Products-Liability Class Suits for Injunctive Relief Under Federal Rule 23

Joseph DeCarlo, Jr.
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INTRODUCTION

The abundance and variety of hazards associated with consumer products have led to a panoply of responses by the legal system. At the state level, standards of strict liability in tort were judicially developed in an attempt to meet society's need to minimize the growing burdens of product-related injuries.1 Responding to the weaknesses of the individual claims system,2 Congress recently has enacted federal legislation designed to promote greater product safety and to supplement existing remedies.3 In addition, private

1. The Restatement (Second) of Torts §§ 402A-402B (1965) summarizes the current rule of law. Section 402A provides: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

Section 402B provides: "One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though (a) it is not made fraudulently or negligently, and (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller."


3. · Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (codified at 15 U.S.C. §§ 2051-2081 (1976)). The Act creates the Consumer Product Safety Commission which, in turn, is given broad authority, inter alia, to promulgate consumer product safety standards, id. § 2056, to ban consumer products found to present "an unreasonable risk of injury" from commerce, id. § 2057, and to maintain actions in the federal district courts for the seizure of "imminently hazardous consumer product[s]." Id. § 2051.

The statute provides that any interested person may petition the Commission to promulgate, modify, or revoke a consumer product safety rule, id. § 2057(a), and adds that such remedies "shall be in addition to, and not in lieu of, other remedies provided by law." Id. § 2057(f).
plaintiffs seeking various forms of preventive injunctive relief\(^4\) have attempted to maintain products liability\(^5\) suits as class actions on behalf of all consumers of certain allegedly defective products.\(^6\) This Comment will examine the role of injunctive products liability class suits as an alternative means of implementing more fully the substantive policies underlying both state and federal products liability law.

The ability to pursue products liability claims as class actions is an unsettled area of law. The drafters of rule 23 of the Federal Rules of Civil Procedure, which governs representative suits in the federal courts,\(^7\) cautioned that mass accidents ordinarily would not be appropriate for class treatment.\(^8\) Although products liability controversies, strictly speaking, do not arise out of mass accidents,\(^9\) this reasoning has been specifically relied upon by one court to deny class action status to one products liability action for damages.\(^10\)

Moreover, several federal courts faced with claims for injunctive relief over the Commission's products safety rule, the legislation also provides that any interested person may bring suit in the federal district courts to enforce that rule and obtain injunctive relief. Id. § 2073.

4. See notes 99-101 infra and accompanying text.

5. The term "products liability" is used throughout this Comment in a narrow sense and refers to a rule of strict liability in tort making a seller of defective products liable to a user or consumer injured by that seller's product even though all possible care was exercised in the preparation and sale of the product. See note 1 supra. The term is not used to embrace other theories, such as negligence or breach of warranty, upon which a seller of products may be held liable for product-related injuries. See Restatement (Second) of Torts § 402A, Comments a, m (1965); id. § 402B, Comments a, b, d; W. Prosser, Handbook of the Law of Torts, §§ 98-99, at 656-58, 661 (4th ed. 1971). Negligence and breach of warranty involve individual questions of law or fact that may vary from plaintiff to plaintiff, thereby militating against the propriety of class status for similar claims of product defectiveness. See notes 59-66, 126-32 infra and accompanying text. By thus limiting the discussion below to actions based upon a strict liability standard, issues that would needlessly obfuscate the analysis are avoided.


7. This Comment will focus primarily on class suits within the framework of the Federal Rules of Civil Procedure. Rule 23 has been the subject of voluminous litigation, and its parameters have been defined largely through careful craftsmanship and judicial construction. Moreover, a substantial number of state procedural rules governing class actions are patterned after the federal rule. Twenty-six states have class action rules that are modeled after the present version of rule 23. 1 H. Newberg, Class Actions § 1210b, at 304 (1977). In construing these rules, state courts have looked to the federal statute for guidance. See Anthony v. General Motors Corp., 33 Cal. App. 3d 699, 109 Cal. Rptr. 254 (1973); Gilmore v. General Motors Corp., 35 Ohio Misc. 36, 39, 300 N.E.2d 259, 262 (Ct. C.P. 1973). Thus, while focusing on rule 23, the analysis will also be relevant to the maintenance of class actions in state forums.


9. Mass accidents are distinguishable from products liability actions in that in the former, injuries to large numbers of persons occur at a single moment in time, such as airplane crashes and train wrecks, whereas in the latter, injuries to large numbers of persons occur over some extended time period but are traceable to a single causative event.

10. Yandle v. PPG Indus., Inc., 65 F.R.D. 566 (E.D. Tex. 1974). Yandle was an action to recover damages resulting from the plaintiffs' continued exposure to asbestos fibers during their
relief have refused to certify them as class actions on extremely narrow
grounds,11 and two state courts have reached conflicting results on the same
issue.12

This Comment will argue that class action procedures can play a vital role
in achieving the compensatory, deterrent and risk-spreading objectives of
products liability law, and that injunctive products liability suits are particu-
larly appropriate controversies for class treatment. The analysis will begin by
examining the goals contemplated by the substantive theory of products
liability law13 and the general role of class action procedures in attaining these
goals.14 The function and propriety of injunctive relief in products liability
class suits are then discussed.15 Finally, an analysis of the procedural pre-
requisites to class status for such controversies—and judicial reaction to such
claims—is presented.16

I. SUBSTANTIVE AND PROCEDURAL ARGUMENTS FOR CLASS CERTIFICATION
OF INJUNCTIVE PRODUCTS LIABILITY SUITS

A. The Objectives of Strict Liability: Compensation,
Risk Spreading, and Deterrence

The imposition of a standard of strict liability in tort upon sellers of
defective products is designed initially to ensure that individual claimants are
compensated for monetary losses resulting from product-related injuries.17 By

employment at the Pittsburgh Corning Corporation asbestos factory. Seven named plaintiffs
brought suit against nine different defendants and sought class action status on behalf of all 570
former plant employees. Id. at 567. Included among the various theories of recovery asserted
against the many defendants was a claim for strict liability against two sellers of raw amosite-
asbestos for failure to warn of the risk of physical injury associated with their products. Id. Class
treatment was denied on the grounds that common issues of law or fact did not predominate over
issues affecting the individual claimants and that superior methods of adjudication were avail-
able. Id. at 570-72.

It will be demonstrated below, however, that such a predomination of factual questions
affecting only individual class members does not characterize actions primarily seeking injunctive
relief. See notes 59-66 infra and accompanying text.

11. See Weeks v. Radio Corp. of America, No. 76-390 (E.D. Pa. Aug. 25, 1976); Rheingold

12. Compare Gilmore v. General Motors Corp., 35 Ohio Misc. 36, 300 N.E.2d 259 (Ct. C.P.
Rptr. 254 (1973) (certification granted).

13. See pt. I(A) infra.

14. See pt. I(B) infra.

15. See pt. I(C) infra.


17. Restatement (Second) of Torts § 402A, Comment c (1965); see id. § 402B, Comments a, b;
Keeton, Products Liability—The Nature and Extent of Strict Liability, 1964 U. Ill. L.F. 693,
693-95. While compensation of an injured consumer may appear to be of primary importance, the
law also endeavors to induce product manufacturers to market safer products and to limit the
general public's responsibility for absorbing the costs of unavoidable product-related injuries by
passing on these added product costs only to the consumers of those products. Shapo, A
Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for
Product Disappointment, 60 Va. L. Rev. 1109, 1371-78 (1974); see notes 18-23 infra and
accompanying text.
marketing a product for use and consumption, a product seller[^18] is held to have assumed a special duty toward any consumer injured by his product.[^19] It is believed "that the consumer of such products is entitled to the maximum . . . protection . . ., and the proper persons to afford it are those who market the products."[^20] The product seller is held to a standard of strict liability because it is believed that the costs of even unavoidable product-related injuries are better placed on the product seller than left on the injured consumer.

In addition to compensating injured consumers, damage awards and liability insurance also serve a risk-spreading function.[^21] The seller is expected to pass on these added costs by increasing the prices of injury-causing products, thereby spreading the economic burdens of product-related injuries among all the consumers of those products.

