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Linda M. Rigot

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CASES NOTED

CLASS ACTIONS—AGGREGATION AGGRAVATION

A class action was instituted in the United States District Court for the Eastern District of Missouri by a shareholder against members of an insurance company's Board of Directors. The complaint alleged that the defendants had sold stock in excess of its fair market value and that the shareholders of the company were entitled to the excess. The jurisdiction of the court was invoked on the basis of diversity of citizenship. Although the claim of the named class representative only amounted to $8,740, the aggregate of claims of the potential class of shareholders would approximate $1,200,000. The district court held that the jurisdictional amount requirement was not met.[1] The United States Court of Appeals for the Eighth Circuit affirmed.[2] A class action, also based upon diversity of citizenship, was brought in the United States District Court for the District of Kansas. The named class member alleged damages of only $7.81 but contended that the amount being sought by the entire class, persons who had been charged a city tax although they resided outside of the city, would be in excess of $10,000. An interlocutory appeal was taken from the district court's denial of a motion to dismiss for failure to meet the minimum jurisdictional amount. The United States Court of Appeals for the Tenth Circuit affirmed the court's denial of that motion.[3] The Supreme Court of the United States granted certiorari to resolve the conflict,[4] consolidated the cases, and *held*: In a class action brought in the federal courts, the separate claims of individual class members cannot be aggregated in order to satisfy the jurisdictional amount requirement. *Snyder v. Harris*, 394 U.S. 332 (1969).

On July 1, 1966, an amended rule regulating the institution and maintenance of class actions became effective. To both the bench and the bar amended Rule 23 of the Federal Rules of Civil Procedure offered not only hope for the orderly adjudication of claims in which numerous individuals had a personal interest but also an end to the nebulous categorization of claims under the old class action rule.[5] For over a quarter of a century lawyers and judges had struggled with the classification of any class action as "true," "hybrid," or "spurious."

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

2. Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968). The court of appeals relied upon Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967).

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

4. Gas Serv. Co. v. Coburn, 393 U.S. 911; Snyder v. Harris, 393 U.S. 911.

5. *See generally* Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966).

The distinctions set forth in the old rule were of little assistance and the developing case law obscured the classifications even further.

This was the climate into which amended Rule 23 was born. The reason for the amendment of the Rule was to establish a practical method for the redress of grievances, unhampered by the restrictive categorization which had made equal access to justice available to only some litigants.[6]

A split of opinion soon developed regarding the new Rule; some lawyers regarded it as a pragmatic achievement, and others viewed it as a constitutional infringement. Although there are aspects of the Rule which may eventually require a declaration of either total or partial unconstitutionality,[7] the issue *sub judice* is not one of these areas. Rather, the current decision restricts the entire class action vehicle and prevents its application in many instances where it would be most appropriate. The majority bottomed its holding upon five bases: 1) the Court's own interpretation has traditionally been that computation of the "matter in controversy" for jurisdictional purposes precludes aggregation; 2) the interpretation of Rule 23 to permit aggregation would violate Rule 82; 3) Congress, in re-enacting § 1332,[8] impliedly agreed with the Court's prohibition against aggregation since it never disapproved the doctrine; 4) the federal courts' workload is too burdensome to accept a doctrine which would result in an increase in the number of cases heard; and 5) permitting aggregation of claims would result in the federal courts deciding many questions of state law.[9]

The class action device has now been thwarted. Even with liberal joinder rules, there is at present no practical way in which certain controversies can be decided. The Court's reasoning that if aggregative claims were permitted in diversity cases many questions of state law would be decided, is tortured at best. If this reasoning were valid, then perhaps the grant of jurisdiction in diversity cases contained within the Constitution[10] should be ignored as there is no compulsion upon any branch of our government to exercise every grant of power given to it. Moreover, the refusal to allow aggregative claims is more far-reaching than merely in the area of federal jurisdiction based upon diversity of citizenship. The effect of the decision will also be seen in actions arising under § 1331 of Title 28 of the United States Code, *i.e.*, general federal question jurisdiction. The only basis for jurisdic-

6. *See* Advisory Committee's Note, Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 73, 98 (1966).

7. Specific reference is made to the binding effect of a judgment obtained by a class of plaintiffs qualifying under FED. R. CIV. P. 23(b)(3). The doctrines of res judicata and collateral estoppel cannot be overlooked.

8. 28 U.S.C. § 1332 (1964).

9. However, the same result flows from the development of the entire body of conflicts law.

10. U.S. CONST. art. III, § 2.

tion unaffected by the case noted herein is that involving a specific federal question.

Thus many areas of developing law which lend themselves to use of the class action device may be stunted in their growth due to the instant decision. For example, there are many suits brought by and on behalf of a corporation's stockholders against the corporate officers or third persons.[11] As a consequence, both the procedural class action device and the substantive case law development in certain areas have been hindered by the instant case.

