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# CONSUMER CLASS ACTIONS UNDER THE NEW MEXICO UNFAIR PRACTICES ACT

PAUL L. BIDERMAN\*

The United States Department of Commerce has conservatively estimated a cost of nearly sixteen billion dollars to businesses as a result of non-organized crime.<sup>1</sup> Yet Senator Philip A. Hart (D.-Mich.) has reported an even greater cost to society from wasted consumer spending. The study conducted by his Senate Antitrust and Monopoly Subcommittee revealed that in 1969 businesses had taken from consumers somewhere between 174 to 231 billion dollars that had purchased not one cent of product value.<sup>2</sup> If these figures are to be believed, in 1969 consumers lost to business no less than ten times the amount that business lost to criminals in 1971. Amid these legitimate demands, the voice of consumer advocacy is sadly muted.

Senator Hart's figures included such factors as inflated prices because of monopolistic practices and unneeded import quotas, but a substantial portion of the cost was the result of fraud, deception, and inefficiency. For example, it was estimated that eight to ten billion dollars is wasted annually on automobile repairs;<sup>3</sup> while one-half to one billion dollars is similarly lost to the home improvement industry.<sup>4</sup>

No accurate estimate of the extent of consumer fraud, deception and overpayment should be anticipated, because of the subtlety and nebulosity of the problem. Ignorance of the laws on the part of consumers renders much misconduct unrecognized, just as ignorance by businessmen brings much of the problem into existence in the first place. The point is that consumers pay a heavy price for the wrongs, intended or not, of business. Yet while business is protected, however inadequately, by a vast arsenal of weapons wielded by law enforcement and judicial agencies, there is little comparable machinery for the protection of the consumer.<sup>5</sup>

Part of the reason for this disparity in society's effort is that our national economy is founded on free enterprise, and we have long believed that certain inherent safeguards of the system will protect

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1. U.S. Dep't of Commerce, Bureau of Domestic Commerce, *The Economic Impact of Crimes Against Business*, 5 (1972).

2. Speech by Senator Philip A. Hart to New York Consumer Assembly, New York City, March 7, 1970.

3. *Id.*

4. President's Crime Commission Report, cited in the Statement by Thomas K. Gilhool to the Federal Trade Commission, *National Consumer Protection Hearings*, 306 (1968).

5. The Division of Consumer Fraud of the New Mexico Attorney General's Office has only one attorney for the entire state.

the consumer. But it has been widely observed that many of our assumptions concerning the invisible controls of the competitive system are unreliable in the context of our technologically advanced society.<sup>6</sup> The rapid development of new and complex products has exceeded the understanding of most of us, leaving us unable to judge reliably the relative quality of the goods we buy. Advertising has replaced comparative shopping as the basis for our selections, and competing manufacturers and retailers are tempted to issue inflated claims.<sup>7</sup> Concentration of production and distribution has resulted in the disappearance of the mutual bargain freely struck. In its place has appeared the form contract with its fine print—drafted by and for the creditor.<sup>8</sup> Creditor's remedies are maximized; buyer's remedies are waived.<sup>9</sup> These factors prevent the consumer from exercising the free choice he once had among products and have rendered him helpless to influence the terms and conditions of the transactions he enters into. Thus, a tool is sorely needed by which consumers can place a limit on the claims that sellers may make in inducing the public to buy and on the terms by which their transactions are to be governed.

One limited and little-used tool, the New Mexico Unfair Practices Act,<sup>10</sup> has been provided in New Mexico. This essay shall examine the breadth of this law as a consumer protection device when combined with the broad private remedial or prospective relief available through the use of class actions.

## THE NEW MEXICO UNFAIR PRACTICES LAW

### A. *Analysis of Provisions*

New Mexico's Unfair Practices Act<sup>11</sup> is modeled after § 5 of the Federal Trade Commission Act,<sup>12</sup> as enacted by the Wheeler-Lea Amendments of 1938.<sup>13</sup> Most states have adopted some sort of related legislation, but New Mexico is one of only twelve which have included a private right of action.<sup>14</sup> All of the acts provide for some

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6. D. Bazelon, *The Paper Economy* (1963).

7. J. Galbraith, *American Capitalism*, 98-102 (1956).

8. Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 *Harv. L. Rev.* 529 (1971).

