1-1-1972

Class Action: No Aggregation of Claims for Diversity Jurisdiction

Robert G. Frame

CLASS ACTION: NO AGGREGATION OF CLAIMS FOR DIVERSITY JURISDICTION

Plaintiffs, lakefront owners of property on Lake Champlain, brought a diversity action in a federal court on behalf of themselves and some 200 similarly situated landowners and lessees for damage to their property rights as a result of defendant's alleged pollution of the lake. Defendant, a paper company, had purportedly discharged untreated or inadequately treated waste into the lake, creating a massive sludge blanket which rendered plaintiffs' property unfit for any reasonable use. The federal district court "with great reluctance" refused to allow the case to proceed as a class action because the claims of many of the members of the proposed class failed to meet the $10,000 jurisdictional requirement, even though the claims of the named representatives met the minimum amount.[1] On appeal, the Court of Appeals for the Second Circuit, *held*, affirmed: A class action under rule 23(b)(3) of the Federal Rules of Civil Procedure will not be allowed unless each class member satisfies the jurisdictional amount requirement. *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972).

In *Snyder v. Harris*,[2] it was held that in a class action brought in federal court, the separate claims of individual class members could not be aggregated in order to satisfy the jurisdictional amount requirement.[3] The reasoning in *Snyder* was based on precedent established under the old rule 23, according to which only the named plaintiffs in a "spurious" class action were bound by the results.[4] After the 1966 amendments to rule 23, the entire class was bound by the judgment.[5] In light of this change, it was hoped that aggregation would be allowed since it could be reasoned that the amount actually in controversy was the amount sought by the entire class.[6] This view was urged by Justice Fortas in his dissent to the decision in *Snyder*.[7]

---

1. Zahn v. International Paper Co., 53 F.R.D. 430, 433 (D. Vt. 1971).

2. 394 U.S. 332 (1969).

3. *Id.* In Snyder v. Harris, 393 U.S. 911 (1968), the Court granted certiorari. This was done to resolve a conflict between the United States Court of Appeals for the Eighth Circuit, which had denied aggregation in Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968), and the Tenth Circuit, which had permitted aggregation in Gas Serv. Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968). See Snyder v. Harris, 394 U.S. 332 (1969).

4. Prior to the 1966 amendments, determination of the amount in controversy in a class action was governed by the conceptual test of whether the claims were "joint," "common," or "several." If the claims were "common" or "joint" then the class action was "true" and aggregation was allowed. "Several" claims affecting specific property involved in the action resulted in a "hybrid" class action. If the claims were "several" but involved common questions of law or fact, the class action was "spurious." Aggregation was permitted in the "hybrid" but not in the "spurious" actions. *See* 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 562 (Wright ed. 1961, Supp. 1969).

5. FED. R. CIV. P. 23(c)(3). The judgment in an action maintained as a class action under subdivision (b)(3) binds all members of the class who have not requested exclusion.

6. *See generally* Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601 (1969); Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966).

7. Snyder v. Harris, 394 U.S. 332, 353 (1969).

The majority decision in *Snyder* dashed any hopes of a liberal interpretation of rule 23 by holding that prior judicial interpretation of a jurisdictional statute[8] could not be modified by the advent of a new rule.[9] In effect, this pronouncement required a reversion to the old "joint," "common," and "several" classifications in determining jurisdiction, although these classifications were deliberately discarded in the new rules.[10] Professor Wright has expressed his belief that *Snyder* is not likely to be overruled, and further expressed fear that *Snyder* would be expanded to encompass the situation present in *Zahn*.[11]

Zahn presented the Court of Appeals for the Second Circuit with a novel question apparently left open by the Supreme Court in *Snyder*. None of the named plaintiffs in *Snyder* met the jurisdictional amount requirement, and the court did not specifically address itself to the situation where all of the named plaintiffs meet the required amount but some of the unnamed members of the class do not.

In holding that every member of a class in an action brought under rule 23(b)(3) must meet the $10,000 jurisdictional amount, the Second Circuit looked past the intent of the rule, and, as the Supreme Court did in *Snyder*, relied on precedent established prior to the adoption of the amended rule.

Submitted to close scrutiny, the court's reasoning reveals several weaknesses. The court reasoned that the Supreme Court's reliance on *Clark v. Paul Gray, Inc.*[12] in the *Snyder* decision dictated the extension of the jurisdictional amount requirement to every member of the class. Yet nowhere in the official report of the *Clark* decision is there a clear indication that it was, in fact, a class action.[13] In addition, *Clark* was decided before the 1966 amendment to rule 23 made the results of an action under that rule binding on the entire class.

The court indicated that it was "entirely sympathetic" to the proposition that the amended rules should be given a nonrestrictive and liberal interpretation.[14] It cited with approval *Eisen v. Carlisle & Jacqueline*,[15] which held that one of the primary functions of a class action is to provide individuals who have claims too small to justify litigation a device for vindicating their collective rights.[16] However, after paying this "lip service" to the proposition of liberal interpretation, the court stated that the policies underlying the amended rules would not be determinative of the case.

---

8. The statute there involved was 28 U.S.C. § 1332(a) (1964).

9. Snyder v. Harris, 394 U.S. 332, 336 (1969).

10. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967).

11. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 72, 316 (2d ed. 1970).

12. 306 U.S. 583 (1938).

13. This fact was admitted by the trial court judge. Zahn v. International Paper Co., 53 F.R.D. 430, 431 (D. Vt. 1971).

14. 469 F.2d at 1035.

15. 391 F.2d 555 (2d Cir. 1968).

16. *Id.* at 563. *See* Advisory Comm. Note, 39 F.R.D. 98, 102-03 (1966).

It was further reasoned that the decision of the court would support the "congressional purpose" in establishing a jurisdictional amount in title 28, section 1332, of the United States Code (1970). This congressional purpose was apparently thought to be an attempt to halt the increase in cases in the federal courts.[17] However, the courts have often relaxed jurisdictional requirements in order to permit a liberal interpretation of the rules.[18] This relaxation has been particularly evident in the area of ancillary jurisdiction.[19]

The court stated, in further justification of its decision, that the Advisory Committee did not intend that rule 23(b)(3) ordinarily be utilized in a mass tort situation.[20] This statement is somewhat misleading. The committee did say that a class action might be inappropriate in a "mass accident," where questions not only of damages, but of liability and defenses to liability, would affect the individuals of the class in different ways.[21] However, the committee believed that a class action would be appropriate where liability could be established in one action, despite the need for a separate determination of damages.[22] It would seem that *Zahn* definitely fell within this latter category.

Circuit Judge Timbers, while not addressing himself to each of the points discussed above, dissented on the ground that the claims of those members of the class who did not meet the jurisdictional amount requirement could have been adjudicated through use of the ill-defined concept of "ancillary jurisdiction." The judge viewed the Supreme Court decision in *Moore v. New York Cotton Exchange*[23] as signaling a move toward liberalized application of ancillary jurisdiction both to promote judicial economy and to permit resolution of all disputes arising out of a single cause of action in one proceeding.[24] He contended that an extension of this concept permitting the claims of the unnamed plaintiffs in the instant action to be adjudicated would be "unquestionably harmonious" with the current trend of liberalization.[25] As mentioned above, this trend is particularly evident in actions under rule 20,[26] where a num-

17. 469 F.2d at 1035.

18. *See* Brandt v. Olsen, 179 F. Supp. 363, 370 (N.D. Iowa 1959):

> Since the adoption of the Federal Rules of Civil Procedure, it has been recognized that important provisions relating to the addition of parties would have limited effect if the same jurisdictional and venue requirements were to be applied in the case of added parties as to the action between the original parties.

19. *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 9 (2d ed. 1970).

20. 469 F.2d at 1036.

21. Advisory Comm. Note, 39 F.R.D. 98, 103 (1966).

22. *Id.*

23. 270 U.S. 593 (1926).

24. 469 F.2d at 1036.

25. *Id.* at 1037.

26. FED. R. CIV. P. 20.

> PERMISSIVE JOINDER OF PARTIES
>
> (a) *Permissive Joinder.* All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

ber of recent decisions have allowed parties to be joined even though their individual claims failed to meet the $10,000 jurisdictional amount.[27]

The dissent further reasoned that an analogy should be drawn to the liberal use of "pendent jurisdiction" in cases such as the Supreme Court decision in *United Mine Workers v. Gibbs*.[28] In *Gibbs* the Court held that a state claim, brought in conjunction with a federal claim over which the court had jurisdiction, could be adjudicated even though the federal claim was subsequently dismissed.[29] In the instant case, it could be argued that the *power* of the federal court to hear the case attached when the claims of all of the named representatives of the class met the jurisdictional requirement. That power could then be extended to permit adjudication of those claims raised by the remainder of the class which derived from "a common nucleus of operative fact."[30] As indicated by the dissent, implementation of this logical extension would avoid the "duplicative litigation" promoted by the majority opinion, *i.e.*, the trial of the claims of the named representatives in the federal district court and identical actions of other class members in the state courts.[31]

