1963

Intervention by Nondiverse Parties in Spurious Class Actions

Minn. L. Rev. Editorial Board

Notes

Intervention by Nondiverse Parties in Spurious Class Actions

The requirement of complete diversity among opposing parties to an action has not been applied to intervention in spurious class actions although it has been applied in such similar areas as permissive intervention in nonclass actions and permissive joinder. This result is commonly justified on the ground that the spurious class action is merely a device to circumvent the complete diversity requirement. The author of this Note rejects this justification and re-examines the problem of intervention. He concludes that such intervention may be justifiable on independent grounds.

INTRODUCTION

The statutory grant of federal diversity jurisdiction was early interpreted by Mr. Chief Justice Marshall in *Strawbridge v. Curtiss*[1] to require complete diversity between all opposing parties with a joint interest in an action. Although the Supreme Court itself soon expressed dissatisfaction with this requirement,[2] it still exists as a limitation on diversity jurisdiction.[3] The present application of this requirement to the procedural devices of joinder, intervention, and class actions presents an anomalous situation.

Courts will apply the rule of complete diversity to joinder situations—for example, where *A* and *B*, citizens of Minnesota, and *C*, a citizen of Wisconsin, wish to join in an action against *D*, a citizen of Wisconsin. Where joinder is permissive under Rule 20,[4]

1. 7 U.S. (3 Cranch) 267 (1806).
2. See Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 555 (1844).
3. The holding in *Strawbridge* does not appear to be a constitutional limitation. See Haynes v. Felder, 239 F.2d 868, 876 (5th Cir. 1957); 3 MOORE, FEDERAL PRACTICE ¶ 22.09[1], at 3029 (2d ed. 1948); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 919 (1958) [hereinafter cited as *Developments*]. This is particularly true with spurious class actions since the rights involved are several, not joint.
4. FED. R. CIV. P. 20.

courts will refuse to allow *C* to be joined in the action.[5] When joinder is necessary under Rule 19,[6] courts distinguish between indispensable and conditionally necessary parties.[7] If *C* is an indispensable party, the court will require that he be joined even though the lack of complete diversity will divest the court of jurisdiction over the entire action;[8] if *C* is only a conditionally necessary party, his joinder is not required, and the court may dismiss him, but retain jurisdiction over the rest of the action.[9] Similarly, if instead of joining initially in the action, *C* seeks permission to intervene[10] in the action brought by *A* and *B*, courts will also apply the rule of complete diversity and deny the intervention.[11] But if *A* and *B* are able to bring their suit as a spurious class action[12] on their own behalf as well as on behalf of others similarly situated, most courts will allow *C* to intervene despite his lack of diversity.[13]

One commonly asserted explanation of this anomaly is that the spurious class action is intended to enable parties to circumvent the complete diversity requirement of permissive joinder.[14] Such

5. Horn v. Lockhart, 84 U.S. (17 Wall.) 570, 579 (1873); Weaver v. Marcus, 165 F.2d 862 (4th Cir. 1948); *Developments* 893.

6. FED. R. CIV. P. 9.

7. An indispensable party is one who has "an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1855). A conditionally necessary party is one whose interest is "separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court . . . ." *Ibid.*

8. See Schuckman v. Rubenstein, 164 F.2d 952 (6th Cir. 1947).

9. See Dunham v. Robertson, 198 F.2d 316 (10th Cir. 1952); FED. R. CIV. P. 19(b).

10. See FED. R. CIV. P. 24(b)(2).

11. See Hunt Tool Co. v. Moore, Inc., 212 F.2d 685 (5th Cir. 1954); Hunter v. Southern Indem. Underwriters, Inc., 47 F. Supp. 242, 243 (E.D. Ky. 1942); *Developments* 905–06. *But see* Berman v. Herrick, 30 F.R.D. 9 (E.D. Pa. 1962). Intervention of right, however, is allowed without regard to the citizenship of the intervenor. See, *e.g.*, Lenz v. Wagner, 240 F.2d 666 (5th Cir. 1957).

12. FED. R. CIV. P. 23(a)(3).

13. See, *e.g.*, Amen v. Black, 234 F.2d 12 (10th Cir. 1956), *appeal dismissed per stipulation*, 355 U.S. 600 (1958); P.W. Husserl, Inc. v. Newman, 25 F.R.D. 264 (S.D.N.Y. 1960); Shipley v. Pittsburgh & L.E.R.R., 70 F. Supp. 870 (W.D. Pa. 1947); 3 MOORE, FEDERAL PRACTICE ¶ 23.12, at 3474 (2d ed. 1948). *But see* Wagner v. Kemper, 13 F.R.D. 128, 130 (W.D. Mo. 1952).

14. This view was advanced in the ABA, PROCEEDINGS OF THE CLEVELAND INSTITUTE ON THE FEDERAL RULES 264 (1938), and fully explained in 3 MOORE, FEDERAL PRACTICE ¶ 23.11[3] (2d ed. 1948). Many courts have adopted this view, often citing Moore as authority. See, *e.g.*, California

a use of the spurious class action, however, has been criticized as "at once irrelevant to the purpose of the class suit, trivial, and probably unsound."[15] The function of this Note is to re-examine the justification for the relaxation of the normal jurisdictional requirements for intervention in the spurious class suit.[16] Such an examination requires an analysis both of the application of res judicata to class suits and of the nature and function of the spurious class suit.

I. RES JUDICATA IN CLASS SUITS

A. THE DOCTRINE OF ANCILLARY JURISDICTION

The res judicata effect of a judgment in a class action bears on the problem of intervention by nondiverse parties through the operation of the doctrine of ancillary jurisdiction. According to this doctrine, the court is held to acquire jurisdiction over a case or controversy as a whole.[17] If a court has jurisdiction over the main action, the failure of an intervenor to meet the diversity requirement will be ignored to the extent that his claim is ancillary or subordinate to the main action.[18] Jurisdiction over the nondiverse party is justified on the ground that it is necessary to enable the court to make the judgment in the main action effective.[19]

Apparel Creators v. Wieder of Cal., 162 F.2d 893, 897 (2d Cir. 1947); Pentland v. Dravo Corp., 152 F.2d 851, 852 (3d Cir. 1945); Weeks v. Bareco Oil Co., 125 F.2d 84, 88 n.5 (7th Cir. 1941); Kaeppler v. James H. Matthews & Co., 180 F. Supp. 691, 695 (E.D. Pa. 1960); Zachman v. Erwin, 186 F. Supp. 681, 689 (S.D. Tex. 1959); D & A Motors, Inc. v. General Motors Corp., 19 F.R.D. 365, 366 (S.D.N.Y. 1956).

15. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 704 (1941). See Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1962), where the court concedes that the spurious class suit does permit circumvention of the complete diversity requirement, but declared:

> [W]e envisage it as having a broader purpose—to allow a final determination of common questions of law and fact. Otherwise 23(a)(3) is relegated to an out-of-context incongruity amongst the utilitarian procedural modes which, when brought together, elucidate the modern-day concept of class actions.

16. This Note will deal solely with the problems raised by plaintiff classes for those raised by defendant classes involve different policies and considerations. For example, the nature and function of the spurious class suit as an effective group remedy is not a consideration with a defendant class. See Kalven & Rosenfield, *supra* note 15, at 696 n.39.

17. See Fulton Nat'l Bank v. Hozier, 267 U.S. 276, 280 (1925).

18. *Developments* 894 n.137. Another application of ancillary jurisdiction is in regard to compulsory counterclaims. A court will allow a compulsory counterclaim to be interposed even if it is not supported by independent jurisdictional grounds. See Green, *Federal Jurisdiction Over Counterclaims*, 48 NW. U.L. REV. 271, 282 (1953).