9. *Id.*

10. N.M. Stat. Ann. § 49-15-1 *et. seq.* (Supp. 1971).

11. *Id.*

12. Federal Trade Commission Act § 5, 15 U.S.C. 45(1) (1914).

13. Act of Mar. 21, 1968, Pub. L. No. 75-447, § 3, 52 Stat. 111, *amending* 15 U.S.C. 45(1).

14. Lovett, *State Deceptive Trade Practice Legislation*, 46 *Tul. L. Rev.* 724 (1972).

form of enforcement by an agency of the state, usually the office of the attorney general.<sup>15</sup>

The New Mexico Act begins by defining as "unfair or deceptive trade practices" an extensive but not exclusive list of practices, most of which consist of representations which mislead or confuse buyers in some way.<sup>16</sup> The Act goes on in the same section to add a broad category of "unconscionable trade practices," defined as:<sup>17</sup>

any act or practice in connection with the sale, lease, rental or loan or in connection with the offering for sale, lease, rental or loan of any goods or services, or in the extension of credit, or in the collection of debts which to a person's detriment:

- 1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
- 2) results in a gross disparity between the value received by a person and the price paid.

The Act then goes on to declare such practices unlawful<sup>18</sup> and adopts interpretations by the Federal Trade Commission and the federal courts as its general rule of construction.<sup>19</sup> After outlawing certain specific practices,<sup>20</sup> the Act establishes remedies.<sup>21</sup> The attorney general is authorized to bring an action in the name of the state to restrain the use of any practice which is unlawful under the standards of the Act, where the attorney general has a "reasonable belief" that the practice is, was, or will be employed.<sup>22</sup> Authorization is provided for the attorney general in lieu of instituting suit, to accept written assurance of discontinuance of the practice and to arrange for the aggrieved persons to receive restitution (which, however, will bar future damage claims by the aggrieved persons if they accept it). The assurances are made public and enforceable.<sup>23</sup> The attorney general may also seek civil penalties of up to \$5,000 per violation,<sup>24</sup> and he is given fairly substantial powers to conduct civil

15. *Id.*

16. N.M. Stat. Ann. § 49-15-2 (C) (Supp. 1971).

17. N.M. Stat. Ann. § 49-15-2 (D) (Supp. 1971).

18. N.M. Stat. Ann. § 49-15-3 (Supp. 1971).

19. N.M. Stat. Ann. § 49-15-4 (Supp. 1971). The Federal Trade Commission issues numerous Trade Practice and Trade Regulation Rules defining and forbidding certain misleading and deceptive practices in a wide variety of industries. These are compiled in 16 C.F.R. § 0.735-10 to -19 and -31 to -42.

20. N.M. Stat. Ann. §§ 49-15-5 to -5.1(B) (Supp. 1971).

21. N.M. Stat. Ann. §§ 49-15-7 to -11 and -15 to -18 (Supp. 1971).

22. N.M. Stat. Ann. § 49-15-7 (Supp. 1971).

23. N.M. Stat. Ann. § 49-15-7.1 (Supp. 1971).

24. N.M. Stat. Ann. § 49-15-9 (Supp. 1971).

investigations into the records of suspected violators, even before proceedings are instituted in court.<sup>25</sup>

Two provisions of the Act are especially noteworthy.

First:

Construction.—The Unfair Practices Act neither enlarges nor diminishes the rights of parties in private litigation.<sup>26</sup>

Thus, the Act must be read as far as possible in conjunction with, and not in place of, existing substantive and procedural law.

Second, and most significant for this study, is the private remedy provided by the New Mexico Act:<sup>27</sup>

*Private remedies*—A. A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it *under the principles of equity* and on terms that the court considers reasonable. *Proof of monetary damages, loss of profits, or intent to deceive or to take unfair advantage of any person is not required.* . . . [Emphasis added]

Part B of subsection 8 awards costs to the prevailing party unless the court otherwise directs.<sup>28</sup> It further awards attorney's fees to the defendant if the plaintiff's action was known to him to be groundless, and to plaintiff if the defendant's unconscionable, unfair, or deceptive trade practice was wilful and known by defendant to be deceptive or unconscionable.<sup>29</sup> The final part of the section reiterates that the injunctive remedy is in addition to existing statutory and common law remedies.<sup>30</sup>

