenth amendment to regulate private transactions where the regulation is reasonably aimed at the “badges” and “incidents” of slavery. 392 U.S. at 439-40. This language suggests that Jones is not precedent for legislation pertaining to religion or national origin. The Jones Court seemed to indicate as much: “In sharp contrast to the [Fair Housing Act] . . . the statute in this case [§ 1982] deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.” 392 U.S. at 413. See Note, The “New” Thirteenth Amendment: A Preliminary Analysis, 82 Harv. L. Rev. 1294, 1308 (1969). Moreover, legislative history suggests that Congress understood the commerce clause and/or § 5 of the fourteenth amendment to confer constitutional authorization for the Fair Housing Act. See testimony of Attorney General Ramsey Clark, Hearings on S. 1338, S. 2114, S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. at 3-29 (1967); S. Report No. 721, 90th Cong., 1st Sess. at 6-8 (1967). If either the commerce clause or the fourteenth amendment reaches private housing transactions it is of course inconsequential that the Act proscribes realtors’ representations with regard to religion and national origin, as well as race.

But two courts have explicitly considered and rejected the commerce clause and fourteenth amendment as constitutional authorization for § 3604(e). See Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969); United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969). Furthermore, no federal court has upheld the constitutionality of the Act on commerce clause or fourteenth amendment grounds. But cf. Mayers v. Ridley, 465 F.2d 680, 687-38 (D.C. Cir. 1972). In Brown the court rejected the commerce clause argument with the observation that “[t]here is no evidence that the activities proscribed herein are in interstate commerce and the court so finds.” 304 F. Supp. at 1239. In Mintzes the court rejected the commerce clause without comment. 304 F. Supp. at 1312. Cited in support of the court’s position in Brown were Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964)—cases involving claims of discrimination in violation of the public accommodations provisions of the Civil Rights Act of 1964. In Heart of Atlanta the Court rejected a constitutional challenge to congressional regulation of travelers’ accommodations. The Court looked to Congress’ plenary power to regulate interstate commerce and found that this power extended even to such incidents of commerce as purely local accommodations businesses. 379 U.S. at 257-58. Arguably, discrimination in housing incidentally affects interstate commerce to no less an extent than does discrimination in accommodations. In McClung, where there was no evidence that the defendant firm serviced interstate travelers, the Court found an incident of commerce in the interstate origins of food served by the defendant. See 379 U.S. at 303-05. Clearly, the “ingredients” of houses move in interstate commerce also. Thus it would seem that the Brown court’s rejection of the commerce clause as constitutional authority for Congress’ power to enact § 3604(e) is ill-founded.

In Brown and Mintzes the courts also rejected the fourteenth amendment as consti-
In Guest, Justice Stewart, writing for the Court, stated that the fourteenth amendment prohibits only discrimination fostered or encouraged by "state action." Id. at 755. However, six members of the Court indicated that § 5 of the amendment empowers Congress to enact laws punishing all conspiracies, with or without state action, that interfere with fourteenth amendment rights. See id. at 762, 777-79. In Brown the court simply stated that the "majority" of the Guest Court did not "hold" that state action was no longer a prerequisite to the fourteenth amendment regulation. 304 F. Supp. at 1299. The court in Mintzes interpreted Guest similarly. 304 F. Supp. at 1312.

In Lawrence Realty the court explicitly abstained from considering the commerce clause and fourteenth amendment as constitutional pegs for the Act. 474 F.2d at 121 n.9. This seems shortsighted because it is improbable that discrimination relating to religion or national origin can be prohibited by Congress under its thirteenth amendment power, and, if such discrimination can be reached either under the commerce clause or fourteenth amendment power, the thirteenth amendment peg for the Act is superfluous. It should be noted, however, that since the factual situations in Brown, Mintzes and Lawrence Realty all pertained to racial discrimination, upholding § 3604(e) pursuant to the thirteenth amendment was appropriate.