Once the total cost to society of producing dangerous products is reflected accurately in the prices paid by consumers, it is reasonable to assume that they will generally decide to purchase safer and less expensive products.[^22] Many consumers who would purchase a relatively dangerous product at a price that did not reflect its accident costs may, instead, decide to purchase less expensive and safer products. In this manner, damage awards and the costs of liability insurance also act as a deterrent by creating market forces that promote greater product safety and consumer protection.[^23]

Unfortunately, in practice, the high cost of products liability litigation prevents many injured persons from prosecuting their claims and from recovering for their injuries.[^24] As a result, the total cost of producing dangerous products is not reflected in the prices paid by consumers.[^25] This

[^18]: A strict liability standard is imposed only upon persons engaged in the business of selling such products and does not extend to isolated sales between private parties. Restatement (Second) of Torts § 402A(1)(a), Comment f (1965); id. § 402B, Comment e; W. Prosser, supra note 5, § 100, at 664-65.

[^19]: Restatement (Second) of Torts § 402A, Comment c (1965). See also id. § 402B, Comments a, b; Green, Strict Liability Under Sections 402A and 402B: A Decade of Litigation, 54 Tex. L. Rev. 1185, 1200-10 (1976). The special duty imposed upon manufacturers is intended to ensure that their products safely satisfy reasonable consumer expectations, even in the absence of any express assurances having been made to the consumer. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62-64, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1962).

[^20]: Restatement (Second) of Torts § 402A, Comment r (1965). See also id. § 402B, Comments a, b.


[^22]: See Risk Distribution, supra note 21, at 500-03; Keeton, supra note 17, at 694 & n.7; Shapo, supra note 17, at 1371-75.

[^23]: See Risk Distribution, supra note 21, at 500-03; Keeton, supra note 17, at 694 & n.7; Shapo, supra note 17, at 1371-75.

[^24]: Final Report, supra note 2, ¶ 408, at 2695-96.

[^25]: See Final Report, supra note 2, ¶ 407, at 2689; Blum and Kalven, The Empty Cabinet of Dr. Calabresi—Auto Accidents and General Deterrence, 34 U. Chi. L. Rev. 239 (1967); Risk Distribution, supra note 21, at 505-07.

It has been estimated that product defects cause injuries to over 20 million consumers each year at an annual cost to society of more than $5.5 billion. S. Rep. No. 251, 94th Cong., 1st Sess. 4, reprinted in [1976] U.S. Code Cong. & Ad. News 993. 996.
failure to include accident costs in product prices results in the continued presence in the market place and continued consumer selection of more dangerous products than would be available if prices served their deterrent and risk-spreading functions. Indeed, a major federal role in the promotion of product safety was prompted by recognition of the "inadequacy of existing controls on product hazards." Although congressional attention was concerned initially with the failure of the individual claims system to achieve compensatory goals, the legislative response ultimately focused on risk-spreading and deterrent aims and the broader consequences to all consumers that follow from the endemic failings of state common law.

Because the risk-spreading and deterrent objectives are dependent upon the success of the compensatory system, any limitations on the recovery of damages by deserving claimants will affect other consumers of similar products. The failure to compensate adequately perverts public policy by allowing product sellers to develop levels of product safety independent of consumer demands. In addition, product sellers' propensity to maximize profits may often lead to decisions that conflict with society's interests in the prevention of avoidable product-related injuries. One car manufacturer reportedly decided not to make an $11-per-motor vehicle improvement—at a total model cost of $137 million—that would have prevented 180 burn deaths, 180 serious burn injuries, and 2,100 burned vehicles because it expected liability of only $49.5 million as a consequence of that product defect. Proper functioning of the compensatory system might well have led to greater exposure to liability and to voluntary preventive action by the manufacturer.

The individual claims system also suffers from the tendency to require duplication of judicial efforts and to impose added burdens on already congested court calendars. The prospect of repeated litigation is present throughout products liability law. Multiple suits concerning a single defect alleged to have injured large numbers of consumers frequently occur in defective drug litigation. Similarly, one car manufacturer's decision to market a product allegedly known to be defective and to present a risk of physical injury was reportedly reached with the expectation of more than 2,000 claims based on a single defect affecting 12.5 million products. It is against this background of substantive goals and practical limitations that the propriety of products liability class suits seeking injunctive relief should be evaluated.

26. See Final Report, supra note 2, ¶ 407, at 2689; Blum and Kalven, supra note 25, at 243, 246-49; Risk Distribution, supra note 21, at 505-07.
27. Final Report, supra note 2, ¶ 402, at 2619.
29. See notes 21-23 supra and accompanying text.
B. Products Liability Controversies as Class Actions

Rule 23 was designed primarily to promote judicial "economies of time, effort, and expense." Products liability controversies, which, as noted earlier, generate a staggering volume of litigation, would seem to be ideal candidates for the furtherance of these judicial economies. Whether a particular product presents an unreasonable risk of injury to the ultimate users or consumers of that product posits the class question in all products liability class suits. The inquiry may focus upon the product's inherent design, the manner in which it was manufactured, or the adequacy of any warnings concerning possible dangers associated with the product. Resolution of this threshold issue generally calls for difficult and complex factual findings that would be needlessly repeated in individual suits.

Products liability suits seeking damages, however, also present questions of law and fact affecting only individual class members, thereby reducing the extent of judicial economies afforded by class status. Issues concerning each class member's postpurchase conduct, proximate cause, and damages, based upon the seller's duty to inform product users of the risks of physical injury attendant to that product's use or consumption. Several commentators have described products liability law as defining a "communicative tort" based upon the seller's duty to inform product users of the risks of physical injury attendant to that product's use or consumption. Green, supra note 19, at 1188-89; Shapo, supra note 17, at 1370-88.

The concept of a defective product does not embrace products that, in the present state of human skill and knowledge, are incapable of being made safe for their intended and ordinary use. Restatement (Second) of Torts § 402A, Comment k (1965); W. Prosser, supra note 5, § 99, at 660-61. Drugs typify this category of products and are neither defective nor unreasonably dangerous provided they are properly prepared and manufactured and their ostensible usefulness and desirability justify their sale to consumers. Restatement (Second) of Torts § 402A, Comment k (1965).

Moreover, it is unclear whether sellers of products that will undergo further processing or substantial changes before reaching ultimate users or consumers will be held to a standard of strict liability. See Restatement (Second) of Torts § 402A, Caveat (2), Comment p (1965); W. Prosser, supra note 5, § 99, at 660.

Defenses to products liability claims are limited. The defendant may introduce evidence tending to prove a plaintiff's abnormal use of the product or his voluntary assumption of a known risk. Restatement (Second) of Torts § 402A, Comment n (1965); W. Prosser, supra note 5, § 102, at 668-71; Annot., 4 A.L.R.3d 501 (1965). The seller may, however, be held liable for injuries resulting from reasonably foreseeable misuses of his product. W. Prosser, supra note 5, § 102, at 669-70. Because the seller's liability is not based upon his negligence in failing to discover or protect against the risk of injury associated with the use or consumption of his product, like conduct on the part of a user or consumer of that product does not always bar liability.
which must be resolved in all actions for damages, are not capable of uniform determination. Yet, these issues are not present in actions primarily seeking equitable relief such as an injunction. Rather, in equitable actions, the right of the class to the requested relief turns only upon the nature of the alleged defect, which remains constant as to each class member. These products liability controversies are, therefore, often particularly appropriate for the furtherance of the judicial economies intended by the drafters of rule 23.

Rule 23 also was designed to promote greater fairness in the adjudication of claims brought by similarly situated claimants. To the extent that "the interests of absentees, who may be affected by the litigation regardless of its class nature, are given representation in the litigative process," class action procedures promote judicial fairness. Indeed, the ability of products liability plaintiffs to pursue their claims individually is affected by the prosecution of other claims regarding the same alleged defect by the doctrine of stare decisis, since the holding in each decision will affect all controversies involving similar alleged defects. Class actions, on the other hand, would provide the court

Alternatively, the defendant may argue that, because of the nature of the particular product, see note 36 supra, strict liability should not obtain.

