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Federal Jurisdiction--Diversity of Citizenship--Jurisdictional Amount in Class Actions [,i>Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968); *Gas Service Co. v. Coburn*, 389 F.2d 831 (10th Cir. 1968)]

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FEDERAL JURISDICTION — DIVERSITY OF CITIZENSHIP — JURISDICTIONAL AMOUNT IN CLASS ACTIONS

Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968);
Gas Service Co. v. Coburn, 389 F. 2d 831 (10th Cir. 1968).

Melvin Belli recently observed that although the legislatures have a role in effecting a revolution in the civil law, "the spark was struck by the courts themselves overruling ancient doctrines incompatible with modern living conditions."[1] One such doctrine, thrust into the forefront of practical considerations by the 1966 amendments to the *Federal Rules of Civil Procedure*, has lately been considered by two federal circuit courts. The Tenth Circuit in *Gas Service Co. v. Coburn*,[2] chose to kindle the flame of reform and overrule the doctrine of *Pinel v. Pinel*,[3] which refused to permit the aggregation of several and distinct claims in order to satisfy the monetary limitation of the federal jurisdiction statute.[4] However, the Eighth Circuit[5] attempted to extinguish that flame when it reaffirmed the doctrine of *Pinel*, despite the liberal appearance of the recent amendment to rule 23,[6] and denied a class of small claimants the privilege of litigating in a federal court.

In the Eighth Circuit *Snyder v. Harris* case,[7] the plaintiff brought a class action under rule 23 against the former directors of a finance company who had allegedly caused the shareholders a total loss of $1.2 million through a breach of the former directors' fiduciary duty. Although her individual claim was for only $8,740 (an amount insufficient for federal jurisdiction), plaintiff argued that she should be permitted to represent the causes of the other shareholders in the same controversy and aggregate all the claims in order to satisfy the $10,000 jurisdictional requirement. The district court,[8] strictly construing amended rule 23, sustained the defendant's

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1 2 M. BELLI, THE LAW REVOLT 365 (1968).

2 Gas Serv. Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968).

3 240 U.S. 594 (1916). Strangely enough, the rule proscribing aggregation seems to have aroused little or no dialogue. However, an extensive analysis of the problem can be found in Blume, *Jurisdictional Amount in Representative Suits*, 15 MINN. L. REV. 501 (1931).

4 "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 . . . between —
(1) citizens of different States." 28 U.S.C. § 1332 (a) (1964).

5 Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968).

6 FED. R. CIV. P. 23.

7 390 F.2d 204 (8th Cir. 1968).

8 Snyder v. Harris, 268 F. Supp. 701 (E.D. Mo. 1967).

motion to dismiss, and the court of appeals accepted the lower court's reasoning that the *Pinel* limitation was too well established to be deposed.[9]

The procedure for class actions prior to the 1966 amendments of the *Federal Rules* does reveal an arguable justification for the *Snyder* court's steadfastness to the no-aggregation rule.[10] Old rule 23 authorized the maintenance of three separate types of class action suits: true, hybrid, and spurious.[11] The categories, distinguished conceptually by the varying relations among the class members,[12] "proved obscure and uncertain."[13] The "spurious" action — although denominated a class action and responsive to the needs of various persons to litigate together — did not have the stature of a class action. For purposes of convenience and expense,[14] interested persons who could bring an action on their own were permitted to

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[9] Unfortunately, the plaintiff will most likely be unable to maintain a class suit in a State court since the general rule among the States is that "[s]eparate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not alone create a common or general interest in those who are wronged." Society Milion Athena v. National Bank of Greece, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939). Further, the heavy expense of litigation will probably prevent the plaintiff from maintaining an individual action in the State court.

[10] Aggregation had been permitted only if the right to be enforced was jointly held by the group members, *i.e.*, a "common and undivided" right as opposed to "several and distinct" rights. But in reality, the cases involving joint rights did not involve aggregation since "the jurisdictional amount would be determined by the joint or common claim; [because] no one *has* a several claim." 3A J. MOORE, FEDERAL PRACTICE ¶ 23.13, at 3480 (2d ed. 1967). Where the rights to be enforced were several and distinct and "there [was] a common question of law or fact and common relief [was] sought," the action was regarded as "a congeries of separate actions." 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 569, at 323 (rev. ed. 1961).

[11] Former Fed. R. Civ. P. 23(a)(1)-(3), 39 F.R.D. 94 (1966).

[12] "True" referred to actions in which a joint, common, or derivative right was said to be involved. "Hybrid" referred to the adjudication of several rights relating to a specific property or fund. "Spurious" actions — often referred to as common question litigation — were said to involve several rights, a common question of law or fact, and a desire for common relief. *Id.*

[13] FED. R. CIV. P. 23, Advisory Committee's Notes, 39 F.R.D. 98 (1966).

[14] Convenience and expense is to be contrasted with necessity. The "true" action was regarded as a necessity because persons other than the named plaintiff(s) were indispensible to the litigation yet were too numerous to be brought before the court. It was an escape device. "The class action was both an escape from and an adjustment to the rule of joinder." 3A J. MOORE, *supra* note 10, ¶ 23.02, at 3411.