The majority opinion relies heavily upon the supposed unconstitutional expansion of federal jurisdiction which would result from aggregative claims. However, both §§ 1331 and 1332 of Title 28, United States Code, refer only to the "matter in controversy." Nowhere is the phrase defined except by previous decisions of the Supreme Court of the United States. There can be no unconstitutional basis for the determination of this sum unless the test used is contrary to either the Constitution or laws of the United States. Which of these would be violated if the amount were determined by the total sum sought by the class rather than the sum sought by each plaintiff where each has an individual claim? Indeed, the former method is more in harmony with the manner in which a Rule 23 class action proceeds to adjudication, and the results would be more consistent so that future litigants would have standards to guide them in the selection of a judicial system. At present, since the "interest" of the plaintiff(s) must now be defined, the courts and practicing attorneys will once again have to wrestle with definitions which will either vary on a case-by-case basis or become so complicated that understanding them will become a specialized area of the law unto itself. As Mr. Justice Fortas pointed out in his able and well-reasoned dissent:

> This general aggregation rule, and its much later application to class actions, rest entirely on judicial decisions, not on any Act of Congress. There is certainly no reason the specific application of this body of federal decisional law to class actions should be immune from re-evaluation after a fundamental change in the structure of federal class actions has made its continuing application wholly anomalous.[12]

Through rather circuitous reasoning, the Court finds Congressional approval of its holding in the instant case. The argument appears to be as follows: 1) this court has interpreted "matter in controversy" as prohibitive of aggregation save in two joinder instances; 2) Congress has repeatedly re-enacted the two statutes containing this

11. *E.g.*, Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966), 249 F. Supp. 539 (S.D.N.Y. 1966), 266 F. Supp. 180 (S.D.N.Y. 1967); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966). *See also* 22 U. MIAMI L. REV. 181 (1967).

12. 394 U.S. at 347-48.

phrase; 3) in so doing, Congress has not questioned the judicial interpretation; 4) Congress' silence is implicit approval of the doctrine; and 5) thus, this court cannot modify or abrogate this interpretation which has been approved by Congress (since it has not been disapproved). Accordingly, the Court visualizes an adoption by silence and fails to even consider that Congressional policy may be not to approve the interpretation and make it binding, but rather to achieve a fluidity in case law by enacting general criteria and then allowing the courts the freedom to initiate new doctrines and to modify or vitiate unwieldy or impractical ones. The dissent herein reasoned that

> [t]his case, far from being one in which there are "very persuasive circumstances" indicating congressional adoption of prior judicial doctrines, is one where only by the most obvious fiction can congressional re-enactment of a general statute be said to manifest an intention to adopt and perpetuate an existing technical judicial doctrine designated to facilitate administration of the statute.[13]

Moreover, Justice Fortas pointed out that when the 1958 congressional re-enactment of §§ 1331 and 1332 increased the minimum jurisdictional amount required, no mention of aggregation, or the other doctrines which have been judicially conceived to define and determine the amount involved in the matter in controversy, was made in either the hearings or the reports.[14]

Furthermore, prior to the 1966 amendment of Rule 23 aggregative claims could be asserted in some instances, depending upon whether the interest involved in the class action was common. As this test provided no assistance but rather resulted in another developing area of procedural case law, a practical amendment could have alleviated confusion. The Rule in its amended form neither regulates nor professes to involve the determination of federal jurisdiction. On the other hand, it merely, for the first time, establishes a workable class action device, a *procedural* tool. The only regulations contained within the Rule itself are the standards for the maintenance of a class action and the prerequisites for proceeding through litigation by using this vehicle. In the instant case, the dissent recognized the limited effect of the new Rule:

> The decision that a class action is appropriate is not to be taken lightly; the district court must consider the full range of relevant factors specified in the Rule. However, whether a claim is in traditional terms, "joint" or "several" no longer has any necessary relevance to whether a class action is proper. Thus, the amended Rule 23, which in the area of its operation has the effect of statute, states a new method for determining

13. *Id.* at 349.
14. *Id.*

> when the common interests of many individuals can be asserted and resolved in a single litigation.[15]

After it has been determined that a single action may be maintained by a particular class, then a fortiori it is because the interest of the class is common.

> Once it is decided under the new Rule that an action may be maintained as a class action, it is the claim of the whole class and not the individual economic stakes of the separate members of the class which is the "matter in controversy." That this is so is perhaps most clearly indicated by the fact that the judgment in a class action, properly maintained as such, includes all members of the class.[16]

In each of the consolidated cases, the individual plaintiffs had a singular interest, *i.e.*, the determination of the liability upon which each individual claim rested; liability to one necessarily would mean liability to all. Even in the former Rule 23 actions, these claims could have been recognized by some courts as common, but by others as several.[17] Avoidance of this result—the intended purpose of the 1966 amended Rule 23—has been hindered, "[f]or the majority result will continue to make determinative of the maintainability of a class action just that obsolete conceptualism the amended Rule sought to make irrelevant."[18]