Finally, it should also be noted that product-related injuries to persons other than the users or consumers of those products may not be governed by the same legal standards. See Restatement (Second) of Torts § 402A, Caveat (1), Comment o (1965); id. § 402B, Caveat (2), Comment i; W. Prosser, supra note 5, at 662-63; Annot., 33 A.L.R.3d 415 (1970).

39. A product seller violates his duty to the consuming public merely by placing a defective product in the stream of trade. Although violation of this duty may lead to the imposition of liability for product-related injuries, plaintiffs must first prove that their injuries were causally related to this violation of duty in order to recover damages from the seller-defendant. This distinction between the issues of duty and causation is of central significance in passing upon the propriety of class treatment for products liability suits. Although proof of defective condition is tantamount to proof of the defendant's violation of duty as to all members of a potential class, defined as users and consumers of that defective product, and thus resolves the class question, proof of causation as to each claimant presents an entirely different obstacle to class litigation. See notes 59-70 infra and accompanying text; cf. Green, supra note 19, at 1199-1208 (generally distinguishing the issues of duty and causation in products liability claims). Evidence showing that like products sold by the same defendants caused similar injuries to other consumers is, however, highly probative of the causation issue and tends to establish the existence of the product defect complained of. See W. Prosser, supra note 5, § 103, at 673.

40. The damages issue raises potential jurisdictional obstacles to the use of class actions by products liability plaintiffs, see notes 67-75 infra and accompanying text, as well as significant practical arguments against class certification under Fed. R. Civ. P. 23(b)(3). See notes 59-66 infra and accompanying text.

41. See notes 59-66 infra and accompanying text.

42. See notes 71-75, 129 infra and accompanying text.


44. Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1353 (1976) [hereinafter cited as Developments].

45. Similar alleged defects in products manufactured by separate defendants are frequently encountered in reported decisions. Compare Fortunato v. Ford Motor Co., 464 F.2d 962 (2d Cir.), cert. denied, 409 U.S. 1038 (1972) with Badorek v. General Motors Corp., 11 Cal. App. 3d...
with an opportunity to reach a single adjudication concerning a claim of product defectiveness that is binding upon all members of the consumer class. At the same time, the court's supervision of the plaintiff's legal representation ensures that the interests of each class member will be fairly and adequately protected.

Moreover, in any products liability claim the judiciary is called upon to do substantially more than adjust the legal relations between the protagonists. Decisions concerning liability and damage awards will have significant effects upon achieving the objectives of risk spreading and deterrence. Class actions will put before the courts the interests of absentees, thereby enabling the courts to see the "full implications" of their decisions, and to determine what results "would best serve the policies underlying" products liability law. The judiciary will, therefore, be better informed to make judgments that require it to weigh society's interest in product safety against the expense and inconvenience that product recall or repair may impose upon the manufacturer.

Class actions also promote the realization of the substantive goals underlying products liability law by facilitating maximum claims prosecution. Class actions reduce per plaintiff legal costs since attorney fees are determined under judicial supervision on the basis of the benefits provided to all class members. By lowering the high cost of bringing a lawsuit, a major failing of the individual claims system, class actions would "open [the] courts to claims not ordinarily litigated," thereby allowing the judiciary "to enforce policies underlying causes of action in circumstances where those policies might not otherwise be effectuated."

Finally, class actions provide specific procedural advantages for those involved in products liability actions. With regard to injured consumers, in addition to reducing the per plaintiff legal costs and increasing the plaintiffs' litigation posture by injecting the absentees' interests into the controversy, the filing of the complaint tolls the statute of limitations for the benefit of the entire class, even when certification of the suit as a class action is subsequently denied. Moreover, the named representative satisfies the personal


46. See 7A C. Wright & A. Miller, supra note 43, §§ 1793-1797. See also Developments, supra note 44, at 1523-76; notes 137-40 infra and accompanying text.

47. See notes 17-23 supra and accompanying text.


49. See notes 28-30 supra and accompanying text.


51. See notes 24-30 supra and accompanying text.

52. Developments, supra note 44, at 1353.

53. Id.

54. See notes 50 supra and accompanying text.


At the same time, defendants also benefit from class action procedures. The potential economies to be gained from avoiding multiple suits concerning a single alleged defect may be enormous. The defendant is given an opportunity to settle with the entire class after making a candid evaluation of exposure to liability. The defendant is thus able to obtain a unitary disposition of the controversy that is binding on all class members and, at the same time, is consistent with the substantive policies underlying both products liability law and class action procedures.

C. The Role of Injunctive Relief

1. Products Liability Class Actions Seeking Damages

Procedural obstacles to certification of products liability suits seeking damages require that class treatment be limited to injunctive actions. Certification of suits for damages as class actions under rule 23(b)(3) requires that the common questions of law or fact which must be present in all class suits "predominate over any questions affecting only individual members" of the class. Although common questions of law and fact do exist in all products liability suits, the presence of significant issues concerning postpurchase conduct, proximate cause, and the extent of injury would appear to disqualify products liability damage suits as class action candidates. Indeed,

60. See notes 33-42 supra and accompanying text.
61. Each claimant's entitlement to damages will depend upon individual proofs. An allegedly defective product will often have been distributed in the stream of trade for a substantial period of time before the risk of injury is discovered and a class suit is filed. The number of absentee class members could be extremely large, and each plaintiff would be required to prove both that the alleged defect was the proximate cause of his injury as well as the extent of his damages. It was this prospect that led the drafters of rule 23 to observe that "[i]n these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." Fed. R. Civ. P. 23, Advisory Comm. Note, 39 F.R.D. 98, 103 (1966). Although in such cases the court would be free under rule 23(c)(4)(B) to subdivide the class in order to create uniformity among class members, the necessity of such action would be highly relevant in determining the superiority of class treatment over the other available means for adjudication of all claims. See note 64 infra and accompanying text.

Rule 23(b)(3) has been described as the most controversial subdivision of the federal class action statute and the subdivision with the most uncertain scope of application. 7A C. Wright & A. Miller, supra note 43, § 1783, at 115. More often than not courts have declined to certify suits for damages on behalf of mass tort victims as class actions under the subdivision. See cases cited note 62 infra.

Moreover, when jurisdiction for such claims is based upon diversity, the federal courts would be required to apply the substantive laws of the various states in which the class members may reside, Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and the conflict of law rules of the state in which the particular court is situated. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). Thus, there exists the possibility of significant differences among the legal criteria to be applied to the claims of the various plaintiffs as well as to the legal defenses to those claims. Differing types of comparative negligence statutes or common-law rules might require only mitigation of one claimant's recovery and denial of recovery by another plaintiff. Although the substantive law of one class member's state of residence may be given controlling effect by one district court, that
these drawbacks have been dispositive in several class actions brought to recover damages arising out of various mass accidents, such as airplane crashes, in which the issues of postpurchase conduct and proximate cause do not vary from plaintiff to plaintiff. This same reasoning has been relied upon to deny class action status in several products liability suits. Related to the failure of such suits for damages to satisfy the “predomination” requirement is the likely finding that class status simply is not a “superior” method for resolution of such controversies.

However, neither the “predomination” nor the “superiority” requirement applies to the certification of actions primarily seeking injunctive relief as class actions. Injunctive products liability claims may be certified as representative suits under entirely different class action categories, rules 23(b)(1) and (2), thereby obviating any need of satisfying the foregoing rule 23(b)(3) requirements. Consequently, a major stumbling block to class status is not present in equitable products liability actions.
Jurisdictional obstacles to the certification of damage suits as class actions in the federal system also act to limit class treatment to equitable products liability suits. In Snyder v. Harris, the Supreme Court held that the damages of individual class members cannot be aggregated in order to satisfy the amount in controversy requirement in diversity cases, at least when each claimant's right to recover is separate and distinct from the rights of other class members. In Zahn v. International Paper Co., the Court later held that each individual class member must satisfy the amount in controversy prerequisite and that any plaintiff, named or unnamed, who failed to do so must be dismissed from the action and could not avoid the amount in controversy requirement under concepts of ancillary jurisdiction. Consequently, a federal forum is available only to those class action damage suits in which the members already have suffered relatively serious injuries.