### *B. The Effectiveness of the Remedies*

Two significant facts emerge for the aggrieved consumer from the provisions of the Act. First, no money damages (other than costs or attorney's fees) will be obtainable in a private proceeding under the Act. Indeed, although the Act roundly outlaws certain types of practices which might not give rise to any other common law or statutory civil cause of action, it provides only an injunctive remedy for private litigants. By going through the attorney general the aggrieved consumer *might* get restitution, but this depends upon whether the violator of the Act can be pressured into settling for an assurance and

25. N.M. Stat. Ann. § 49-15-10 (Supp. 1971).

26. N.M. Stat. Ann. § 49-15-12 (Supp. 1971).

27. N.M. Stat. Ann. § 49-15-8 (Supp. 1971).

28. N.M. Stat. Ann. § 49-15-8(B) (Supp. 1971).

29. *Id.*

30. N.M. Stat. Ann. § 49-15-8(C) (Supp. 1971).

agreement to make restitution. He might prefer to take his chances on a civil penalty and place upon the attorney general the burden of showing wilfulness. Moreover, however strong the likelihood of an agreement for restitution, the entire procedure removes control of the litigation from the hands of the individual consumer and his counsel and gives it to the attorney general. The staff limitations of the attorney general's office, the priorities of the individual attorney assigned to the matter, and the office's interpretation of the public interest all become factors in whether or not restitution will result.<sup>31</sup>

The second fact that emerges from the Unfair Practices Act is more salutary for the consumer. Rules of standing and justiciability are greatly liberalized for the private remedy that does exist. Thus it is enough that a plaintiff is *likely* to be damaged.<sup>32</sup> Moreover, it is not necessary for the issuance of an injunction against a violator that the plaintiff show intent to deceive or take unfair advantage.<sup>33</sup> A businessman who is ignorant or misinformed as to the meaning of statutes he is violating may therefore be enjoined from continuing this conduct. Or, conduct which does not violate any statute may be examined by a court and enjoined as unconscionable under the standards of the Act.<sup>34</sup> The plaintiff also has a chance of getting attorney's fees, if he can carry the burden of showing what amounts to malice by the violator.<sup>35</sup>

### C. Proposed Improvements

Despite the relative ease with which one may get into court, and the consumer-oriented standard by which a practice may be declared unlawful (particularly if the "unconscionable trade practice" standard is used), the lack of a strong private remedy is a serious shortcoming of the Act. If a meaningful tool for the protection of consumers—as well as legitimate businessmen—is desired, a stronger deterrent is needed against unfair, deceptive and unconscionable trade practices. Such a deterrent must offer not only a meaningful penalty for unlawful conduct, but also an incentive for a citizen to undertake the job of litigating.<sup>36</sup>

It is submitted that the present statute should be amended to

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31. This is not meant to belittle the potential value of the attorney general's investigative, preventive, and punitive power. See, e.g., *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971). Statement of Spencer King, Consumer Protection Division, New Mexico Attorney General's Office to the Federal Trade Commission, National Consumer Protection Hearings, 261 (1968).

32. N.M. Stat. Ann. § 49-15-8(A) (Supp. 1971).

33. *Id.*

34. N.M.S.A. § 49-15-2(C) and (D) (Supp. 1971).

35. N.M. Stat. Ann. § 49-15-8(B).

36. Lovett, *Private Actions for Deceptive Trade Practices*, 23 Ad. L. Rev. 271 (1971).

allow a private litigant to recover at least the greater of either the amount of damages or the consideration or value of consideration.<sup>37</sup> Preferably, it should allow exemplary or punitive damages in the amount of three times the damage or value of consideration.<sup>38</sup> To prevent oppression (or bankruptcy) a ceiling might be imposed on recoveries.<sup>39</sup>

In the absence of such provisions, the most vigorous application possible should be made of the existing tools. The Unfair Practices Act does provide a broad definition of unlawful conduct, a generous standing requirement, a modest burden of proof and a private injunctive remedy. A discussion of the use of the class action device with this statute to aid in consumer protection will occupy the remainder of this article.

### THE POSSIBILITIES FOR CLASS RELIEF

Under Rule 23 of the New Mexico Rules of Civil Procedure,<sup>40</sup> class suits may be brought on behalf of classes of plaintiffs and against classes of defendants. Each of these types of suit will be examined with reference to the Unfair Practices Act.