In answer to Mr. Lawrence's contention that § 3604(e) violates his first amendment right to free speech, the court reasoned that realty firms make statements to dwelling owners primarily for the purpose of earning fees. Id. at 122. Thus such statements, even though factual, constitute commercial speech or, in the alternative, speech incidental to commercial conduct. Id. And since commercial speech occupies a relatively inferior position in the first amendment "hierarchy," see Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 GEO. WASH. L. REV. 429 (1971); Note, Freedom of Expression in a Commercial Context, 78 HARV. L. REV. 1191 (1965); Comment, Advertising for the "Discriminating" Landlord: The Media and Fair Housing Legislation, 58 IOWA L. REV. 638 (1973), the court concluded that, on balance, the businessman's interest in making factual statements must yield to the congressional interest in deterring blockbusting. 474 F.2d at 122.

In support of its argument that a valid governmental interest can outweigh some types of speech the court cited United States v. O'Brien, 391 U.S. 367 (1968). O'Brien involved a challenge to the provision in the Universal Military Training and Service Act, 50 U.S.C. App. § 462(b) (Supp. 1, 1965), amending 50 U.S.C. App. § 462(b) (1948), that made it unlawful to knowingly mutilate or destroy a draft card. The petitioner in O'Brien, a convicted draft card burner, asserted that this legislation was an unconstitutional restriction of his first amendment right of symbolic speech. Since the act of draft card burning involves "speech" and "nonspeech" elements, the Supreme Court rejected O'Brien's claim and found that the governmental interest in "the smooth . . . functioning of the Selective Service System" outweighed O'Brien's right to express himself by burning his draft card. 391 U.S. at 381-82. The Court was careful to point out, however, that the governmental regulation involved was a narrowly drawn incidental restriction on O'Brien's first amendment right; moreover, the governmental interest that outweighed O'Brien's alleged rights was the efficiency of the draft, not the supression of free expression. Id. at 377. The Court concluded that O'Brien was convicted for the "noncommunicative impact of his conduct and for nothing else." Id. at 382. Implicit in this holding is the conclusion that if noncommunicative conduct is not involved, then the governmental interest cannot outweigh the citizen's interest in free expression. This conclusion is evidenced by the Court's finding that the law "prohibits . . . conduct and does nothing more." Id. at 381. Therefore, O'Brien permits restraint of free expression only if that restraint is incidental to the regulation of independent noncommunicative conduct. See id. at 382.

Unless commercial communications are deemed to be per se noncommunicative conduct, it seems that the Lawrence Realty court's reliance on O'Brien is misplaced. Section 3604(e) is directly aimed at restraining real estate agents' communicative conduct. Sec-
Section 3613 of the Fair Housing Act provides that the Attorney General shall have standing to sue for preventive relief in any appropriate federal district court whenever

[he] has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the Act] . . . or that any group of persons has been denied any of the rights granted by [the Act] . . . and such denial raises an issue of general public importance . . . .

The district court had ruled that the Attorney General had standing to sue under the first alternative ("pattern or practice"), but not under the second ("issue of general public importance"). On appeal, Lawrence Realty raised two challenges to the standing of the Attorney General: first, the Attorney General lacked standing under the group "pattern or practice" alternative unless it could be shown that the individual activities of Bob Lawrence Realty—divorced from the activities of other real estate firms—constituted an individual pattern or practice of blockbusting; second, the Attorney General lacked standing to seek to enjoin Bob Lawrence Realty as a participant in a group pattern or practice of blockbusting, unless it could be shown that Lawrence Realty had acted in concert or conspiracy with other real estate firms.

The circuit court first found that the district court had erred in denying standing to the Attorney General under the "issue of public importance." The court went on to reject Lawrence Realty's contention that an individual pattern or practice need be established to confer standing, by stating:

Unless we are to construe the phrase "group of persons" as totally superfluous, there is no need for each member of the "group of per-

tion 3604(e) proscribes "representations," whereas the gravamen of O'Brien's offense was "the deliberate rendering of [draft] certificates unavailable for the various purposes which they may serve." Id. at 380. In other words, § 3604(e) does not outlaw non-communicative conduct—i.e., blockbusting—with a mere incidental restriction on realtors' free expression; instead, it outlaws "representations" regarding the racial transition of a neighborhood, clearly a direct restraint on expression with an incidental impact on conduct. Hence, if § 3604(e) is to stand as a constitutional restraint on free speech, it must stand on the commercial speech distinction rather than on the O'Brien balancing-of-interests test.