Although the amount in controversy prerequisite must also be satisfied in injunctive products liability suits, it would appear that this requirement is more readily satisfied in such cases. The amount in controversy in injunctive actions generally is determined with respect to "the value of the right involved." Thus, in products liability suits, the amount in controversy is the value of the right of each member of the class to protection against the risk of physical injury associated with the allegedly defective product. The cost of supra and accompanying text, it is not possible to certify products liability damage actions under rule 23(b)(2) and it is difficult to certify such actions under 23(b)(1). Rule 23(b)(2) provides for class status in situations where the conduct of the party opposing the class makes injunctive or declaratory relief an appropriate remedy. It is obvious, therefore, that damage actions can not obtain class status under this subdivision. Rule 23(b)(1) permits class actions when separate suits might impose varying or incompatible duties upon the party opposing the class, or would in some way seriously affect the rights of persons not represented in the suits. Rule 23(b)(1) has been interpreted in a manner which makes certification of products liability damage actions unlikely. See notes 163-64, 172 infra and accompanying text. Thus injunctive products liability suits, which may be certified under rule 23(b)(1) and 23(b)(2), see pts. II(B), (C) infra, offer consumers of dangerous products the best opportunity for obtaining class action certification.

68. Id. at 335.
70. "[O]ne plaintiff may not ride in on another's coattails." Id. at 301 (quoting Zahn v. International Paper Co., 469 F.2d 1033, 1035 (2d Cir. 1972)). It is clear, therefore, that the nature and extent of the damages or other relief sought by products liability plaintiffs will often be dispositive of their ability to employ rule 23. When the plaintiffs seek only damages and rest jurisdiction on diversity of citizenship, each class member's claim must exceed $10,000. Zahn would, of course, be irrelevant when all plaintiffs have sufficiently large claims. But, the very fact of such large claims suggests that each claimant would desire to pursue his suit individually which would, under rule 23(b)(3)(A), weigh against class certification. See notes 64-66 supra and accompanying text.
injuries already sustained is not, by itself, dispositive of the jurisdictional question. Consequently, in City of Chicago v. General Motors Corp., the court held that "plaintiff's right not to be harmed by dangerous motor vehicle emissions and defendants' converse right to unfettered manufacturing are both in excess of [the jurisdictional] amount."

In addition, it should be noted that the amount of damages suffered by those who one car manufacturer anticipated would be injured or killed by its product would satisfy the jurisdiction requirement. The manufacturer estimated that liability for each injury would be approximately $67,000, and liability for each death would be approximately $200,000. Therefore, it is reasonable to assume that injunctive products liability class suits will often meet the monetary requirement for diversity jurisdiction.

2. Injunctive Relief as a Substantive Remedy

The few products liability class suits seeking injunctive relief which have been brought were decided on narrow procedural grounds, and leave open the question of whether, as a matter of substantive law, equitable relief is ever appropriate in such tort cases. Although injunctive relief has historically been restricted to the protection of only property rights, it is now well established that equitable protection of personal rights by injunction is available upon the same conditions as those regarding the protection of property rights. This recent expansion of the role of equitable relief has been attributed in large part "to the attractiveness of so flexible a remedy in a modern society with expanding regulation of complex economic and social affairs." It is submitted that, notwithstanding the lack of any definitive precedent concerning the availability of injunctive relief to products liability claimants, regulation of the relationship between consumers and manufacturers of defective products is frequently an appropriate controversy for equity's preventive intervention.

Perhaps the most useful analogy to products liability actions is the power of equity to enjoin a nuisance. The defendant is held to a standard of strict

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74. Id. at 288.
75. Dowie, supra note 30, at 23-25. Additional support for the position that consumers of defective products typically will, if not protected against the risk of injury presented by those products, suffer actual damages sufficient to satisfy the jurisdictional amount can be found in the voluminous case law concerning drug and automobile product defects. See, e.g., Fortunato v. Ford Motor Co., 464 F.2d 962 (2d Cir.) ($400,000), cert. denied, 409 U.S. 1038 (1972); Schenebeck v. Sterling Drug, Inc., 423 F.2d 919 (8th Cir. 1970) ($50,000); Kershaw v. Sterling Drug, Inc., 415 F.2d 1009 (5th Cir. 1969) ($150,000); Stevens v. Parke, Davis & Co., 24 Cal. App. 3d 208, 101 Cal. Rptr. 64 (1972), aff'd, 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973) (damages reduced from $400,000 to $60,000).
76. See notes 141-50 infra and accompanying text.
77. Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 996 (1965) [hereinafter cited as Injunctions].
79. Injunctions, supra note 77, at 996.
liability in tort in both types of action. Moreover, although the salient feature of a private nuisance is interference with the use and enjoyment of land, "many interferences with personal comfort... which at first glance would appear to be wrongs purely personal to the landowner... are treated as nuisances because they interfere with that right to the undisturbed enjoyment of the premises." Consequently, the interests protected in nuisance and products liability actions often are quite similar. For example, an injunction issued over a century ago against the operation of a rifle range until it was made safe for use without endangering the lives of persons occupying the adjoining property acted ultimately to safeguard the plaintiffs' personal and physical well-being. Indeed, the interests protected in that nuisance cause of action do not appear to be distinguishable in any meaningful sense from the gravamen of a products liability class suit brought to enjoin the sale of motor vehicles alleged to present a risk of injury from air pollution.

a. The Availability of Equitable Relief

There exists "no general formula" governing the availability of equitable relief. Several principles limiting the issuance of preventive injunctions, however, are clearly recognizable and would thus establish the general parameters of equitable relief in products liability controversies. Initially, it must be shown that the mere recovery of damages at law will not be an adequate remedy and that the plaintiff will, therefore, suffer irreparable harm in the absence of the requested relief. Relevant factors in determining whether alternative remedies are inadequate include the potential need for a multiplicity of damage actions, the seriousness of the potential harm, the uniqueness of the interests protected, and the financial inability of the defendant to respond in damages.

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80. Compare Restatement (Second) of Torts § 402A, Comment c (1965) with Biechele v. Norfolk & Western Ry. Co., 309 F. Supp. 354, 358 (N.D. Ohio 1969). In Biechele, the court stated: "The defendant makes much point in argument that it is and has been doing everything possible to prevent the difficulty, and was not negligent.... [T]his argument may be answered by reference to an old case, citation unknown, dealing with the action of a man whose house was being shaken to pieces by blasting in a neighbor's quarry. The court held that it was no comfort to the plaintiff to know that his house was being demolished by the defendant in the most careful manner possible." Id. (citation omitted).

It would likewise be no comfort to products liability plaintiffs to know that they are being subjected to a risk of physical injury without negligence on the part of the defendant. Furthermore, in both injunctive products liability and nuisance class actions, the issue of the defendant's violation of duty to all plaintiffs is properly subject to unitary adjudication and does not depend upon the conduct of individual claimants. See notes 35-44 supra and accompanying text.