An additional result of the instant decision remains to be discussed. In a class action meeting the requirements of Rule 23(b)(3), each member of the alleged class is automatically bound by any determinations made in the action unless he specifically requests to be excluded from the class. Therefore, the following problem arises: If a class action were brought wherein the named class representative(s) met the jurisdictional amount requirement, each class member who did not request exclusion would be bound by the judgment in that action although he did not meet the minimum jurisdictional amount requirement and although the Supreme Court of the United States has now held that his claim may not be aggregated. Either unconstitutional implications must attach or the Court has by its decision in the cases noted herein rendered ineffective this most practical and most-used provision of the class action Rule.[19] One cannot refrain from wondering if the result of the possible negation of section (b)(3) of Rule 23 will be that the current class action device

15. *Id.* at 352-53.

16. *Id.* at 353. This is, of course, only true in those actions maintained under FED. R. CIV. P. 23(b)(3).

17. 3A J. MOORE, FEDERAL PRACTICE ¶ 23.13 (2d ed. 1968) and 1968 Supp. are illustrative of the discrepancies evolved.

18. 394 U.S. at 354.

19. *See* note 7 *supra* and accompanying text.

will become an unwieldy procedure which is appropriate in only limited situations.[20]

The majority of the Court herein placed great emphasis on the restrictive mandate contained within Rule 82.[21] Unfortunately, oftentimes while interpreting procedural rules courts overlook the equally strong mandate contained within Rule 1 of the Federal Rules of Civil Procedure: "[These Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." As long as the development of substantive law is not hampered, a workable procedural code frequently requires a liberal construction. Although it was reversed by the instant decision, the reasoning of the United State Court of Appeals for the Tenth Circuit is worthy of note:

> It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the $10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. . . . Rule 23 before or after amendment does not purport to affect this principle.[22]

The majority of the Court appears to overlook that the new class action Rule is separate and distinct from its predecessor. Thus, in an effort to achieve a smooth transition (rather than recognize a new creation), the Court seized upon what it apparently considered a close analogy, to wit: joinder. It then proceeded to clearly, albeit erroneously, apply the aggregation rules of that procedural device. Although the foreseeable result of this reasoning is the stagnation of the class action, this was perhaps the most tenable of the Court's arguments.

With the passage of amended Rule 23, the class action device appeared to have an optimistic future. However, Professor Wright recently expressed his fear that the development of the device could be short-lived.

> The amended rule nowhere refers to a "joint" or a "common" interest. 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 en-

20. Adderly v. Wainwright, 46 F.R.D. 97 (M.D. Fla. 1968) (allowing use of the class action in seeking a writ of habeas corpus). *Contra*, Hill v. Nelson, 272 F. Supp. 790, 794 (N.D. Cal. 1967), wherein the court stated:

> We do not say that a class action for a writ of habeas corpus could never under any circumstances be maintained but determine at this time that because of the procedural problems inherent in this proceeding, use of such a class suit does not appear the most practicable vehicle to determine the issues presented.

21. FED. R. CIV. P. 82 provides in part:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

22. Gas Serv. Co. v. Coburn, 389 F.2d 831, 834 (10th Cir. 1968).

> tirely 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.[23]

Strangely enough, Mr. Justice Black, who delivered the opinion of the Court in the decisions under consideration, once expressed his own apprehension that the Rules might be restrained from reaching their full workability and indeed prophesied the result of the instant decision. In a dissenting opinion he wrote:

> It does no good to have liberalizing rules like 60(b) if, after they are written, their arteries are hardened by this Court's resort to ancient common-law concepts.[24]

LINDA M. RIGOT

CONSTITUTIONAL LAW—PRIVATE POSSESSION OF OBSCENE FILMS WHERE THERE IS NO INTENT TO SELL, CIRCULATE, OR DISTRIBUTE

After spending nearly an hour viewing three eight-millimeter films of "nude men and women engaged in sexual intercourse and sodomy,"[1] which had been unearthed during a search of the appellant's home for gambling paraphernalia under the aegis of a search warrant, police officers arrested the appellant for possession of material which he knew to be obscene, in violation of Georgia law.[2] Defendant's conviction by a jury

23. 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 569 (Supp. 1968) (Wright ed. 1961).

24. Ackermann v. United States, 340 U.S. 193, 205 (1950).

1. Stanley v. State, 224 Ga. 251, 252, 161 S.E.2d 309, 319 (1968).

2. Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, *or who shall knowingly have possession of*, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony . . . . As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion. (Emphasis added.)

GA. CODE ANN. § 26-6301 (Supp. 1968).

Under FLA. STAT. § 847.011(1)(a) (1967), it is a felony to possess obscene materials with the intent to sell, distribute, etc. However, under FLA. STAT. § 847.011(2) (1967), mere possession of obscene matter is a misdemeanor:

> A person who knowingly has in his possession, custody, or control any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine,