Litigation Section Comments on Department of Justice Class Action Proposal

On December 1, 1977, the Office for Improvement in Administration of Justice of the United States Department of Justice (OIAJ) circulated for comment a draft statute which would radically alter the class action device as we now know it. The Litigation Section of the American Bar Association submitted its detailed comments in late January. Given the length and complexity of the Department's proposal and the extensive nature of the comments prepared by the Litigation Section, the following summary will only touch on the high points of both.

According to the OIAJ, the proposed legislation is based on three major conclusions: first, that more must be done to deter instances of pervasive small injury; second, that where individual injury is more substantial, effective means of compensatory redress should be provided under procedures which avoid unnecessary expense; and third, that the courts must be given tools to manage both types of cases. To achieve these goals, the OIAJ proposes to create two new types of class actions: a public penalty procedure for redress of small monetary injuries to numerous members of the public, and a separate class compensatory procedure for redress of substantial monetary injuries to numerous members of the public.

Under the Department's proposal, a public penalty action may be brought by an injured person or persons or by the United States. If initiated by an individual, the United States Attorney General must within sixty days elect to assume control of the action, recommend that it proceed in the name of the private plaintiff, recommend that it not be allowed to proceed, or designate an appropriate state attorney general who may, at his election, assume control of the case. If liability is established, the defendant suffers a judgment for a penalty equal to the total amount of the injury caused, which amount is paid into the Administrative Office of the United States Courts. Other individuals harmed can then file individual claims with the Administrative Office and receive payment. Money remaining after payment is eventually forwarded to the United States Treasury. In addition to the penalty, the defendant must pay the plaintiff's costs and attorney's fees, as well as an incentive fee which the plaintiff receives for having brought the matter to the attention of the Department of Justice.

In contrast to the public penalty action, the class compensatory action proposal does not contemplate any involvement by the Department of Justice in the litigation. The basic prerequisites for maintaining a class action for damages are reduced to three: (1) that at least forty persons suffer injury exceeding $500 each; (2) that there be at least one question of law or fact common to the proposed class; and (3) that the named plaintiffs and their counsel adequately protect the interests of all class members. Within ninety days of the filing of the action, a preliminary hearing shall be held to determine whether the named plaintiff has "a reasonable possibility" of prevailing on the merits and on the question of numerosity. If the court finds no such reasonable possibility, the defendant is awarded his costs and attorney's fees. If the court rules that a reasonable possibility does exist, an award of costs and attorney's fees is immediately made to the plaintiff. This award is nonrefundable regardless of whether the plaintiff ultimately fails to prevail on the merits. Following the preliminary hearing, the proposal requires that notice be directed to the class members. However, individual notice to all identifiable class members is not necessary if, in the discretion of the court, the notice provided is sufficient to "insure adequacy of representation of absentee interests and fairness." Within forty-five days after the preliminary hearing, a class action certification hearing is held to determine whether the plaintiff has satisfied the three class compensatory action prerequisites mentioned above.

In addition, the proposal contains a number of provisions applicable to both types of class actions including a section awarding attorney fees on the basis of the average hourly rate in the community for the type of action involved in the case, measures to expedite the litigation and discourage dilatory motion practice, criteria to evaluate attorneys' qualifications, and procedures for the supervision of settlements.

The Litigation Section's comments on the public penalty action focused on a number of practical and constitutional problems foreseen by the Section's members. The Section comments expressed concern over the elimination of a number of procedural safeguards currently established for class actions. For example, individual notice to class members is not required and other injured individuals are not permitted either to intervene or opt out. Nonetheless, a public penalty judgment is conclusive on all members of the injured class with damages less than $500. Further, in calculating the aggregate penalty, proof of individual injury is not required and fluid recovery is permitted. Second, the Section members were skeptical of the protection intended to be established by the creation of an active role for federal and state law enforcement officials. Given the large number of public penalty actions that presumably would be filed, it is feared that federal supervision would be superficial and in some cases wholly ineffective. The Section members found particularly objectionable the proposal that federal of-

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federal courts. Several federal courts have adopted rules which would put the mandatory arbitration program into effect on an experimental basis. The committee is surveying all of its members for comments on this important subject. Other interested persons should direct their comments to Ronald L. Olson, 606 South Hill Street, Los Angeles, California 90014.

Pro Bono

The committee has designed a program which would ask each member of the Litigation Section to undertake an annual pro bono commitment of one lawsuit. We believe that litigators have a unique opportunity and ability for such a program. One highly-respected professional group has observed:

> Legal representation, in its quintessential form, means an individual lawyer dealing with the problems of an individual client. The greatest need is for such representation, and projects that promise to provide it should have a high relative value.

In addition, the committee is exploring the possibility of establishing support centers for legal aid offices around the country. The centers, to be staffed by members of the Litigation Section, would be available to advise and train legal aid lawyers. The committee chairman is Ronald L. Olson, Los Angeles.

Discovery Rule Changes

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provide explicit sanctions against a party not supplementing a discovery response as required by present Rule 26 (c). The Department suggests that in the event a party fails to supplement his response and such failure causes prejudice or delay, the rule be amended to provide appropriate sanctions for such failure to supplement the response.

Finally, the Department pointed out that there is a general feeling among practitioners that trial courts are reluctant to impose the sanctions currently available under Rule 37, especially with respect to the award of attorneys' fees provided for in Rule 37(a)(4), (b), (c) and (d), and that it would be advisable to provide for the awarding of attorneys' fees as mandatory absent "some extraordinary circumstance" or "some manifest injustice."

It is most encouraging to note that Daniel J. Meador, Assistant Attorney General for the OIAJ commended our Special Committee for moving ahead to consider the proposed amendments to the discovery rules. He added a note of encouragement to the Civil Rules Advisory Committee that every effort should be made to expedite consideration and adoption of the changes. To date, the Advisory Committee has met to consider the changes and has endorsed in principle our recommended changes to the discovery rules.

Carolyn B. Lamm
Associate Editor

Class Action Proposal

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ficials evaluate the ability of the plaintiff's counsel to adequately and fairly represent the interests of the class. Apart from the question of the Department of Justice's qualification to pass upon class action lawyers' qualifications, the Section members expressed concern at the inherent potential for political abuse, favoritism and corruption.

The comments expressed some doubt as to the feasibility of a comprehensive penalty approach and suggested that it might be more reasonable to attempt to design public penalty type schemes for specific areas of substantive law.

The Section's comments on the proposed class compensatory action also cited a number of potential problems. First, the proposal again eliminates a number of presently existing procedural safeguards including the requirement that common issues of law or fact predominate, the requirement that the representative party's claims be typical, and the manageability and method-superiority requirements. These deletions, although simplifying class action procedures in some respects, may result in unmanageably complex actions causing even greater delay. Second, the proposal significantly relaxes present notice requirements, while providing that all class members who have not requested exclusion and to whom notice has been "directed" will be bound by the judgment. Third, some Section members objected to the award of costs and attorney's fees to the plaintiff after the preliminary hearing, regardless of the eventual outcome of the class certification hearing and the suit.

The Section comments expressed general support for a number of innovations in the proposal including the institution of a preliminary hearing on the merits, the requirement that the court assess the capability of the named plaintiff's counsel as well as the named plaintiff himself to represent adequately the interests of the class, and the discovery limitations imposed prior to the preliminary hearing.

George B. Mickum III
Chairman
Committee on Class Actions and Derivative Suits

The next meeting of the Litigation Section's Council and Committee Chairmen will be June 16-18, 1978. Any member who desires to place an item before the Council should address same in writing to Section Chairman William J. Manning, One Battery Park Plaza, New York, NY 10004.

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