81. Dobbs, supra note 78, § 5.3, at 332.
82. W. Prosser, supra note 5, § 89, at 591 (footnote omitted). See also D. Dobbs, supra note 78, §§ 2.11, 5.3, at 113, 332 n.5.
83. See McKillopp v. Taylor, 25 N.J. Eq. 139 (Ch. Ct. 1874).
85. Dobbs, supra note 78, § 2.5, at 57.
86. See generally O. Fiss, Injunctions 9 (1972).
87. Dobbs, supra note 78, § 2.5, at 57.
With respect to products liability controversies, these factors would often appear to argue in favor of the propriety of equitable relief. The seriousness of the potential harm and the financial inability of the defendant to respond in damages, of course, present factual issues for case-by-case adjudication. Yet, an injunction directed against harmful conduct of a continuing nature, such as the risk of injury created by a product defect, obviates the need for the multiple damage actions\(^8\) often present in products liability situations,\(^9\) thereby conserving judicial resources and avoiding unnecessary burdens for the plaintiff.\(^{10}\)

The nuisance analogy noted above lends further support for the propriety of injunctions in products liability suits. The difficulty of ascertaining compensatory damages is frequently a factor favoring equitable relief against private nuisances.\(^9\) Similarly, the assessment of money damages for personal injuries resulting from defective products is highly speculative in nature.\(^9\) Merely awarding compensatory damages manifestly fails to do justice whenever such personal injuries are likely to be substantial and are preventable.\(^9\)

Furthermore, injunctions are a common remedy in nuisance actions because every tract of land is regarded as "unique" and damages, therefore, are not considered adequate when the land's usefulness is seriously impaired.\(^9\) Yet, human life and safety are no less important than property. Surely the interests protected by products liability law are, at the very least, as "unique" as those protected by nuisance actions.\(^9\)

Finally, it should also be noted that the issue of prematurity—whether the threat of harm is sufficiently ripe to make the grant of preventive relief appropriate—which often arises in nuisance actions is less problematic in products liability suits.\(^9\) In nuisance actions, preventive relief will not be granted to a plaintiff who has suffered no actual damages unless he establishes that the threatened harm is imminent, substantial, and otherwise unavoidable.\(^7\) In products liability cases, on the other hand, typically the representative plaintiff or absentee class members have already suffered substantial personal injuries providing strong evidence that other consumers of the same defective product are likely to sustain similar injuries in the absence of preventive relief.

\(^{88}\) Injunctions, supra note 77, at 1001.

\(^{89}\) See e.g., Rosenfeld v. A.H. Robins Co., 63 A.D.2d 11, 13, 407 N.Y.S.2d 196, 197 (1978) (670 cases involving the Dalkon Shield (IUD)).

\(^{90}\) Id. at 1002-04.

\(^{91}\) D. Dobbs, supra note 78, § 2.5, at 58 (quoting Derwell Co. v. Apic, Inc., 278 A.2d 338, 343 (Del. Ch. 1971)).

\(^{92}\) De Funiak, Equitable Protection of Personal or Individual Rights, 36 Ky. L.J. 7, 11 (1947).

\(^{93}\) D. Dobbs, supra note 78, § 2.5, at 59.

\(^{94}\) Id. at § 5.7, at 362.

\(^{95}\) Typically, the named plaintiff has already sustained personal injury from the risk of harm complained of. See notes 99-101 infra and accompanying text.

b. The Scope of Equitable Relief

Once it has been determined that equitable remedies are proper, the court can order any affirmative action it deems necessary to remove or render harmless the source of the threatened injury. The scope of the appropriate relief in products liability cases, therefore, depends upon the risk of injury associated with the particular product defect.

Thus, injunctive products liability actions have been brought in federal courts for a variety of remedies. One injured consumer sought, on behalf of herself and other similarly situated plaintiffs, to enjoin the manufacture and sale of certain color television sets, dangerously prone to implosion and resulting fire, as well as certain mobile homes equipped with those defective televisions.

Another plaintiff sued, as a private attorney general, for the creation of a fund to be used on behalf of the class plaintiffs for: (1) conducting research into the causes, cures and prevention of the development of vaginal cancer and other conditions in the female children of mothers who, during the term of their pregnancies, took certain prescription drugs; (2) alerting parents and their female offspring of the risks of developing vaginal cancer caused by those drugs; and (3) paying the costs of routine preventive examinations of all identified female offspring among the class plaintiffs in order to detect the development of these injuries.

Moreover, the maintenance of class actions primarily seeking injunctive relief does not prevent courts from granting damages or other monetary relief to the

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98. De Funiak, Requisites For Equitable Protection Against Torts, 37 Ky. L.J. 29, 29-30 (1948).
100. See Class Action Complaint, Rheingold v. E.R. Squibb & Sons, Inc., No. 3240-74 (S.D.N.Y. Oct. 14, 1975), reprinted in Note, The Products Liability Class Suit: Preventive Relief for the Consumer, 27 S.C.L. Rev. 229, 255 app. (1975) [hereinafter cited as Class Action Complaint with page references to 27 S.C.L. Rev. 229]; Developments, supra note 44, at 1374. “Implicit in the substantive theory of the class suit is a notion that society’s interests are served when public regulatory policy is enforced by private lawsuits. And, indeed, the image of the class suit as a manifestation of a private attorney general theory of litigation is corroborated by the overwhelmingly public law basis of the substantive claims litigated in federal class actions.” Id. at 1373. (footnotes omitted).
101. See Class Action Complaint, supra note 100, at 255 app. In another suit brought in federal court, a municipality sued, on behalf of all its residents, to enjoin the sale of certain motor vehicles in order to prevent a continuing risk of injury from air pollution. See City of Chicago v. General Motors Corp., 332 F. Supp. 285, 287 (N.D. Ill. 1971), aff'd, 467 F.2d 1262 (7th Cir. 1972).

Class actions seeking injunctive relief also have been brought in state forums under class action statutes modeled after the federal rule. One such class action sought the recall, inspection and, when necessary, the replacement of various disc wheels sold as optional equipment in trucks that allegedly contained a defect that could cause them to fail, even if loaded within reasonable limits and maintained with due care, and thereby injure truck passengers and others. See Anthony v. General Motors Corp., 33 Cal. App. 3d 699, 109 Cal. Rptr. 254 (1973). Another suit sought an injunction requiring the inspection of all automobiles containing allegedly defective heaters
class members in the same proceeding.\textsuperscript{102} As a result of the role played by compensation of individual claimants in furthering the objectives of risk spreading and deterrence,\textsuperscript{103} this relief acts to reinforce the efficacy of the preventive remedy, and is well within the equitable jurisdiction of the court.\textsuperscript{104} This power has been liberally exercised in favor of injured class members in injunctive class suits dealing with employment, welfare, securities and other controversies.\textsuperscript{105} One commentator has urged that "[m]ass restitution recoveries by official agencies are . . . persuasive authority for the liberal allowance of ancillary relief for class members in class actions for primarily . . . injunctive relief instituted by 'private attorneys general.' "\textsuperscript{106}

Finally, one may question why, even assuming the appropriateness of injunctive class products liability suits, an injured plaintiff would choose such an alternative to the traditional damage action. It is submitted that the enhanced litigation posture following from class action status,\textsuperscript{107} and the availability of ancillary monetary remedies in actions seeking injunctive relief would ensure an ample source of potential litigants. Although compensatory remedies are generally thought to be the primary focus of products liability litigation, oftentimes only equitable remedies can afford the most adequate relief.\textsuperscript{108} This is true not only in those cases in which the individual consumers thankfully have not yet suffered any actual physical injuries,\textsuperscript{109} but also in those cases in which some of the absentee class members have suffered only relatively minor physical injuries not sufficient to justify the enormous litigation expenses required to adjudicate their claims for damages.\textsuperscript{110} The interests of these absentee class members may, therefore, be advanced by class representatives with substantial monetary claims, who in addition to furthering the interest of class members, may also recover for their own monetary claims.

\section*{II. Federal Rules Analysis}

In order to maintain any suit as a class action under rule 23 a plaintiff must satisfy the four prerequisites contained in rule 23(a)\textsuperscript{111} and also must qualify the suit under one of the categories of class actions contained in rule 23(b). As noted above, products liability suits primarily seeking damages would appear to be unable to satisfy the "predomination" and "superiority" requirements for

\begin{footnotesize}
\begin{itemize}
\item[102.] See 1 H. Newberg, \textit{supra} note 7, § 1145b, at 242.
\item[103.] See notes 17-30 supra and accompanying text.
\item[104.] See 1 H. Newberg, \textit{supra} note 7, § 1145b, at 243-44.
\item[105.] \textit{Id.} §§ 1145, 1145c, at 240, 245-46.
\item[106.] \textit{Id.} § 1145c, at 246 (footnote omitted).
\item[107.] See notes 54-57 supra and accompanying text
\item[108.] See notes 85-94 supra and accompanying text
\item[109.] See notes 99-101 supra and accompanying text
\item[110.] See notes 24-30 supra and accompanying text
\item[111.] Fed. R. Civ. P. 23(a) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."
\end{itemize}
\end{footnotesize}
certification under rule 23(b)(3). Accordingly, the discussion that follows will be limited to an examination of the ability of injunctive products liability suits to satisfy the prerequisites of rule 23(a) and to qualify under the class action categories contained in rule 23(b)(1) and 23(b)(2).