#### A. Plaintiff class actions

The more common device is the suit brought on behalf of a class of plaintiffs, the typical consumer class action.<sup>41</sup> The benefits derived in suits for damages from such an action are readily apparent. Wrongs committed by a single business against one consumer are often replicated in many transactions,<sup>42</sup> yet the separate damage claims of each individual claimant might be small. As a result many people suffer wrongs that go unremedied. The consumer may be unaware of the existence of the claim, or it may be so small that individual litigation is uneconomical.<sup>43</sup> The offending party may be aware of his misconduct yet find it expedient and profitable to settle the occasional individual claim that is presented to him, while continuing in his unlawful activity as to the larger number of unknowing

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37. Cf. Mass. Ann. Laws ch. 93A, § 9 (1), (2) and (4) (Supp. 1971).

38. Cf. Haw. Rev. Laws § 480-13 (Supp. 1971).

39. Cf. Wash. Rev. Code § 19.86.090 (Supp. 1971).

40. N.M.R. Civ. P. 23 (1953).

41. E.g. *Daar v. Yellow Cap Co.*, 67 Cal.2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

42. *Bitsie v. McGee*, Civ. No. 71-540 (D. Ariz., Apr. 18, 1972) (Class action suit against Indian trader alleging standard practice of violating disclosure requirements of Truth-in-Lending Law, 15 U.S.C. § 1601 *et. seq.* (1968)).

43. Statement of Philip G. Schrag, National Office for the Rights of the Indigent; NAACP Legal Defense and Educational Fund, Inc., to the Federal Trade Commission, National Consumer Protection Hearings, at 22 (1968).

customers. The class suit overcomes these problems by making litigants of all persons with claims, whether or not they initially know it, thereby asserting their respective claims at minimal litigation cost. In addition, the large sum of money derived from a recovery on behalf of the class is distributed among the victims, not simply to a single plaintiff as punitive damages might be.<sup>44</sup>

While the impact of plaintiff class actions may in damage actions be substantial, the nature of the remedy of the Unfair Practices Act leaves little value to such a proceeding. The private remedy available to consumers by the Act is limited to injunctive relief.<sup>45</sup> Thus, while a suit brought on behalf of a class might eliminate any technical problem as to who is protected by an order enjoining an unlawful practice, it can do little on behalf of those not joined as parties, unless other remedies are available. Although a civil penalty is provided by the Act for actions brought by the attorney general,<sup>46</sup> these actions are prosecuted in the name of the state.<sup>47</sup> Hence, no class plaintiff claim could be brought for such a penalty because no private litigants bring the action.<sup>48</sup>

### B. Defendant class actions

A suit against a class of defendants is far rarer than a plaintiff class action. Yet it can be of great value in attempting to curb unconscionable or unfair practices in certain circumstances. In searching for legal tools with which to protect the consumer, the number and cost of unlawful transactions to be curtailed by the remedy should be considered along with the effectiveness of it. A defendant class action under the Unfair Practices Act is a desirable tool because it can have a considerable impact under both criteria.

The circumstances in which a defendant class action can be valuable include: (1) where an unlawful, deceptive or unconscionable trade practice is engaged in as standard practice throughout a trade; (2) where a statute followed in a trade is ruled in a test case to be unconstitutional, or implicitly repealed by another law, but continues to be followed; and, (3) where a court interprets an ambiguous statute differently from the interpretation given in the trade, and the new interpretation is ignored.

An example of the first situation is found in the practice of pawn-

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44. Lovett, *supra*, note 36.

45. N.M. Stat. Ann. § 49-15-8 (Supp. 1971).

46. N.M. Stat. Ann. § 49-15-9 (Supp. 1971).

47. N.M. Stat. Ann. § 49-15-7 (Supp. 1971).

48. The court is authorized to grant a civil penalty of up to \$5,000 per violation, which would seem to say that every victim of an unconscionable practice could earn the State \$5,000. But this is not done through a class proceeding; the State is the only party plaintiff.



brokers throughout New Mexico to ignore the disclosure requirement of the Federal Truth-in-Lending Law,<sup>49</sup> despite the applicability of that law to typical pawn transactions.<sup>50</sup> An example of the second situation might occur if a statute setting a maximum interest rate for a specific type of transaction continues to be followed in the trade despite the later enactment of a general statute setting a lower rate. The third situation could arise over any ambiguously worded enactment. In each of these categories of cases, an unconscionable trade practice could be found because of the unfair advantage the businessman enjoyed over the unknowledgeable consumer. This is particularly the case where a poor or uneducated clientele is involved, as in the case of pawn.<sup>51</sup> Other considerations in applying the Unfair Practices Act to these situations will be considered *infra*.