The instant decision will have the effect of restricting rule 23(b)(3) class actions, in at least the Second Circuit, to those rare instances where every member of the class has a claim in excess of $10,000. Such a restriction runs contrary to the underlying purposes of the rule. Indeed, the trial court, in reaching its decision "with great reluctance," admitted that "if a construction of rule 23 were controlling, rather than the phrase 'amount in controversy' in the jurisdictional statute,"[32] its decision would have been different. A contrary decision would not, of necessity, have greatly increased the federal workload, since the trial court retains broad discretion under rule 23(b)(3)(D) to refuse to permit a class action to proceed if it appears that difficulties in management would be prohibitive.[33] Furthermore, a number of state courts discourage class actions.[34] Therefore, it is conceivable that members of the class denied access to

27. *See* Eidschun v. Pierce, 335 F. Supp. 603 (S.D. Iowa 1971); General Research, Inc. v. American Employers' Ins. Co., 289 F. Supp. 735 (W.D. Mich. 1968); Johns-Mansville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966).

28. 383 U.S. 715 (1966).

29. *Id.* at 725, where the Court held that

> if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

30. See Almenares v. Wyman, 453 F.2d 1075, 1084 (2d Cir. 1971), holding that the court had the power to hear pendent claims of class members who did not meet the jurisdictional requirements but that the court had discretion to dismiss the claims if they proved to be unmanageable.

31. 469 F.2d at 1039.

32. 53 F.R.D. 430, 433 (D. Vt. 1971).

33. FED. R. CIV. P. 23(b)(3)(D).

34. *See, e.g.*, Lewis v. Rosen, 149 Conn. 734, 181 A.2d 592 (1962); Kentucky Dept. Store, Inc. v. Fidelity-Phenix Fire Ins. Co., 351 S.W.2d 508 (Ky. 1961); Salitan v. Dashney, 219 Ore. 553, 347 P.2d 974 (1959). *But see* Judson School v. Wick, —Ariz. —, 494 P.2d 698 (1972); Paley v. Coca Cola Co., 39 Mich. App. 379, 197 N.W.2d 478 (1972).

the federal courts because of the *Zahn* decision will never have their day in court.

Hopefully, the Supreme Court will not approve this further restraint on the effectiveness of rule 23 as a tool of judicial economy and efficiency.[35] Should such an unfortunate result arise, congressional modification of the jurisdictional statute appears to be the only available solution.

ROBERT G. FRAME

CONSUMER WAIVER OF DEFENSES UNDER THE UCC

Defendants, husband and wife, purchased a new Dodge automobile on an installment contract which contained a waiver of defenses against the dealer's assignee. Three months later the buyers returned the car, complaining that serious defects had not been corrected although the car had been brought back for repairs six times. After repossession and sale of the car, Chrysler Credit Corporation, the assignee of the installment contract, sued for the deficiency. The purchasers raised the defense of failure of consideration, and they requested a jury trial on all issues. The trial court entered a judgment on the pleadings against the purchasers. On appeal, the District Court of Appeal, Second District, *held*, reversed and remanded: An assignee of a retail installment sales contract who is "too closely connected" to the retail merchant to be considered a holder in good faith, cannot rely on the contract clause whereby the buyer waived all defenses against the assignee. *Rehurek v. Chrysler Credit Corp.*, 262 So.2d 452 (Fla. 2d Dist.), *cert. denied*, 267 So.2d 833 (Fla. 1972).

The court's interpretation of section 9-206[1] of the Uniform Com-

35. On February 20, 1973, the United States Supreme Court granted certiorari to review the Second Circuit's decision in *Zahn*. Zahn v. International Paper Co., 93 S. Ct. 1370 (1973).

1. FLA. STAT. § 679.206(1) (1971):

AGREEMENT NOT TO ASSERT DEFENSES AGAINST ASSIGNEE

Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, *an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the chapter on commercial paper* (chapter 673). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement (emphasis supplied).

2. RESTATEMENT OF CONTRACTS § 167 (1932):

(1) An assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto, and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts existing at the time of the assignment, or are based on facts arising thereafter prior to knowledge of the assignment by the obligor.

(2) Except as stated in Subsection (3), an assignee's right against the obligor