A. Rule 23(a)—Prerequisites of All Class Actions

1. Numerosity and Joinder—Rule 23(a)(1)

The initial prerequisite to the maintenance of any suit as a federal class action is that the class be so numerous that joinder of all members is impracticable. Although numerosity of the prospective class is perhaps of primary importance, no inviolate criteria have been established, and other factors may be significant to this determination. Thus, the geographic diversity among class members is often considered to determine the practicability of joinder. Additionally, the financial inability of absentee class members to bring individual suits—one of the major stumbling blocks to recovery in products liability cases generally—is also highly relevant under rule 23(a)(1).

The numerosity prerequisite is easily satisfied in injunctive products liability class suits since, whenever it is alleged that the defendant's defective product presents an unreasonable risk of injury and is distributed in the stream of trade, every ultimate user of that product is a potential class member. Thus, injunctive class actions have been brought on behalf of citywide, statewide, and nationwide consumer classes. The members

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113. See pt. II(A) infra.
114. See pt. II(B) infra.
115. See pt. II(C) infra.
119. See notes 24-30, 49-53 supra and accompanying text.
120. See, e.g., Swanson v. American Consumer Indus., 415 F.2d 1326, 1333 n.9 (7th Cir. 1969). Moreover, rule 23(a)(1) does not impose upon the purported class representative the obligation to allege the exact number or the identity of all absentee class members. Carpenter v. Davis, 424 F.2d 257, 260 (5th Cir. 1970); Piva v. Xerox Corp., 70 F.R.D. 378, 385 (N.D. Cal. 1975); Tober v. Charnita, 58 F.R.D. 74, 79 (M.D. Pa. 1973); Sultan v. Bessemer-Birmingham Motel Assocs., 322 F. Supp. 86, 90-91 (S.D.N.Y. 1970). Mere speculation, however, will not suffice.
121. See notes 33-42 supra and accompanying text.
of such large consumer classes will typically be geographically diverse and unable to bring individual suits either because of financial inability or ignorance of the risk of injury, thereby making joinder of those claims highly impracticable.

2. Common Questions of Law or Fact—Rule 23(a)(2)

Under rule 23(a)(2), a suit may be maintained as a class action only if "there are questions of law or fact common to the class." Whether a particular product presents an unreasonable risk of injury to the ultimate users or consumers of that product posits the class question in all such suits. Thus, it is submitted, the commonality requirement is satisfied in all products liability class suits. Difficulties in determining issues such as causation, the extent of injuries and the adjudication of individual defenses, which typically are confronted in class suits seeking damages, are not present with respect to the issue of injunctive relief. The injunction question raises "no issues which focus on the activities or circumstances of individual class members." Although such individual questions would be present when the suit also seeks ancillary monetary relief for individual claimants, subdivision (a)(2) does not require that each question of law or fact be common to all class members. Finally, the nature and scope of the relief mandated by the risk of injury created by the specific product defect also presents a common question as to all class members.

3. Typicality of Claims or Defenses—Rule 23(a)(3)

Rule 23(a)(3) imposes a further requirement that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." This prerequisite also is satisfied in all injunctive products liability class suits since they are based upon a single alleged defect and seek identical relief as to each class member. Moreover, although individual claims for ancillary relief will include amounts for medical expenses, lost earnings, property

125. See notes 24-30 supra and accompanying text. See generally Swanson v. American Consumer Indus., 415 F.2d 1326, 1333 & n.9 (7th Cir. 1969).
126. Fed. R. Civ. P. 23(a)(2). See generally 7 C. Wright & A. Miller, supra note 43, § 1763; Developments, supra note 44, at 1454-71. Several commentators view subsection (a)(2) as "a superfluous provision, or at least partially redundant, since the existence of common questions can be viewed as an essential ingredient of a finding that the case falls within one of the three categories of class actions." 7 C. Wright & A. Miller, supra note 43, § 1763, at 609.
127. See notes 33-42 supra and accompanying text.
128. See notes 59-70 supra and accompanying text.
129. Plaintiffs' Motion, supra note 99, at 1504 app.; see id. at 1520 app.
130. See notes 103-07 supra and accompanying text.
131. See, e.g., Mosley v. General Motors Corp., 497 F.2d 1330, 1334 (8th Cir. 1974).
132. See notes 98-101 supra and accompanying text.
134. See notes 33-42, 99-101 supra and accompanying text.
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... damages, or wrongful death that will vary from claimant to claimant. Subdivision (a)(3) is satisfied so long as all such claims stem from a single event or are based on the same legal or remedial theory.

4. Adequacy of Representation—Rule 23(a)(4)

Finally, rule 23(a)(4) imposes the obligation that the representative party "fairly and adequately protect the interests of the class." Whenever class treatment fails to ensure adequately the protection of the interests of absentees who will be bound by the judgment, there is a failure of due process. Subdivision (a)(4), therefore, imposes a minimum obligation that the representative party have substantial claims, that all claims be vigorously prosecuted, and that the class representative have the financial wherewithal for protracted litigation.

Failure to satisfy subdivision (a)(4) has been the basis of several district court decisions denying class action status to injunctive products liability suits. In Weeks v. R.C.A. Corp., an action was brought by the survivor of a mobile home owner who was killed in the fire resulting from the implosion of an allegedly defective color television set manufactured and sold by one of the defendants. The plaintiff sought damages on her own behalf and on behalf of her deceased husband. Additionally, the plaintiff sought class action status for an order enjoining the defendant from continuing to manufacture or to sell other similarly defective products. The court dismissed the class complaint reasoning that, because the named plaintiff no longer owned such a television set and was no longer directly exposed to the alleged risk of injury, she therefore lacked standing to seek injunctive relief on behalf of such an amorphous class.

135. See notes 59-66 supra and accompanying text.
138. The use of class actions has been viewed by several commentators as tending to "homogenize the legal interests of the class and to simplify the definition of their legal relationships with the opposing party" by treating all class members alike. F. James & G. Hazard, Civil Procedure § 10.18, at 508 (2d ed. 1977) (citing Hazard, The Effect of the Class Action Device Upon the Substantive Law, 58 F.R.D. 307 (1973); Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance—Procedure Dilemma, 47 S. Cal. L. Rev. 842 (1974)).
139. Thus, class treatment fails to ensure adequately the protection of the interests of absentees whenever there is actual or potential conflict between their interests and the interests of the class representative. Hansberry v. Lee, 311 U.S. 32, 42 (1940).
140. "Because members of the class are bound—even though they may not be actually aware of the proceedings—by the judgment in a [R]ule 23 action . . . , the requirement of adequate representation must be stringently applied." Alameda Oil Co. v. Ideal Basic Indus., Inc., 326 F. Supp. 98, 103 (D. Colo. 1971).
142. See Plaintiffs' Motion, supra note 99, at 1501-02 app.
143. Id. at 1501-03 app.
144. Id.
The *Weeks* decision is in accord with other cases holding that a plaintiff may not represent a purported class of which that plaintiff is not a member.146 Among these cases is *Rheingold v. E. R. Squibb & Sons, Inc.*,147 an action brought by a consumer of a certain prescription drug, diethylstilbestrol (DES), taken during pregnancy to prevent miscarriage.148 Plaintiff alleged that the female children born to all consumers of that drug were exposed to the risk of developing vaginal cancer. Plaintiff sued for injunctive relief on behalf of her own daughter and all other female children similarly situated against several defendants, each of which had manufactured and sold the drug. The named plaintiff thereby sought to represent the interests of female children born to consumers of drugs that had been manufactured by one or more of the multiple defendants.149 Because some members of the class might have been exposed to the risk of injury by a defendant different from the particular manufacturer of the DES consumed by the named plaintiff, the court denied class status for lack of proper standing.150

It is submitted, however, that the *Weeks* and *Rheingold* decisions did not focus upon the question of the named party's ability to represent the class members and turned on confused interpretations of rule 23. Both courts failed to distinguish between the issues of class membership and adequacy of representation. The *Weeks* decision appears to have overemphasized the significance of the representative's failure to continue to own a defective television set.151 The representative plaintiff had suffered the loss of her spouse and her home allegedly as a result of the product defect complained of.152 She was still, albeit less directly, exposed to the risk of injury presented by the remaining defective television sets owned by other consumers. It would appear, therefore, that she was both capable and highly motivated to represent the proposed class.

The *Rheingold* decision suffers from the same error. By failing to appreciate the significance of the fact that all class members were exposed to the same risk of injury arising from the same defective product, the court manipulated the concept of class membership to deny class status, yet never reached the factors relevant to the separate inquiry prescribed by rule 23(a)(4).

Although express language of rule 23(a) requires that the named party be a member of the proposed class,153 the issue of class membership should not be


149. See *Class Action Complaint*, *supra* note 100, at 250-51 app.


151. See *Plaintiffs' Motion*, *supra* note 99, at 1501-02 app.

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The courts should employ a two-step process. They should first determine whether the named party is a member of the proposed class, and then examine his ability to represent absentee members. In attempting to resolve the second question, the courts should focus upon whether the named party has substantial claims, the financial wherewithal for a protracted litigation, and whether there exists any actual or potential conflict between the interests of the representative party and those of the class members. It is submitted that through this two-step process, adequacy of representation would be examined more thoroughly, and absentee members would receive greater protection.

The corresponding requirement in the California class action statute to that imposed by rule 23(a)(4) has been more clearly construed in the area of injunctive products liability suits. In *Anthony v. General Motors Corp.*, the plaintiffs were held to be adequate representatives of all owners of certain 1960-1965 models of the defendant's trucks equipped with allegedly defective disc wheels, notwithstanding the named plaintiffs' failure to own vehicles manufactured in each suspect model year. The court responded to the defendant's argument that the plaintiffs were not members of the class they purported to represent by observing:

> [The gravamen of plaintiffs'] case is the contention that *all* wheels of the type involved contain an inherent defect which may cause them to fail . . . . It is patent from the record before us that that issue is one which will require an elaborate and probably a protracted trial. It is exactly the sort of common issue for which class actions are designed.

By thus focusing on the inherent risk of injury in such products distributed in the stream of trade, the *Anthony* court did not attach undue significance to the fact that the named plaintiffs each owned only one model of the defendant's truck. Accordingly, plaintiffs were found to be members of the proposed class. Any question concerning the adequacy of the named plaintiffs' representation of the interests of the absentee claimants required a separate examination of the factors noted above.

Ultimately, adequacy of representation will depend upon the facts of each individual suit. Yet, it is submitted that the central concern of such inquiries is properly upon adequacy of representation as it relates to the scope of and need for the requested relief, rather than on artificial conflicts created by misconceptions concerning membership in and definitions of the classes.

**B. Actions Under Rule 23(b)(1)**

1. **Rule 23(b)(1)(A)**

An action that satisfies the four prerequisites of rule 23(a) may be certified as a class suit under rule 23(b)(1)(A) when individual actions brought by or against potential class members "would create a risk of inconsistent or varying...

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154. See notes 137-40 supra and accompanying text.
156. *Id.* at 704, 109 Cal. Rptr. at 257.
157. *Id.* at 704-05, 109 Cal. Rptr. at 257.
158. See note 154 supra and accompanying text.
adjudications...which would establish incompatible standards of conduct for the party opposing the class.\textsuperscript{159} The scope of rule 23(b)(1)(A) is the subject of some judicial controversy.

Several mass accident decisions have interpreted the rule broadly and granted certification under this subsection on the theory that, without class status, the respective defendants in those actions would be exposed to multiple individual suits and possible conflicting judgments as to liability.\textsuperscript{160} Other mass accident cases have, however, expressly repudiated such a reading of rule 23(b)(1)(A).\textsuperscript{161} Interpreting "incompatible standards of conduct"\textsuperscript{162} narrowly to refer only to "conduct required of the defendant in fulfilling judgments in separate actions,"\textsuperscript{163} these cases have held that mass accidents are not appropriate for certification under rule 23(b)(1)(A).\textsuperscript{164}

It would appear, however, that injunctive products liability suits stand on substantially different footing from other mass accident class actions and are well within the rule's intendment. One example would be a series of actions seeking to prescribe various design modifications in order to reduce or to


\textsuperscript{160} See, e.g., Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1973), aff'd mem., 507 F.2d 1278 (5th Cir. 1975); In re Gabel, 330 F. Supp. 624, 630 (C.D. Cal. 1972). In Hernandez, the district court relied upon rule 23(b)(1)(A) in certifying a class action suit brought by six passengers on behalf of all 655 passengers to recover damages sustained from exposure to contaminated food or water during their cruise aboard the defendant's ship. Plaintiffs asserted four theories of recovery: breach of contract; negligence in providing contaminated food or water; breach of implied warranty of fitness with respect to the food or water; and negligence in providing inadequate medical care. 61 F.R.D. at 558-59. Although products liability law had its historical origins in actions brought against sellers of food for human consumption, see Restatement (Second) of Torts § 402A, Comment b (1965), plaintiffs apparently did not advance any theories of strict liability.

The court, limiting the class action solely to the issue of the defendant's negligence, found that class treatment afforded a fair means of achieving a unitary adjudication and that the prosecution of separate actions by individual class members would create a risk of varying adjudications which would establish incompatible standards of conduct for the defendant, 61 F.R.D. at 560-61. "Avoidance of multiplicity of suits, and prevention of inconsistent or varying adjudications are benchmarks of a valid class action." Id. at 559. The court held that the issues of the proximate cause of each passenger's injury, the adequacy of the medical treatment available to each passenger, and the damages they each suffered were too individualized to admit of class determinations. Id. at 561.


\textsuperscript{162} Fed. R. Civ. P. 23(b)(1)(A).

\textsuperscript{163} McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083, 1086 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

\textsuperscript{164} Bentkowski v. Marfuerza Compania Maritima, S.A., 70 F.R.D. 401, 403 (E.D. Pa. 1976); Vincent v. Hughes Air West, Inc., 557 F.2d 759, 767-68 (9th Cir. 1977). "[A] judgment that defendants were liable to one plaintiff would not require action inconsistent with a judgment that they were not liable to another plaintiff. By paying the first judgment, defendants could act consistently with both judgments." McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083, 1086 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976).
eliminate the risk of injury associated with a single product defect. Indeed, specific standards were proposed by the class representative in *City of Chicago v. General Motors Corp.*, and it is not unreasonable to suppose that standards that might have been proposed in individual suits for the same relief could have varied greatly.

Moreover, the drafters suggested that this subdivision might be the appropriate class action category for suits brought to invalidate a bond issue, to abate a common nuisance, or to declare the rights and duties of riparian land owners. These actions, as well as injunctive products liability suits, all endeavor to impose various affirmative duties of conduct upon the respective defendants. The potential for incompatible standards of conduct stems from the differing obligations a court might impose upon a defendant. Thus, the fact that the defendant could be held liable for damages as to one plaintiff and not liable as to another, a situation which courts following the narrow reading of rule 23(b)(1)(A) have held not within the meaning of the rule, is not relied upon for certification in these actions.

2. Rule 23(b)(1)(B)

Class status may be permitted under rule 23(b)(1)(B) when the prosecution of separate suits by individual class members "would as a practical matter be dispositive of the interests of the other members not parties to the adjudications" or when prosecution of separate suits would "substantially impair or impede [the] ability [of the remaining claimants] to protect their interests." The drafters suggested that the first part of this subdivision would be the appropriate category for an action by policyholders against a fraternal benefit organization to bar its financial reorganization or for an action by shareholders to declare a dividend, and that the latter clause would be appropriate for an action by creditors to set aside a fraudulent conveyance by a debtor.

