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Civil Procedure--Federal Rule 23--Aggregation of Claims

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The changing nature of the communications process has made it imperative that the law show concern for the public interest in effective utilization of media for the expression of diverse points of view. Confrontation of ideas, a topic of eloquent affection in contemporary decisions, demands some recognition of a right to be heard as a constitutional principle.\textsuperscript{49}

C. Grey Pash, Jr.

C\textsc{ivil} \textsc{procedure} — \textsc{federal} \textsc{rule} 23 — \textsc{aggregation} of \textsc{claims}. — Plaintiff brought a class action in Missouri federal court alleging jurisdiction based on diversity of citizenship.\textsuperscript{1} Since plaintiff's individual claim was less than $10,000, defendant moved dismissal for failure to show jurisdiction, contending that aggregation of individual claims to reach the jurisdictional amount was improper in actions under Rule 23.\textsuperscript{2} The Eighth Circuit Court of Appeals affirmed the district court in holding aggregation improper.\textsuperscript{3} Soon thereafter, the Tenth Circuit reached the opposite result under similar circumstances and allowed aggregation of claims to invoke diversity jurisdiction.\textsuperscript{4} Because of the conflict between the position of the Fifth\textsuperscript{5} and Eighth Circuits on one hand and the Tenth Circuit on the other, the Supreme Court granted certiorari.\textsuperscript{6} \textit{Held}: Aggregation was improper. Under Federal Rule 23, separate and distinct claims may not be added together to satisfy the amount in controversy requirement of 28 U.S.C. § 1332. \textsc{snyder v. harris}, 394 U.S. 332 (1969).

\textsuperscript{49} \textit{Id.} at 1678.

\textsuperscript{1} The substance of her complaint was that certain directors of the Missouri Fidelity Union Trust Life Insurance Company had sold their respective shares at inflated prices, that the money exceeding the fair market value represented payment to those men to obtain control of the company, and that the excess should be distributed among the stockholders.

\textsuperscript{2} 28 U.S.C. § 1332 (1964) requires, \textit{inter alia}, a showing that "... the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs..." The plaintiff contended that she and 4,000 other stockholders were entitled to aggregate their individual claims to reach an amount in controversy of about $1,200,000.

\textsuperscript{3} \textsc{snyder v. harris}, 309 F.2d 204 (8th Cir. 1967), \textit{cert. granted}, 393 U.S. 911 (1968). This decision was congruous with a similar ruling by the Fifth Circuit Court of Appeals in \textsc{alvarez v. pan american life ins. co.}, 375 F.2d 992 (5th Cir. 1967), \textit{cert. denied}, 389 U.S. 827 (1967).

\textsuperscript{4} \textsc{gas serv. co. v. coburn}, 389 F.2d 831 (10th Cir. 1968), \textit{cert. granted}, 393 U.S. 911 (1968). This case is the companion to the one which is the subject of this comment. In a class action, the plaintiff alleged illegal collection of a city franchise tax from him and 18,000 other customers living outside the city limits. Although the alleged total overcharge was unknown, the court permitted Coburn to aggregate his $7.81 claim with those of the other class members, which aggregate was alleged to total more than $10,000.

\textsuperscript{5} See note 3 \textit{supra}.

\textsuperscript{6} \textsc{snyder} was affirmed; \textsc{coburn} was reversed. See note 4 \textit{supra}.
The 1966 version of Federal Rule 23 seems to have posed more questions than it answered. For example, even though the new Rule abolished the tripartite pigeon holes of “true,” “hybrid,” and “spurious” class actions which existed under former Rule 23, would the courts still refer to those classifications when ruling on aggregation under the new Rule? The question is important because both Snyder and its companion case would have been spurious class actions under old Rule 23, actions for which aggregation would not have been allowed.

In the 1967 case of Alvarez v. Pan American Life Insurance Company, the Fifth Circuit Court of Appeals ruled aggregation under new Federal Rule 23 proper only to the extent allowed under the old Rule. Finding the plaintiff’s claims separate and distinct, the court held that permitting aggregation under the new Rule would expand the federal jurisdiction in violation of Rule 82. After all, it was settled doctrine long before the 1938 Federal Rules that “[w]hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount.” This was the so-called “Pinel doctrine,” a black letter interpretation of the amount in controversy requirement of 28 U.S.C. § 1332; and the Alvarez court felt bound under Rule 82 not to molest it by broadly construing new Rule 23. In the present case, the Supreme Court relies almost exclusively on this doctrine and expressly refuses to abrogate it.

8 “True class actions were those in which the rights of the different class members were common and undivided; in such cases aggregation [of claims] was permitted.” Snyder v. Harris, 394 U.S. 332, 335 (1969).
9 “A ‘hybrid’ class action involved a class whose members had a mutuality of interest in specific property . . . .” Aggregation was not allowed in this type of case. A prototype of this was the old equity receivership. 43 N.Y.U. L. Rev. 762, 763 n.5 (1968).
10 Spurious class actions were in essence a form of permissive joinder in which parties with separate claims litigated in a single suit because there were common questions of law or fact; aggregation of claims was not allowed in this type of action. 394 U.S. at 335.
12 These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts . . . .” Fed. R. Civ. P. 82.
14 394 U.S. at 338.
In the face of the Court's choice against aggregation, several valid arguments for the opposite result have been presented. Consider the minority opinion by Mr. Justice Fortas to the effect that a procedural rule affecting the occasions on which diversity jurisdiction is exercised does not offend the Pinel doctrine and is therefore not in violation of Rule 82. In addition, it has been asserted that the res judicata effect upon those in the class who fail to opt out under the new Rule compels aggregation; and that since the old "nature of the claim" test is abolished, aggregation should now be proper for any action under Rule 23. There is also the argument that since the purpose of the amount in controversy requirement is to clear federal dockets and free courts for adjudication of "substantial controversies," federal diversity jurisdiction should be based on the aggregate claim. Equity often measures the amount in controversy either by what the plaintiff stands to gain or by what the defendant stands to lose. Although no litigant has argued for this test of the jurisdictional amount, isn't it as logical as any other?

After examining the above technical arguments both for and against aggregation, the observer remains undecided on the issue because both arguments have merit. This case, therefore, can only be explained

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15 His reasoning is that even though original Rule 23 permitted litigation of claims of all class members, notwithstanding that some of them were not of diverse citizenship from adverse parties, its promulgation was not seen as an enlargement of jurisdiction. Rather, it changed only the procedural context in which the subject matter jurisdiction statutes are applied. Id. at 855.


17 The old Rule examined the nature of the action and determined the propriety of aggregation according to the standards set out in note 8, supra. Since the new Rule abolished that inquiry and since at least some actions under the new Rule would previously have been aggregable, it follows that all claims properly brought under Rule 23 should now be aggregable.


20 "In determining the matter in controversy, we may look to the object sought to be accomplished by plaintiff's complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce." Ronzio v. Denver & R.G.W.R. Co., 116 F.2d 604, 606 (10th Cir. 1940). This was a suit in equity to quiet title, wherein the value of recovery to the plaintiff was less than the cost of compliance to the defendant, the latter figure being the only one meeting the then $3,000 amount in controversy minimum. See Ridder Bros. v. Blethen, 142 F.2d 395 (9th Cir. 1944); Enzor v. Jefferson Standard Life Ins. Co., 14 F. Supp. 677 (E.D.S.C. 1936).

21 "Thus the logical analysis makes no judgments for us, it simply focuses our direction toward possible concrete referents on which to judge." Kennedy, Valuing Federal Matter in Controversy, An Hohfeldian Analysis in Symbolic Logic, 35 TENV. L. REV. 423, 494 (1961).
by looking beyond the written opinion into the values that underlie the decision.

Seen in the federal context, this decision reveals itself to be both approach and avoidance; approach to federalism and avoidance of the administrative problems surrounding Rule 23. In barring a Rule 23 diversity case from the federal forum, the Court has thrown state tribunals a formidable body of law to fashion.\(^2\) In light of the now-popular consumer fraud class suits, this takes on added significance. Avoidance, however, seems to be the prime motive. Recognizing that aggregation under Rule 23 would require aggregation under Rules 18 (joinder of claims) and 20 (permissive joinder),\(^3\) the Court refuses to thus increase the federal case load. The decision also throws to the state courts the responsibility of ruling on aggregation according to the old rule standards.\(^4\) Perhaps the best example of avoidance is the Court's refusal to overrule the judge-made Pinel doctrine by interpreting congressional silence on the matter as tacit approval of that long standing test.\(^5\)

Potential class action litigants unable to invoke federal question jurisdiction are now faced with three options. They may, of course, bring class actions in state court subject to state jurisdictional limitations, and grapple with the non-uniform case law which will continue to surround the state versions of Federal Rule 23.\(^6\) Secondly, it may still be possible for class action litigants in diversity cases to enter the federal forum by resorting to Rule 23.2 which allows class actions by unincorporated associations. Since under former Rule 23 such an action was a true class suit\(^7\) in which aggregation of claims

\(^{22}\) “Suits involving issues of state law . . . can often be most appropriately tried in state court.” 394 U.S. at 341.

Mr. Justice Frankfurter would surely have been well satisfied with this case, as indicated by the following passage from one of his concurring opinions: Madison believed that Congress would return to the state courts judicial power entrusted to the federal courts ‘when they find the tribunals of the states established on a good footing’. . . . Can it fairly be said that state tribunals are not now established on a sufficiently ‘good footing’ to adjudicate state litigation that arises between citizens of different States. . . . ? Lumbermen’s Mut. Cas. Co. v. Elbert, 348 U.S. 48, 49 (1954) (concurring opinion).

\(^{23}\) 394 U.S. at 340.

\(^{24}\) The Court justified this relegation as follows:

But the disadvantageous results are over-emphasized, we think, since lower courts have developed largely workable standards for determining when claims are joint and common, and therefore entitled to be aggregated, and when they are separate and distinct and therefore not aggregable. Id. at 341.

\(^{25}\) Id. at 339.

\(^{26}\) This assumes that the plaintiff's state adopts a rule substantially identical to Federal Rule 23.

was permitted, the instant holding would not affect such an action. Even if the prospective members can be identified without the aid of discovery devices, the political effort and expense of organizing such an association may effectively preclude use of this device. Finally, if state legislation permits, the above-mentioned organization could sue in its own capacity in federal court without any resort to the class action requirements. Although it can sue as an entity, no citizenship has been accorded the unincorporated association; citizenship of each member, therefore, would have to be diverse from that of the adverse parties—and total diversity in an interstate organization is rare. Although none of the three options is a cure-all for small claim litigants, each has its peculiar disadvantage. An application of these options to the facts of each new case should aid counsel in selecting the route presenting the fewest difficulties.

Steve Hixson

CIVIL PROCEDURE—CLASS ACTION—APPLICABILITY FOR CONSUMER/COMMON LAW FRAUD.—On July 1, 1969, the Kentucky Rules of Civil Procedure [hereinafter referred to as Civil Rules] were amended to conform to the Federal Rules of Civil Procedure which had been changed in 1966. Civil Rule 23, Class Actions, was one of the rules changed. On July 3, 1969, a class action was filed in Madison Circuit Court

28 Since the members of the class are often identified by using the discovery rules after commencement of the action, resort to advertising would probably be necessary to identify those entitled to join the association—a costly and time consuming proposition.


1 The applicable section to be discussed here is Ky. R. Civ. P. 23.02(3), the section that followed the old “spurious” class action concept. Ky. R. Civ. P. 23.02(3) provides:

An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition . . . (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.

A complete analysis of Ky. R. Civ. P. 23 is beyond the scope of this comment and the 23.02(3) provision will be considered as the controlling part of the rule for this discussion. It should be noted however that other provisions of Ky. R. Civ. P. 23 must be satisfied before the 23.02(3) provision becomes an issue.