10. See 474 F.2d at 123.
11. Id. at 125. The court analogized the conferring of standing under "issue of public importance" to the exercise of prosecutorial discretion. Id. at 125 n.14.
sons" to be engaged in an "individual pattern or practice" of violating the Act before the Attorney General has standing to sue. The statute was thus intended to reach the illegal activities of a group of persons even if the individual members of the group of persons were not engaged in an "individual pattern or practice." Thus, under the court's interpretation of the standing provision, a group of persons can be engaged in a pattern or practice of blockbusting even though no individual member of the group is engaged in such a pattern or practice. Finally, the court rejected the Bob Lawrence Realty contention that the language "group pattern or practice" requires concerted action or conspiracy. The court stated that the meaning of the phrase "group pattern or practice" is not defined in either the Fair Housing Act or the Act's legislative history; however, legislative and judicial interpretations of the language indicate that the language was intended to encompass something more than an isolated or accidental or peculiar event. Since the essence of the blockbusting phenomenon is that "a large number of competitors individually besiege an area seeking to gain a share of the market," the court apparently believed that such conduct is within the scope of the "group pattern or practice" language. Moreover, Judge Goldberg reasoned that, since Congress intended to inhibit blockbusting, it was the court's duty to interpret the standing provision of the Fair Housing Act so as to give effect to that intent. Therefore, the court concluded that "a 'group pattern or practice' of blockbusting is established when a number of individuals utilize methods which violate § 3604(e)." Conspiracy or concerted action is not a prerequisite because the success of blockbusting does not require such cooperation on the part of realtors.

The court's broad interpretation of the standing provision of the Fair Housing Act raises two problems. First, Judge Goldberg failed to explicate the range and type of "methods" that violate the statute, specifically with reference to the "representations" language of section 3604(e). Secondly, the lack of specificity of the holding permits, if not suggests, applications of the statute that will foster rather than inhibit perpetuation of neighborhood segregation. A brief examination of two distinct processes through which racial housing patterns change

12. Id. at 123.
13. Id. at 123-24.
14. See id. at 124.
15. Id. at 124.
16. Id.
17. Id.
might illustrate both the potential danger of an overly broad interpretation of the statute and the need for restraint in its application.

In the "classic" case of blockbusting, realty firms, as middlemen/owners, take the initiative; they enter a stable neighborhood, propagate rumors of an impending black invasion, promote and exacerbate whites' fears of blacks, capitalize on an induced panic by buying from whites at relatively low prices, and then confirm their rumors by selling to blacks at relatively high prices. A distinguishable type of blockbusting results from what can be termed "panic selling." Here, blacks take the initiative by seeking to move into a white neighborhood. White homeowners may seek to retain "racial purity" in the neighborhood by acting with hostility toward current and prospective black residents, in hopes of inducing the latter to stay out. Nevertheless, because of the flight of prejudiced and fearful whites, and because of the housing needs of blacks, a change in racial composition of the neighborhood is likely to ensue. Moreover, realty firms perforce will serve as brokers as homes change hands. The "representation" language of section 3604(e) as interpreted by the Lawrence Realty case can be read to reach the activities of realty firms in both "classic" blockbusting and "panic selling" situations.