In a strict financial sense, the refusal to certify an injunctive products liability suit as a class action acts only to leave absentee class members seeking the same relief with "the same complexity and expense as if no prior actions had been brought," and does not alone qualify those actions for class status under either clause of rule 23(b)(1)(B). In addition, although one may argue that the prosecution of individual products liability suits may "substantially impair or impede" the ability of class members to bring their claims, it appears that certification would be improper under the latter clause of subdivision (b)(1)(B). However, the prosecution of separate suits for injunct...
tive relief by products liability claimants would, as a practical matter, be
dispositive of the interests of the remaining class members and thus argue for
certification under the initial clause of rule 23(b)(1)(B).

First, by maintaining class actions, products liability plaintiffs would be
entitled to have the court weigh the interests of the entire class as actual
parties to the suit in determining the propriety of equitable relief.\textsuperscript{173} Conversely, any award of injunctive relief to an individual products liability
plaintiff would necessarily affect other similarly situated consumers. Second,
prosecution of individual products liability suits will also create stare decisis
effects that extend to those controversies involving similar or related product
defects.\textsuperscript{174} Finally, it should be noted that remedial consequences to other
consumers of defective products are specifically contemplated by the risk-
spreading and deterrent objectives of products liability theory.\textsuperscript{175} Certification
of such suits as class actions under the initial clause of rule 23(b)(1)(B) would,
therefore, be entirely consistent with this substantive law theory.

C. Actions Under Rule 23(b)(2)

Products liability plaintiffs may also seek equitable relief on behalf of large
classes of consumers under rule 23(b)(2). Class suits may be permitted under
this subdivision when the prerequisites of rule 23(a) have been satisfied and
"the party opposing the class has acted or refused to act on grounds generally
applicable to the class, thereby making appropriate final injunctive relief or
corresponding declaratory relief with respect to the class as a whole."\textsuperscript{176} The
drafters suggested that this subsection was well suited for civil rights and
antitrust cases.\textsuperscript{177}

Although there is much overlap between the categories of class suits defined
by subdivisions (b)(1) and (2), certification under the latter is limited to those
class actions seeking primarily injunctive relief.\textsuperscript{178} Certification under sub-
division (b)(2) is determined with respect to the appropriateness of injunctive
relief based upon the defendant's past conduct, as documented by the

satisfaction of all successful claims. \textit{id.} § 1774, at 15. It does not appear that the prosecution of
individual products liability suits would have the same foreclosing effect upon unrepresented
consumers. Successful suits by individuals generally would not exhaust the funds of a particular
defendant so as to preclude others from bringing similar actions, and would create favorable stare
decisis for subsequent claimants. \textit{But cf.} Roginsky v. Richardson-Merrell, Inc., \textit{378 F.2d} 832, 839
(2d Cir. 1967) (punitive damages denied to avoid financially crippling the defendant).
\textsuperscript{173} See notes 55, 85-93 supra and accompanying text.
\textsuperscript{174} It should be noted, however, that stare decisis effects alone are not always sufficient to
\textsuperscript{175} See notes 51-30 supra and accompanying text.
F.R.D. 98, 102 (1966); 7A C. Wright & A. Miller, supra note 43, § 1775.}
private counsel have been filing (b)(2) class actions with increasing frequency in employment,
antitrust, securities, and other types of class litigation. The awards of attorneys' fees to counsel who act as 'private attorneys general' in advancing important public policy and the
willingness of the federal courts to expand the concept of injunctive relief to encompass classwide
awards of monetary relief to class members have significantly furthered the institution of
subsection (b)(2) type class." 1 H. Newberg, supra note 7, § 1145, at 240 nn. 100-110.}
\textsuperscript{178} 1 H. Newberg, supra note 7, § 1145, at 240.
PRODUCTS LIABILITY CLASS SUITS

Evidentiary record. Certification under subdivision (b)(1), on the other hand, depends upon the defendant's future obligations or the prospective rights of other claimants, matters that are much less capable of demonstrative proof. Thus, whenever equitable relief is appropriate, rule 23(b)(2) would afford greater access to class treatment of injunctive products liability suits.

Rule 23(b)(2), however, does not permit certification of a class whose members have independent tort claims arising out of the same occurrence and whose representatives assert only liability for damages. Thus, although individual compensatory recoveries may be available in products liability suits certified as class actions, under this subdivision such monetary relief cannot be the predominant type of remedy sought. Other class representatives, however, may seek to avoid the insurmountable criteria for certification of damage actions under rule 23(b)(3) by conducting such suits under rule 23(b)(2) in the form of equitable actions. Whenever a complaint presents claims for both equitable relief and compensatory damages, close scrutiny will be required to determine the plaintiff's true motivation.

On balance it would appear that rule 23(b)(2) offers the most promise for certification of products liability suits as class actions. The requirement that the party opposing the class must have failed to perform some legal duty with respect to the class as a whole will always be satisfied by the class question in all such actions—whether the defendant has breached a legal duty to the consumer class by distributing a defective and dangerous product in the stream of trade. Consequently, preventive injunctive relief for the benefit of that consumer class will often be the most "adequate" of all alternative remedies.

180. See notes 103-07 supra and accompanying text.
182. See notes 99-102 supra and accompanying text.
183. See notes 59-66 supra and accompanying text.
184. This potential difficulty may be illustrated by analogy to two factually similar nuisance suits. In Biechele v. Norfolk & Western Ry. Co., 309 F. Supp. 354 (N.D. Ohio 1969), the class plaintiffs sought both an injunction, against an alleged nuisance created by the defendant in the operation of its coal storage and shipping facilities, and compensatory relief for the individual damages arising out of those operations. Class status was determined to be appropriate upon the district court's finding, without any elaboration, that "[t]he first and principal action [was] that for injunctive relief." Id. at 355. On the other hand, in Boring v. Medusa Portland Cement Co., 63 F.R.D. 78 (M.D. Pa. 1974), involving facts quite similar to those in Biechele, certification under rule 23(b)(2) was denied upon another district court's factual finding that it was "noteworthy that the plaintiffs filed suit . . . seeking unspecified injunctive relief, yet [had] never moved for an order of court granting such relief." 63 F.R.D. at 83.
185. See notes 176 supra and accompanying text.
186. See notes 126-32 supra and accompanying text.
187. See notes 85-101 supra and accompanying text.
CONCLUSION

The imposition of a standard of strict liability is justified by the societal need to minimize product-related injuries and by the desire to distribute the economic burdens of unavoidable injuries more equitably among all consumers.\(^{188}\) Class treatment of products liability claims would appear to be entirely consistent with the realization of these social goals:

Class action procedures assist courts in giving full realization to substantive policies in two ways. First, to the extent that they open courts to claims not ordinarily litigated, class actions enable courts to enforce policies underlying causes of action in circumstances where those policies might not otherwise be effectuated. Second, to the extent that they enable courts to see the full implications of recognizing rights or remedies, class action procedures assist courts in judging precisely what outcomes of litigation would best serve the policies underlying causes of action. . . . \(\text{[C]}\)ourts are more likely to see both the significance of the claims of a plaintiff and the consequences of imposing liability upon a defendant, and thus are more likely to arrive at a substantively just conclusion. . . . \(\text{[M]}\)oreover, the interests of absentees, who may be affected by the litigation regardless of its class nature, are given representation in the litigative process, and thus are more likely to be given their due.\(^{189}\)

This Comment has endeavored to explore the possible ways in which injunctive products liability suits are particularly appropriate controversies for class treatment. No categorical barriers appear to exist to certification of these suits as federal class actions. Such actions will generally satisfy the four prerequisites of rule 23(a)\(^{190}\) and, under the appropriate factual circumstances, appear to fit within either of the two categories of injunctive class actions contained in rule 23.\(^{191}\) Indeed, injunctive class suits can play a vital role in complementing the substantive theory of products liability law and, at the same time, ameliorate the principal defects in the individual claims system.

Joseph DeCarlo, Jr.

\(^{188}\) See notes 17-30 supra and accompanying text.
\(^{189}\) Developments, supra note 44, at 1353.
\(^{190}\) See notes 111-58 supra and accompanying text.
\(^{191}\) See notes 159-87 supra and accompanying text.