It should be apparent that in the circumstances described above, the impact of an injunctive suit against a class of defendants could be substantial. The injunctive remedy could extend to an entire trade in the State. Once an established practice had been declared unlawful the price of non-compliance by any member of the trade would be citation for contempt. A class remedy would eliminate the possibility of putting those who comply voluntarily at a competitive disadvantage because of the cost of their compliance. Most important, the remedy provides a quick and comprehensive response to unlawful trade practices that multiple actions at law might never achieve except for the individual litigants.

The desirability of class actions for consumers having been demonstrated, discussion will now focus on the support in law for plaintiff and defendant class actions.

## AVAILABILITY AND EXTENT OF CLASS RELIEF

### A. *Suit on behalf of a class of plaintiffs*

A class of plaintiffs would not be difficult to establish in a suit under the Unfair Practices Act for injunctive relief. Although the New Mexico statute, unlike those of several other states, was adopted without explicit provision for class proceedings, the states whose statutes do include the class action section all allow recovery of monetary damages as well. It was obviously for the purpose of permitting class recovery of damages that these provisions were in-

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49. 15 U.S.C. § 1601 *et. seq.* (Supp. 1972).

50. *Id.* at § 1602(e) and (h) and at § 1631; Board of Governors of the Federal Reserve System, Letters of Opinion of June 26, 1969, 2 CCH Pov. L. Rep. ¶ 10,193 (1969) and Sept. 18, 1969, 2 CCH Pov. L. Rep. ¶ 10,496 (1969).

51. N.M. Stat. Ann. § 50-6-20 (Supp. 1971).

served.<sup>52</sup> The absence of such a provision from the New Mexico version of the statute should not inhibit the courts of this state from applying the existing class action provision to suits under the Unfair Practices Act, so far as appropriate and allowable.<sup>53</sup>

The prerequisites of a proper class action are stated in Rule 23 of the New Mexico Rules of Civil Procedure.<sup>54</sup> Insofar as here pertinent, the rule states:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) Joint, or common, . . .

(3) Several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

In a consumer class action seeking prospective relief against an unconscionable trade practice, the class of plaintiffs will comprise all those who have engaged in a particular type of transaction, and all who are likely to do so in the future. Clearly joinder of all such persons before the court is impracticable in most cases. Moreover, those named as plaintiffs in such a suit have an identical interest with the other members of their class in prospective enforcement of advantageous laws, thus ensuring their adequate representation in the action.<sup>55</sup> And, there would not be such a diversity of interest that the plaintiffs before the court could harm the interests of the rest of the class.<sup>56</sup>

In such cases, plaintiffs and the rest of the class would share, at the very least, an interest in obtaining common relief, on common questions of law or fact affecting their several rights. Commonality sufficient to allow a class action for damages has been found where an unconscionable price was generally charged for a product,<sup>57</sup> and where common misrepresentations were regularly made by salesmen

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52. *E.g.*, Mass. Ann. Laws ch. 93A, § 9(1), (2) and (4) (Supp. 1971).

53. N.M. Stat. Ann. § 49-15-12 (Supp. 1971).

54. N.M.R. Civ. P. 23(a) (1953).

55. *McDaniel v. Board of Public Instruction*, 39 F. Supp. 638 (N.D. Fla. 1941); *National Hairdressers' and Cosmetologists' Association v. Philad.*, 41 F. Supp. 701 (D. Del. 1941); *aff'd*, 129 F.2d 1020 (3rd Cir. 1942); *cf. Weeks v. Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941). All federal cases and authorities cited hereinafter are based upon former Rule 23 of the Federal Rules of Civil Procedure, which was identical to the present rule. The federal rule was amended in 1966.

