

conducted their operations, the expanse thereof might embrace a small state in its entirety, or a specific industrial area in a large state, or a metropolitan area straddling state lines such as the upper New Jersey-New York City—Long Island-lower Connecticut sector. By reason of the limitations imposed by the requirement of common questions of law or fact, a class action on a national scale could presumably not be instituted against all manufacturers or all utilities whose divergent processing activities emitted a host of different pollutants which in turn were productive of consequences which in varying degree endangered life. In short, to the extent that differences were discernible in the pollutants emitted and in the dangers to public health generated thereby, such disparities could not be depended upon to give rise to "common questions of law or fact."

B. Who would defend against such class action and how would notice be given?

Normally, in a class action against either utilities or manufacturers, the Government would select certain manufacturing or utility corporations as representative of their respective classes and would join such representatives as defendants by having process served upon them. The latter will respond by defending the action. As to other members of the same class sought to be bound by the outcome of such litigation due process requires that they be accorded notice of the pendency of the suit and of the decree rendered at the conclusion thereof. Suggestive of the manner in which notice may be accorded to absentee members of the class is the procedure observed in *United States v. American Optical Co.*, 97 F. Supp. 66 (1951). Therein, the United States joined as defendants 22 oculists out of a total of 2000 constituting members of the class sought to be enjoined for conspiring to violate the antitrust laws. The Government petitioned the District Court to permit the Antitrust Division of the Department of Justice to forward by registered mail, with return receipt requested, to the remaining 2000 oculists a copy of the order of the court, a copy of the complaint, a copy of the Government's petition to show cause, and a copy of the supporting affidavit but without the Government's exhibit.

Unlike the contemplated action against operators of motor vehicles, the public utilities or manufacturers doing business in a limited geographical area and comprising the class sought to be enjoined probably would not be an unwieldy group in terms of numbers. Moreover, each member of the class could be expected to possess resources adequate to enable it to retain counsel for purposes of actively intervening and participating in the conduct of the litigation. Unless such intervention would expand the number of defendants actively engaged in the prosecution of the class action to a point calculated to interfere with the efficient disposition of the litigation, the trial court, under Rule 24(b), in its discretion, is empowered to grant applications to intervene. As revised, Rule 23(c)(2) grants absentee members of a class a right to enter an appearance through counsel; but this privilege apparently is not to be equated with a right of active intervention. Under Rule 23(c)(2) an absentee member is also accorded the privilege, upon request, of being excluded from the class.

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