The "spurious" action permitted persons interested in a common question of law or fact, although not indispensible, to become parties and thereby reduce the expense of litigation. It was a permissive joinder device. Indeed, the only function served by the old rule and not served by a liberal intervention rule was circumvention of the complete diversity of citizenship requirement set forth in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Only the citizenship of the parties of record was material. *See* Montgomery Ward & Co. v. Langer, 168 F.2d 182 (8th Cir. 1948); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 703-04 & n.66 (1941).

join in another's suit against a common defendant.[15] This rule contained a fundamental deficiency in that there was no designated procedure whereby a person not joined in the action might be informed that an action concerning his rights (or liabilities) had been commenced. In addition, there was disagreement among the authorities as to the finality of a "spurious" judgment.[16]

Common question (that is, spurious) litigation brought with it a host of collateral difficulties.[17] Disinclined toward dismissal based on matters of trial convenience, the district court might take the time to resolve an array of issues pertinent only to certain members of the class. Further, who was bound by the action provided a continuing source of confusion in appeals and actions to execute judgments. Meanwhile, a person unfamiliar with the categories of relations among class members[18] might find himself barred by the statute of limitations from asserting the claim which he believed had been or was being litigated in a manner which would make him a party.[19] Most disconcerting was the likelihood that varying adjudications would result from several class members suing in different courts and not being bound by the actions of other class members.

Given these characteristics of the spurious class action, it is quite understandable that aggregation was not allowed. But the negative quality of these features was in part the reason for amending rule 23.[20] If the 1966 amendments did not significantly alter the characteristics of class actions similar to the one brought in *Snyder*, then the Eighth Circuit was clearly correct in imposing the no-aggrega-

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[15] It should be noted that, since *Snyder* and *Coburn* both involved "separate and distinct" claims, they would have been designated as "spurious" class actions under former rule 23.

[16] In his tentative draft of rule 23, Professor Moore provided that the judgment in a "true" class action would be conclusive as to the class while a "spurious" judgment would bind only parties to the proceeding. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571 (1937). The passage was rejected as an abridgment of substantive rights and therefore outside the rulemaking power of the Supreme Court. However, it was accepted by most of the courts. *See, e.g.*, Albrecht v. Bauman, 130 F.2d 452 (D.C. Cir. 1942); Central Mexico Light & Power Co. v. Munch, 116 F.2d 85 (2d Cir. 1940). Contrary to Professor Moore, the American Law Institute provided that the judgment in any class action would be res judicata as to the entire class notwithstanding the court's lack of personal jurisdiction over a nonparty. RESTATEMENT OF JUDGMENTS §§ 26, 86 (1942).

[17] *See generally* FED. R. CIV. P. 23, Advisory Committee's Note, 39 F.R.D. 98 (1966); Z. CHAFEE, SOME PROBLEMS OF EQUITY 244-58 (1950); Kalven & Rosenfield, *supra* note 14.

[18] *See* note 11 *supra* & accompanying text.

[19] Z. CHAFEE, *supra* note 17, at 265-69.

[20] *See* FED. R. CIV. P. 23, Advisory Committee's Notes, 39 F.R.D. 98 (1966).

tion rule. But adopting a more realistic approach, the Tenth Circuit in *Coburn* concluded that the amendments so changed the nature of federal class actions that doctrines applicable to old rule 23 were not necessarily applicable to the new rule.[21]

In *Gas Service Co. v. Coburn*,[22] the plaintiff was an aggrieved taxpayer who sought to aggregate his claim of $7.81 with the several and distinct claims of some 18,000 others, charging that the defendant had arbitrarily imposed upon rural residents a gasoline tax applicable to municipal residents only. Noting that the plaintiff did meet all the requirements for a new rule 23 class action,[23] the court found that the case presented an ideal class action:

> The class is numerous, a single question of law is presented common to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical.[24]

Construing the new rule to contemplate a comprehensive change in the procedural aspects of class suits, the court observed that now "[t]he basic jurisdictional question is whether aggregation under *any* circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction."[25] The court concluded that the question would be answered affirmatively if the sum of the class members' claims exceeded $10,000.

This defeat of the no-aggregation doctrine has been made possible by the elimination, in at least two noticeable ways, of the various practical difficulties encountered previous to amended rule 23. The new rule affords outsiders, that is, those persons within the class but not parties, comprehensive protection. Notice of the common question suit must be afforded all absentees;[26] and the absentee

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[21] 389 F.2d at 833-34.

[22] *Id.* at 831.

[23] FED. R. CIV. P. 23(a), (b).

[24] 389 F.2d at 833.

[25] *Id.* at 834 (emphasis by the court).

[26] Provision is made for two types of notice in common question cases — mandatory and discretionary. The court must direct "the best notice practicable under the circumstances" to class members within a reasonable time after commencement of the suit. FED. R. CIV. P. 23(c)(2). In addition, the court is encouraged to notify class members whenever it becomes appropriate during the course of an action, *e.g.*, when the representative claimant seeks to compromise his original claim. FED. R. CIV. P. 23(d)(2). On the adequacy of notice, see Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Hansberry v. Lee, 311 U.S. 32 (1940).

may, upon written request, exclude himself from the class and the effect of the judgment.[27] While an outsider is bound by an unfavorable judgment, he is also embraced by a favorable result, thus avoiding the potentially adverse effect of the statute of limitations. Furthermore, the amended rule reserves to all persons, party or nonparty, the right to enter an appearance through counsel.[28]

A second remedial aspect of the new rule is established in the broad authority given to the judge. He is encouraged to be aggressive from the time he determines that the action is amenable to the class device, through any modification, deemed necessary from time to time, of the pretrial orders, and on into the conduct of the trial itself. During the litigation the judge may take various measures to ensure adequate representation, notify nonparties of any development in the proceeding, and supervise compromises and settlements.[29]

Due to the conflict in the circuits, two separate rules on the aggregation of claims now exist. The crux of the problem can be illustrated by examining the divergent responses of the *Coburn* and *Snyder* courts to the Fifth Circuit case of *Alvarez v. Pan American Life Insurance Company*.[30] There it was determined that even under amended rule 23 aggregation of claims could not be permitted, because to do so would result in an unauthorized expansion of federal jurisdiction.[31] But in order to arrive at this conclusion it was necessary for that court to draw its reasoning from the fact that under only one of the three separate categories of class actions found in old rule 23 was aggregation permitted to confer jurisdiction.[32] Since the action before the court would not have fallen into that one category (that is, the "true" class action) aggregation would make the jurisdiction of the federal court broader than it had been before the amendment to rule 23.

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[27] FED. R. CIV. P. 23(c)(2)(A).

[28] *Id.* 23(c)(2)(C).

[29] *Id.* 23(d), (e).

[30] 375 F.2d 992 (5th Cir. 1967).

[31] The court felt compelled to arrive at this result because of two seemingly dogmatic authorities. Shortly after acquiring its rulemaking power over the federal courts, the Supreme Court declared its inability to extend or restrict the jurisdiction of the federal courts. Clark v. Paul Gray, Inc., 306 U.S. 583 (1939). Also, the *Federal Rules* themselves specify that none among them shall be construed so as to extend or limit the jurisdiction of the federal courts. FED. R. CIV. P. 82.

[32] Only in "true" class actions was aggregation permitted. *Snyder*, *Coburn*, and *Alvarez* all involved "several and distinct" claims — not the required "joint or common" claims — so that none could have been categorized as a "true" class action under former rule 23. *See* note 10 *supra*.

If this were to be a valid syllogism, it would obviously negate the power of a federal court to aggregate claims which were "separate and distinct." *Snyder* has evidenced the Eighth Circuit's acceptance of such logic by continuing to recognize the three old categories of class actions and denying aggregation.[33] In *Coburn*, the court rejected the syllogism, noting that amended rule 23 was intended to abolish those ambiguous labels, and to define class actions in a flexible and practical manner. That court concluded that it is not necessary to "expand federal jurisdiction" in order to aggregate separate and distinct claims.[34]

The *Coburn* rule seems correct. It is difficult to understand how the Eighth Circuit can justify its holding that amended rule 23 expands federal jurisdiction when nowhere in the federal jurisdiction statute[35] is any provision specifically made for class actions of *any* kind. It seems much more logical to conclude that all class actions are judicial procedural devices and that the Supreme Court of the United States was well aware of jurisdictional limitations when it promulgated amended rule 23.

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[33] The district court, subsequently affirmed by the court of appeals, stated that the law proscribing the aggregation of separate and distinct claims in a class action was substantive in nature and could thus not be changed by an amendment to a rule of procedure. For jurisdictional purposes, the "sole question . . . [should be] whether or not the demands of the plaintiff are separate and distinct from other persons in the class." Snyder v. Harris, 268 F. Supp. 701, 704 (E.D. Mo. 1967), *aff'd*, 390 F.2d 204 (8th Cir. 1968).

[34] The court noted that the broad changes made possible by the amended rule could not be realized if the old categories were perpetuated. To retain these categories "would seem to render the rule sterile . . . ." Gas Service Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968).

In reference to the old rule, the Advisory Committee commented:

> In practice the terms . . . which were used as the basis of the Rule 23 classification proved obscure and uncertain. . . . [We] find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. FED. R. CIV. P. 23, Advisory Committee's Note, 39 F.R.D. 98 (1966).

As is the case with many formalistic rules, the desire to achieve a just result occasionally placed a strain on the rule prescribing aggregation. *See* cases cited *id.*

In *Coburn* the court also recognized that the Supreme Court itself had early deemed it permissible to meet the jurisdictional amount by aggregation when the "matter in controversy" is of the required value. Gibbs v. Buck, 307 U.S. 66 (1939).

[35] 28 U.S.C. § 1332(a) (1964).