56. *Cf. Hansberry v. Lee*, 311 U.S. 32 (1940).

57. *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971).

for a defendant company.<sup>58</sup> It is submitted that a less restrictive standard of commonality should be applied where only injunctive relief against future violations is sought, for reasons which will be discussed in Part C, *infra*.

Because of the common interest among the plaintiffs, subsection (3) of Rule 23(a) is satisfied. A "spurious" class is thereby created under the usual interpretation of the class action rule.<sup>59</sup> The only practical significance in holding this a "spurious" rather than a "true" class would lie in whether joinder of unnamed plaintiffs would be automatic or would require their active intervention.<sup>60</sup> Since no money damages are available in a suit brought solely under the Unfair Practices Act, the extent of or prerequisites to participation by unnamed plaintiffs would be academic. They would be included in the suit only to confer whatever standing is needed to add the non-party defendant class members, and to define the persons toward whom injunctive relief extends if granted.

The purpose of the class action rule, in part, is to allow large numbers of claimants to assert small claims that would be burdensome for the courts and for the claimants to enforce individually.<sup>61</sup> If repeated individual damage claims had to be brought to stop an unfair or unconscionable trade practice, the rule's aims would be largely defeated. Thus, both the letter and the spirit of the Rule are satisfied as to the existence of a plaintiff class.

### *B. Suit brought against classes of defendants*

Although the class of businessmen-defendants will not be so numerous as the class of plaintiffs, a Rule 23(a) class action would be equally proper against them.<sup>62</sup> The number of businessmen within a trade is likely to be large and somewhat changeable. Ascertainment and joinder of all of them would be impracticable because of: (a) the inconspicuous nature of some of them, particularly in unlicensed occupations; (b) the large geographical scope of the suit, which is likely to encompass the entire state; and (c) the possibility of unreported transfers of interest.

A community of interest between the defendants named in the suit and the other members of their class could be established in that all would stand equally to lose if the injunction were issued. This

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58. *Vasquez v. Superior Court*, 4 Cal.3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

59. 3B J. Moore, *Federal Practice* ¶ 23.10 (2d ed. 1969).

60. *Id.*

61. *Montgomery Ward v. Langer*, 168 F.2d 182 (8th Cir. 1948).

62. See *Availability and Extent of Class Relief* Part A *supra*, for suggestions as to circumstances where a defendant class action would be desirable.

community of interest would ensure adequate representation of the class by the named defendants.<sup>63</sup>

The suit would seek to enforce a common right against the class of defendants.<sup>64</sup> The relief sought would be common, and a common question of law affecting plaintiffs' several claims would be presented.<sup>65</sup>

Suits against classes of defendants are within the explicit scope of Rule 23 and have ample precedents.<sup>66</sup> Discretion lies with the court to decide whether to allow an action to be maintained as a suit against a defendant class.<sup>67</sup> The appropriateness of having a class effect in an injunctive suit against an entire trade engaging in an unconscionable practice, the relative equities to be balanced by the court in making its determination, and considerations of judicial economy should all lead the court to rule in appropriate cases that injunctive suits may be brought against defendants and all others similarly situated as a class.

### *C. Injunctive Relief may bind the entire class of defendants.*

A class suit under the Unfair Practices Act should be intended to effect a permanent change in the unlawful manner in which a class of defendants has conducted business. In the typical situation, where defendants' actions have caused, and will continue to cause, irreparable losses to plaintiffs' class, and where many actions at law will be required to fully remedy defendants' wrongful conduct, it is essential that all members of defendants' class be individually bound by the relief granted.

#### *1. The Basis in Rule 23 for a Binding Injunction*

There is ample authority in law and in equity for the binding, class injunctive relief suggested here. The policy underlying the class action rule is the avoidance of a multiplicity of suits, and the assurance of justice for individual small claimants.<sup>68</sup> The rule's policies would be defeated unless the court were to hold its actions binding on all members of both classes.

The binding effect of an order pertaining to a Rule 23(a)(1) (so-

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63. *Tunstall v. Brotherhood of Locomotive Firemen and Engineers*, 148 F.2d 403 (4th Cir. 1945); *cf. Pacific Fire Insurance Co. v. Reiner*, 45 F. Supp. 703 (E.D. La. 1942).