The application of the Fair Housing Act to the classic case is obvious. In the panic selling case, however, the applicability of the Act consistent with congressional intent is less clear. If "representation" is construed to encompass any acts or words that would be likely to convey to a reasonable man the idea that members of another race are or may be entering the neighborhood, then the activities of realtors even in panic selling situations probably are covered by the Act. Apparently it is not necessary that the realtor make direct representations, such as, "Blacks are coming—you better sell out," because in Lawrence Realty the trial court had stated:

21. See Love v. DeCarlo Homes, Inc., 482 F.2d 613, 614 (5th Cir. 1973); Otero v. New York City Housing Authority, 354 F. Supp. 941, 943 (S.D.N.Y.), rev'd, 484 F.2d 1122 (2d Cir. 1973); President's Committee on Urban Housing, A Decent Home 42 (1968); Report of President's Committee on Urban Housing: Technical Studies 11 (1967); Glassberg, Legal Control of Blockbusting, 1972 Urban L. Ann. 145, 166; Morris & Powe, Constitutional and Statutory Rights to Open Housing, 44 Wash. L. Rev. 1, 2-3 (1968).
[B]oth sides [white owners and real estate agents] already know, all too well, what is going on. In short, for an agent to get a listing or make a sale because of racial tension in such an area is relatively easy, whereas the direct mention of race in making the sale is superfluous and wholly unnecessary.\textsuperscript{23}

Furthermore, the Attorney General would seem to have standing in panic selling cases because the activities of realty firms competitively seeking a share of the "panic" market would not be "isolated or accidental or peculiar events."

But while section 3604(e) logically may be extended to panic selling situations, it seems questionable whether Congress intended this result. In the classic case, and in situations approaching the classic case (for example, where middlemen/brokers only initiate rumors and promote fear),\textsuperscript{24} the realtors create a market for profit, and their market-creating activities require an exacerbation of racial prejudice. It could be said that in the classic case the realtor acts with scienter. In the panic selling situation, however, realtors merely enter a pre-existing transitional neighborhood and accurately respond to whites' inquiries as to the presence of new black residents, or solicit listings, or place and display "For Sale" signs. Continued neighborhood transition results only from the assistance realtors give to blacks searching for housing. The realtor in such a case is not acting with the intention of perpetrating a rapid transition in the neighborhood. Indeed, the realtor's activities are less important in causing the transition than either white prejudice or housing needs of blacks. If, as Lawrence Realty suggests, the Fair Housing Act is construed to proscribe realtors' activities in such neighborhoods, the Act will in effect serve to deter attempts by blacks to gain access to integrated housing.\textsuperscript{25}


\textsuperscript{25} Two courts have indicated that it would not be appropriate to extend the Fair Housing Act to the spontaneous panic selling situation, but neither grounded its reasoning on the current needs of blacks for housing. In Abel v. Lomenzo, 267 N.Y.S.2d 265 (Sup. Ct. 1966), aff'd, 219 N.E.2d 287, 272 N.Y.S.2d 771 (1966), the court stated that a realtor's honest answer to a question put to him by an owner, that neither in content nor purpose indicated intent to encourage housing discrimination, might be protected by the first amendment. This approach, given the current status of "commercial speech," seems faulty. See note 7 supra. Such statements are "commercial" in nature and purpose. If the Fifth Circuit has extended § 3604(e) to panic selling situations, then the factual nature of commercial statements would not seem to bring such statements within the first amendment's protection. Thus, even an honest response by a realtor to a customer's question concerning the racial situation in a neighborhood falls within the scope of the Act.
Thus, by failing to distinguish the classic case of blockbusting, where the realtor acts with scienter, from the spontaneous panic selling case, where the realtor merely responds to a demand that already has been created, the Lawrence Realty court may have frustrated the intent of the Fair Housing Act—the inhibition of segregated housing. A narrow interpretation of the anti-blockbusting provision would reach only those realtors who instigate and manipulate the rapid racial transition of a neighborhood. The Lawrence Realty interpretation of the Act, however, seems to include the spontaneous situation where realtors merely participate in the transition. This broad interpretation prevents realtors from assisting, in good faith, blacks in search of suburban housing. Unfortunately, the precise scope of the court's construction of section 3604(e) is obscured by the fact that the opinion does not set forth the facts of the Lawrence Realty case. Thus, the decision cannot be clarified by reference to those facts. Apparently, Lawrence Realty involved the panic selling case, because the trial court found only scant evidence of direct "representations" made by realty firms' employees. The application of the statute to the panic

The second case limiting the impact of the Act, Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126 (N.D. Ind. 1973), involved a challenge to a city ordinance prohibiting the placement and display of "For Sale" signs in residential areas. Barrick Realty, the plaintiff, contended that the ordinance was in violation of § 3604(d) of the Fair Housing Act, which provides that it shall be unlawful "[t]o represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. § 3604(d) (1970). The court rejected this contention and found that the ordinance was complementary to the anti-blockbusting provision of the Act, § 3604(e). The court concluded that while § 3604(e) was directed at classic blockbusting—where the realtor directly induces the sale of homes by making representations concerning the racial transition of the neighborhood—the city ordinance was directed only at the broader problem of panic selling—where residents move from a transitional neighborhood without any direct inducement on the part of realtors. 354 F. Supp. at 134-35. Thus the court implicitly found that § 3604(e) did not extend to the spontaneous panic selling situation: the ordinance would not have been found complementary to § 3604(e) if the court had felt that § 3604(e) already was directed at panic selling. The Barrick Realty opinion, however, is clearly not supportive of the proposition that § 3604(e) ought to be given a narrow scope. To the contrary, the thrust of Barrick Realty encourages the regulation of realtors' conduct.

Arguably, the suggested short-run adverse effect of a broad construction of the standing provision should not be viewed in isolation from other provisions of the Fair Housing Act and other federal housing programs. For example, one commentator has argued that an expansive application of § 3604(e) may foster rather than inhibit discriminatory housing practices. Glassberg, supra note 21, at 168. But Glassberg adds that other provisions of the Act will have a compensatory effect. Id. at 166-67 n.122. This line of reasoning, however, ignores the fact that the Fair Housing Act is not an integrated scheme for uprooting discriminatory housing practices. Instead, the Act, passed in the wake of public outcry over the assassination of Martin Luther King, is an example of congressional haste and poor draftsmanship. See Chandler, Fair Housing Laws: A Critique, 24 Hastings L.J. 159, 203 (1973).

selling situation, however, should have been expressly rejected by the court because, although such application arguably is within the letter of the statute, it is not within the statute's spirit.\(^\text{27}\)

*Uniform Commercial Code—Secured Transactions—Repossession of Collateral Without Judicial Process Not Violative of Fourteenth Amendment.—Northside Motors, Inc. v. Brinkley, 282 So. 2d 617 (Fla. 1973).*

Paul Brinkley financed a 1968 Buick under a sales contract with Northside Motors (Northside). The contract stipulated that title and security remained in the seller until all payments were made in full, and that the seller retained the right to repossess without notice in the event of default. After Brinkley had defaulted on the contract, employees of Northside took possession of the car without his knowledge or consent. Brinkley brought an action for unlawful conversion and damages. The trial court held invalid the provision of the sales contract consenting to repossession without notice\(^1\) and granted Brinkley summary judgment on the issue of liability.\(^2\) On motion for rehearing, Northside alleged that the court had failed to consider the effect of section 679.503\(^3\) of the Florida statutes, which grants

\(^{27}\) See *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 619 (1967); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459-60 (1892). Put another way, the courts ought to look beyond words used in legislation when the supposed meaning leads to absurd or futile results, or to an unreasonable result plainly at variance with the policy of the legislation as a whole. *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966).

1. Paragraph 18 of the contract provided:

   In the event of default . . . Seller, without notice, shall have the right to . . . (c) lawfully enter the premises of any Buyer where the Motor Vehicle may be found without prior notice, demand for performance or legal process and take possession of the Motor Vehicle without being liable in any way to such Buyer on account of entering said premises . . .

Northside Motors, Inc. v. Brinkley, 282 So. 2d 617, 618 (Fla. 1973).

2. See 282 So. 2d at 619.

3. The relevant part of § 679.503 provides:

   Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

*FLA. STAT. § 679.503 (1971).* This section is a verbatim codification of *Uniform Commercial Code* § 9-503.