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Federal Courts--Effect of New Federal Civil Procedure Rule 23 of Aggregation of Claims

Linda L. Hupp
West Virginia University College of Law

Federal Courts—Effect of New Federal Civil Procedure Rule 23 On Aggregation of Claims.

P insureds brought a class action on behalf of themselves and some 5,000 other Cuban refugees for perseverance bonuses allegedly accuring from policies *Ps* held with the *D* company. The complaint was directed toward the assets of the company as well as other contract rights such as voting; furthermore, the complaint alleged conversion of funds by the *D* company and sought an injunction and accounting. *Ps* attempted to aggregate their claims to satisfy the $10,000.00 federal jurisdictional amount requirement. The district court refused to allow aggregation and dismissed the complaints. *Held,* affirmed. Although new Federal Civil Procedure Rule 23 applies, it does not abrogate the aggregation of claims principle established under old Rule 23. If the demands of two or more *Ps* are separate and distinct, rather than an attempt to enforce a common right or title, each claim must meet the jurisdictional requirements on its own merits. *Alvarez v. Pan American Life Insurance Company,* 375 F.2d 992 (5th Cir. 1967).

It would seem that by this ruling the court has taken a great leap backward in its recent answer to a problem which has plagued the courts since the days of the common law and old equity procedures. At common law, a joint action could only be maintained by persons with a joint interest suing upon a joint contract.[1] Prior to 1938, class actions were brought under old Equity Rule 38, by which parties before the court could protect their own rights, as well as those of the class they represented, providing their ability to protect the absent members was expressly pleaded.[2] Regardless of whether the class was plaintiff or defendant in a suit, if the claims were severable no aggregation was permitted; thus, each member's claim had to be of the requisite jurisdictional amount.[3] The joinder of parties with separate interests was considered a convenience for the court, not the parties; therefore, to allow aggregation in those cases would not only bestow upon those parties a privilege not given to other litigants, but would also be against the law.[4] In 1916 the Supreme Court expressed what came to be known as the *Pinel* doctrine in this way:[5]

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[1] Oliver v. Styles, 31 U.S. (6 Pet.) 143, 146 (1832).
[2] *Class Actions—Federal Rule 23 Amended,* 31 ALBANY L. REV. 127, 128 (1967).
[3] Walter v. North Eastern Railroad Co., 147 U.S. 370, 374 (1893).
[4] Seaver v. Bigelows, 72 U.S. (5 Wall.) 208, 210 (1866).
[5] Pinel v. Pinel, 240 U.S. 594, 596 (1916).

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

A 1931 article deemed it "fairly safe" to say that interests were considered common and undivided when 1) the joinder of plaintiffs was required and 2) no occasion had arisen for separate contests between individual plaintiffs and the defendant.[6] Although the courts' understandable confusion in interpreting these principles provided the motivation for establishing old Rule 23,[7] it will be seen that these common law legalisms were not substantially changed by adoption of the 1938 Federal Rules of Civil Procedure.

Old Rule 23 divided class actions into three categories.[8] Professor Moore, who played a large part in drafting this rule, gave a name and definition to each of the three groups in terms of "jural relations."[9] Moore also postulated the res judicata effects of each of them.[10] According to one writer, Professor Moore's "commentaries thereupon [were] accepted [by the courts] almost as if they were

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[6] Blume, *Jurisdictional Amount in Representative Suits,* 15 MINN. L. REV. 501, 518 (1931).

[7] Holt, *Proposed Rule 23: Class Actions Reclassified,* 51 VA. L. REV. 629, 630 (1965).

[8] FED. R. CIV. P. 23(a) (prior to 1966 amendment):

> 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
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> 1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
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> 2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
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> 3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

[9] Note, *Federal Class Actions: A Suggested Revision of Rule 23,* 46 COL. L. REV. 818, 821 (1946). Thus (a) (1), the "true" class action, applied when the parties were indispensable and joinder would be compulsory; (a) (2), the "hybrid," occurred when the members were conditionally necessary because of their interest in a specific property, even though the rights were several; and (a) (3), the "spurious" action, became a form of permissive joinder.

[10] *Id.* at 824. Thus, true actions were conclusive on absent members; hybrid were conclusive on the rights of all their members in the res; and spurious were conclusive only on the parties before the court.

part and parcel of the rule."[11] Aggregation was permitted only in the "true" category which required members to have a "joint" or "common" interest.[12] Thus it could be asserted, ". . .[T]he courts have uniformly agreed to one test: if the interest of the various parties is joint or common, rather than several, their interests may be aggregated."[13] It will be noted that the phrasing here parallels the "common and undivided interest" required by the 1916 *Pinel* doctrine.

Although the rule was "widely acclaimed" when promulgated, it became increasingly criticized.[14] Even before new Rule 23 was adopted, writers were suggesting possibilities of a different approach;[15] while some courts attempted to get around the rule by "torturing" the word "several" or unrealistically applying the classification of "spurious"[16] or binding parties on the basis of ancillary jurisdiction.[17]

The greeting accorded new Rule 23, which became effective July 1, 1966,[18] is sadly reminiscent of that given its predecessor—praise for the rule's apparent functional liberality by the text-writers, followed by the refusal of many courts to let it develop beyond some of the frustrating limits imposed by the old rule. Current Rule 23 completely does away with the difficult Moore trichotomy found in the old. Instead it requires all four prerequisites of its section (a) to be met as well as one of the four alternatives listed in section (b).[19] Aside from its being flexible and pragmatic, the most widely

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[11] Holt, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 630 (1965). The author added, "However, the early unanimous acceptance seems to be generally attributable to mechanical application, rather than careful analysis."

[12] Alvarez v. Pan American Life Insurance Company, 375 F.2d 992, 994 (5th Cir. 1967).

[13] Cohn, *Problems in Establishing Federal Jurisdiction Over an Unincorporated Labor Union*, 47 GEO. L. J. 491, 525 (1958).

[14] Holt, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 629 (1965); Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L. J. 1204 (1966); *Class Actions—Federal Rule 23 Amended*, 31 ALBANY L. REV. 127 (1967); *Proposed Rules of Civil Procedure*, Advisory Committee's Report, 36 F.R.D. 222 (1964).

[15] *Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 936 (1957).

[16] PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE, Advisory Committee's Note, 39 F.R.D. 69, 98 (1966).

[17] Manufacturers Casualty Insurance Company v. Coker, 219 F.2d 631, 634 (4th Cir. 1955).

[18] Supreme Court Adopting Order, 384 U.S. 1029, 1031 (1966).

[19] FED. R. CIV. P. 23 (a) and (b):

> a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all

acclaimed changes fostered by the new Rule are the elimination of the "spurious" category and the large degree of discretion entrusted to the trial courts with regard to the procedures, rights, and possibilities in class actions.[20]

The short period in which new Rule 23 has been in effect may make it unfair to criticize the reluctance of some courts to extend its flexible provisions to the area of aggregation; nevertheless, with few exceptions, the results have been disappointing. *Booth v. General Dynamics Corporation,*[21] however, did employ the tests set out in sections (a) and (b) of the new Rule to determine that aggregation by the taxpayers involved would be permitted. Referring to the distinctions of the old Rule as "irrelevant" and "tortured," the court said it must decide whether a class action was involved "by

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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.

b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

1) the prosecution of separate actions by or against individual members of the class would create a risk of A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

2) 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; or

3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; D) the difficulties likely to be encountered in the management of a class action.

[20] PROPOSED RULES OF CIVIL PROCEDURE, Advisory Committee's Note, 39 F.R.D. 69, 73 (1966); Holt, *Proposed Rule 23: Class Actions Reclassified,* 51 VA. L. REV. 629 (1965); Cohn, *The New Federal Rules of Civil Procedure,* 54 GEO. L. J. 1204 (1966); *Class Actions—Federal Rule 23 Amended,* 31 ALBANY L. REV. 127 (1967).

[21] 264 F. Supp. 465 (N.D. Ill. 1967).

these new standards, rather than under the outworn authorities cited by the present litigants."[22] At the opposite extreme is the refusal to allow aggregation in *School District of Philadelphia v. Harper & Row Publishers, Inc.*[23] While admitting that some class actions could "readily and naturally" meet the requirements of the new Rule, the court felt that in other cases ". . . a premature judgment, later found erroneous, that these standards are fully met will create endless pitfalls."[24] Mainly the court seemed to fear the possibility of a greatly enlarged workload and that a radical extension to the court's jurisdiction would result if its "invitation" to an absentee member to join the suit, became a "command" through the absentee's inaction, a process the court labeled "unprecedented."[25] Praising the "precise, yet elastic" sections of the new Rule, the California district court permitted aggregation of a suit because, "There is present herein a common nucleus of operative facts even though there may be lacking complete identity. . . ."[26] After extolling the virtues of the new Rule over the old, the court then made a direct attack on the opinion of the Pennsylvania court in the *School District of Philadelphia* case.[27]

Another recent decision has refused to allow aggregation, on the basis of the "separate" and "distinct" criteria of the *Pinel* doctrine. The court stated the new Rule did not make *Pinel* obsolete because the rule was merely a procedural device, and for it to grant the court jurisdiction, where the court had none before, would be to violate Federal Rule 82.[28] Somewhat analogous to this holding is the argument in *Alvarez* that Congress imposed a jurisdictional amount

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[22] *Id.* at 470.

[23] 267 F. Supp. 1001 (E.D. Pa. 1967).

[24] *Id.* at 1006. The court added, "It is apparent to us that every doubtful case must be carefully reviewed and measured against the standards established by Rule 23 in the searching light of experience and practicality before a proper decision can be made upon the foreseeable consequences of maintenance as a class action."

[25] *Id.*

[26] Siegel v. Chicken Delight, Inc., 36 U.S.L.W. 2125 (N.D. Cal. 1967).

[27] *Id.* This court however does not entertain any doubt as to the propriety of a rule which extends the binding substantive effect of a judgment to absent, but "described" class members as well as to "idential" class members; since qualifying provisions have been added which enable the court to take necessary protective measures such as ordering notice to be sent to members to signify whether they consider the representation fair and adequate, 23 (d) (2), or requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, 23 (d) (4).

[28] Snyder v. Harris, 268 F. Supp. 701, 704 (E.D. Mo. 1967). FED. R. CIV. P. 82 states, "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ."

requirement in 1789, yet did not grant the Supreme Court power to make procedural rules until 1934, and that by Rule 82 the Court clarified the holding that this rule-making power did not authorize the courts to expand or restrict the jurisdiction conferred by statute. From this, the court in *Alvarez* reasons that aggregation cannot be permitted in cases involving "distinct" and "separate" claims. This is so despite the fact that the new Rule nowhere mentions these terms.[29]

In rebuttal, it is submitted that: the statute speaks only of the "amount in controversy," and does not attempt the niceties of "separate" and "distinct"; that the *Pinel* doctrine, which does make this distinction, is a court-made rule; and that the allowance or disallowance of aggregation within the three classifications of old Rule 23 was merely a function of the *Pinel* doctrine.[30] In view of this, should it not then be left to the courts to determine when these arbitrary policies have ceased to be functional and have instead evolved into impediments? The answer seems clearly to be affirmative; particularly so, because these rules are made in the first place for the convenience of the courts.

Finally, in *DeLorenzo v. Federal Deposit Insurance Corporation,*[31] the court granted only a footnote to explain that prior to the new Rule, it had decided the case involved a spurious class action; then, when the new Rule became effective prior to judgment, so as to affect this case, the court said only that "it would appear that defendant's reasoning against aggregation in a spurious class action is still valid."[32]

The authorities have also had little time to comment on the effects of the new Rule on aggregation; but two, at any rate, have shown some hope for a possible extension of the doctrine. Professor Cohn states that formerly the decision on aggregation was based on the "several" or "joint" rights involved. He views the new Rule's "repudiation of these classifications" as "undermin[ing] the traditional basis for the aggregation distinction. This could possibly lead to the aggregation of the claims of members of all types of classes. . . ."[33] Professor Wright sees jurisdictional amount as the "greatest difficulty" and adds:

[29] Alvarez v. Pan American Life Insurance Company, 375 F.2d 992, 995 (5th Cir. 1967).

[30] 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Wright ed.), § 569 (Supp. 1966).

[31] 259 F. Supp. 193 (S.D. N. Y. 1966).

[32] *Id.*, footnote 5, at page 195.

[33] Cohn, *The New Federal Rules of Civil Procedure,* 54 GEO. L. J. 1204, 1221 n.73 (1966).

> It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts "fritter away their time in the trial of petty controversies." A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached.[34]

Since their inception, federal courts have dealt with the problem of when to aggregate the similar claims of several plaintiffs or defendants, in order to satisfy statutory minimum jurisdictional amount requirements. The traditional right of each person to have his day in court seems to conflict with the practical necessity of solving a mutual problem with the least amount of litigation. Through the years the courts have set up various standards by which to judge this issue, and each has subsequently been discarded as vague, confusing and unworkable. New Rule 23, however, seems to provide a liberal, more workable manner in which to consolidate cases for the greater convenience of both courts and parties. Such a flexible rule has been desperately needed for some time; yet now that it is here, many courts seem unwilling to break with traditional concepts formed under now defunct rules which were largely unworkable even in the less complicated days in which they were formulated. One can only hope that this view of the new rule as being substantially the same as the old is only a temporary setback, not a trend, and that the well-reasoned arguments of the text-writers will serve to finally, albeit belatedly, end the torturous practice of case by case fact study to determine when to aggregate.

Linda L. Hupp

Federal Courts—The Scope of Pendent Jurisdiction

A minor was injured in an automobile accident in Pennsylvania in which all parties involved were residents of Pennsylvania. For purposes of creating federal jurisdiction, a New Jersey guardian was

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[34] 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Wright ed.), § 569 (Supp. 1966). The author adds that if the "ancient learning" prevails, we shall be right back to the inherent difficulties of "joint" and "common" of "which it was a purpose of the amended rule to avoid."