64. See notes 57, 58 and accompanying text *supra*.

65. N.M.R. Civ. P. 23 (a) (1953).

66. 168 F.2d 182; 148 F.2d 403; *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853) (interpreting old rule of equity); *cf. 45 F. Supp. 703*.

67. *Kansas City, Missouri v. Williams*, 205 F.2d 47 (8th Cir.), *cert. den.* 346 U.S. 826 (1953).

68. See *Availability and Extent of Class Relief Part A supra*; See also, 125 F.2d 84.

called "true") class is uncontestable. In *Systems Federation No. 91, Railway Employees Department, American Federation of Labor v. Reed*,<sup>69</sup> Reed, a railway employee, intervened after an injunction had issued on behalf of his class of non-union employees. He sought a contempt decree against the defendant union for depriving him of seniority rights in violation of the injunction, although he had not been a party to the original suit. The court said that:

A class action was invented for situations in which the number of persons having *substantially* identical interests in the subject matter or litigation is so great that it is impracticable to join them all as parties, in accordance with the usual rules of procedure, and in which an issue is raised which is common to all of such persons. Restatement, *Judgments*, § 86.<sup>70</sup>

The court went on to hold that Reed was a member of a "true" class of persons as thus defined, that he was protected by the injunction, and that the prior decision of the court was res judicata as to him.

Defendants in a suit under the Unfair Practices Act could be members of a "true" class where "The character of the right sought to be enforced . . . against the class is . . . common."<sup>71</sup> Where the defendants have engaged in a common course of conduct in their business transactions, and the right sought to be enforced is common to them all, a true class could be found.<sup>72</sup>

Even if the court were to find that the defendant class was of the so-called "spurious" type under Rule 23(a)(3), the requested injunctive relief could nevertheless be made binding against all defendants, and in favor of all plaintiffs. The only guidance given by the United States Supreme Court on this issue is found in *Hansberry v. Lee*,<sup>73</sup> where the Court said:

Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.<sup>74</sup>

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69. 180 F.2d 991 (6th Cir. 1950).

70. 180 F.2d at 997.

71. N.M. R. Civ. P. 23 (a) (1) (1953).

72. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); See *Availability and Extent of Class Relief Part A supra*.

73. 311 U.S. 32 (1940).

74. 311 U.S. at 43.

Hence, due process of law has not been held to preclude a binding effect upon non-participating members of the plaintiff and defendant classes, even when the classes are deemed spurious.

Neither New Mexico's Rule 23 nor any decision in the New Mexico courts suggest any impropriety in binding absentee members of a spurious class. Although the majority rule in the federal courts under the pre-1966 Federal Rule 23 was that only named parties or intervenors were bound, this line of authority came under considerable attack. Commentators argued that there was no basis in law for reading the Rule that way (a proposed Rule 23(b) to the Federal Rules that would have codified this principle was rejected by the advisory committee);<sup>75</sup> that distinctions between "true" and "spurious" suits often defied logic;<sup>76</sup> and most importantly, that the old reading of Rule 23 defeated the very purpose for which class suits were devised:

It is especially hard to know what good will be accomplished by spurious suits against a class of defendants, for nobody is likely to add himself to be sued and hence only the representatives will be bound [under the challenged theory]. . . . [W]henver a class suit is proper at all, the usual principle ought to be that the class is bound by its outcome. The device was invented to avoid naming people, so why limit it frequently to named persons? Class suits are of very little use, if the unnamed members can relitigate the very questions which were decided in the class suit at considerable trouble and expense.<sup>77</sup>

See also *Grand International Brotherhood of Locomotive Engineers v. Mills*,<sup>78</sup> in which the Arizona Supreme Court, interpreting that state's equity rule for class actions, held that refusal to grant relief that is conclusive upon a proper class "practically destroys the beneficial effect of class suits."<sup>79</sup> "Spurious" classes of plaintiffs have been granted injunctive relief effective in favor of all.<sup>80</sup> Injunctive relief in favor of an entire "spurious" class has been granted

75. Editor's Note: *Class Actions—Classifications Under Rule 23 of the Federal Rules*, 2 How. L.J. 111 (1956).

76. 2 Barron and Holtzoff, *Federal Practice and Procedure*, § 562, at 262 (Rules Ed. 1961).

77. Chafee, *Some Problems in Equity*, 257-258 (1950).

78. 31 P.2d 971 (S.Ct. Ariz. 1934).

79. *Id.*, at 984.

80. *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala. 1955); *McDaniel v. Board of Public Instruction*, 39 F. Supp. 638 (N.D. Fla. 1941) (denying motion to dismiss); *Miller v. School District No. 2, Clarendon County, S.C.*, 253 F. Supp. 552 (D. S.C. 1966); *National Hairdressers and Cosmetologists Association v. Philad.*, 41 F. Supp. 701 (D. Del. 1941); *aff'd*, 129 F.2d 1020 (3d Cir. 1942).

where damages were held allowable only as to named plaintiffs.<sup>81</sup> No authority or logic should compel the court to adopt a rightfully rejected interpretation of an obsolete rule procedure.

In New Mexico, one District Court has ruled that a suit for injunctive relief against unconscionable practices may be maintained against the class of all pawnbrokers in the State, by the class of all pledgors.<sup>82</sup> The suit alleges that pawnbrokers generally failed to disclose required credit terms as required by the Truth-in-Lending Law,<sup>83</sup> and that they failed to give prior notice of resale to defaulting pledgors<sup>84</sup> or to account for surplus derived from resale of dead pawn.<sup>85</sup> The court has ordered that after notice and an opportunity to raise objections have been given to every member of defendants' class, the final relief granted in the case shall be binding upon all members of defendants' class.<sup>86</sup>

## 2. *The Basis in Equity for Injunctive Relief Binding a Defendant Class*

The Unfair Practices Act provides that courts may enjoin violations of the Act in accordance with the principles of equity.<sup>87</sup> It is established law in this state that "courts of equity will interpose to prevent a multiplicity of suits."<sup>88</sup> Only an injunction which is binding both on plaintiffs' class and against defendants' class can serve this function, where an entire trade engages in an unlawful practice.

In exercising its discretion, a court must balance the relative equities involved by weighing the damages that would result to each of the parties if equitable relief were granted.<sup>89</sup> If binding declaratory and injunctive relief should issue against the class of all businessmen within a particular trade, the worst damage that could be done to individual absentee defendants is that a superfluous injunction might issue against those who have not been engaging in the unconscionable practice. However, the damage to plaintiffs if binding relief is not imposed against the entire class of defendants is likely to be real,

81. *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184 (M.D. Tenn. 1966).

82. *Roanhorse v. Eoff*, Civil No. 14, 529 (N.M. Dist. Ct., filed Nov. 2, 1972).

83. 15 U.S.C. § 1601 *et. seq.* (Supp. 1972).

84. N.M. Stat. Ann. 50A-9-504(3) (Repl. 1962).

85. N.M. Stat. Ann. 50A-9-504(2) (Repl. 1972).

86. *Roanhorse v. Eoff*; Order signed and entered January 25, 1973.

87. N.M. Stat. Ann. § 49-15-8 (Supp. 1971).

88. *Carlsbad Irrigation District v. Ford*, 46 N.M. 335, 128 P.2d 1047 (1942); *Modern Woodmen of America v. Casados*, 15 F. Supp. 483 (D. N.M. 1936).

89. *Georgetown v. Tennessee Copper Co.*, 206 U.S. 230 (1906); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 294 N.Y.S.2d 452, 257 N.E.2d 870 (1970); Restatement (Second) of Torts § 936 ( ).

immediate and costly. Assuming that the attacked practice is standard throughout the trade, the alternative for plaintiffs' class would be to file repetitive suits against one after another of defendants' class until the entire class had been enjoined one at a time. The damage done to plaintiffs' interests as this process plodded on would be extensive and inequitable.

#### CONCLUSIONS

The Unfair Practices Act of New Mexico can be an effective consumer protection tool because it provides private litigants with a ready means of stopping a broad range of unfair conduct by businessmen. In certain types of cases, involving unconscionable or deceptive practices that span an entire trade or industry, actions brought against classes of defendants can be important adjuncts to the Act. The Legislature should amend the act to provide a private remedy of restitution and punitive damages, as a stronger deterrent to continued wrongful conduct. Until this is done, however, allowance of actions against classes of defendants will be the only private means available to ensure sweeping elimination of costly trade-wide misconduct.