19. See, *e.g.*, Walmac Co. v. Isaacs, 220 F.2d 108 (1st Cir. 1955).

Also, allowing such jurisdiction eliminates trying actions in a piecemeal fashion.[20]

Since the effect of the judgment determines whether intervention by nondiverse parties will be allowed under the doctrine of ancillary jurisdiction in true[21] and hybrid class actions,[22] the effect of the judgment in a spurious class action may also determine whether intervention[23] in that action by nondiverse parties is justifiable under the doctrine of ancillary jurisdiction.

B. THE CATEGORICAL APPROACH

At present, courts have taken a "categorical approach" when faced with problems of res judicata in class actions[24] and have

20. Ancillary jurisdiction has been termed "one of the most useful devices for mitigating the otherwise strict limitations of federal jurisdiction." BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE: RULES EDITION § 23, at 93 (rev. ed. Wright 1960). It "exists because without it the court could neither effectively dispose of the principal case nor do complete justice in the premises. It is a common-sense solution of the problems of piecemeal litigation which otherwise would arise by virtue of the limited jurisdiction of federal courts." *Id.* at 94. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 929 (1953).

21. FED. R. CIV. P. 23(a)(1).

22. FED. R. CIV. P. 23(a)(2).

Permissive intervention by nondiverse parties is generally allowed in true and hybrid class suits. See, *e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Stewart v. Dunham, 115 U.S. 61 (1885). Similarly, intervention of right by nondiverse parties is allowed in nonclass actions. See, *e.g.*, Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960); Hartley Pen Co. v. Lindy Pen Co., 16 F.R.D. 141, 147 (S.D. Cal. 1954).

Fairness would seem to require a court to allow an absent party to intervene if he will be bound by the judgment. See *Developments* 942. "[I]t is helpful to remember that the reason for relaxing the requirement of independent grounds of jurisdiction [is] . . . the need for the court to be unhampered in its right to protect outsiders from injury through the exercise of its processes." Campbell, *Jurisdiction and Venue Aspects of Intervention Under Federal Rule 24*, 7 U. PITT. L. REV. 1, 8 (1940).

23. This problem of intervention by nondiverse parties is magnified by the fact that in a class action almost all cases will involve permissive intervention. Whether intervention of right under Rule 24(a)(2), for which independent jurisdictional grounds are not required, is available to intervenors in class actions is doubtful. Rule 24(a)(2) requires both that a party be inadequately represented and bound by the judgment before he has a right to intervene. In Hansberry v. Lee, 311 U.S. 32 (1940), the Supreme Court said that a judgment in a class action is not binding upon absent members unless they are adequately represented in the class suit. See Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 337–39 (1948); *Developments* 941; *cf.* Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961).

24. The first draft of Rule 23(a) defined the res judicata effect to be given a judgment in a class action. This effect differed according to whether the action was true, hybrid, or spurious. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571 (1937). This proposal was rejected as too substantive

established the following principles: "A judgment in a 'true' class action is conclusive on absent members; in a 'hybrid' action, as to their rights in the res; in a 'spurious' action, only on parties before the court."[25] The rule that a judgment in a true class action binds all members of the class is well established in equity procedure.[26] This rule is necessary to insure the efficacy of the true class suit as a solution to the problem of compulsory joinder where it is impractical to bring all indispensable parties before the court.[27] The necessity for the binding effect of a judgment in a true class action revealed the impropriety of the provision in Equity Rule 48 that in class suits "the decree shall be without prejudice to the rights and claims of all the absent parties";[28] consequently, this limitation was omitted when Equity Rule 38 replaced Equity Rule 48 in 1912.[29] The Supreme Court soon declared that a judgment in a true class suit binds those parties not before the court if they are properly represented.[30] In a hybrid class action, the judgment binds absent members to the extent of their claim in specific property.[31] Thus, since the judgment in a true or a hybrid class action is binding on absent members, intervention by nondiverse parties is justified under the doctrine of ancillary jurisdiction.[32]

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for a procedural rule. See Moore & Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment,* 32 ILL. L. REV. 555, 556 (1938). Professor Moore, however, adopted this proposal in his treatise to explain the effect of a judgment in a class action. 3 MOORE, FEDERAL PRACTICE ¶ 23.11 (2d ed. 1948).

25. Note, 46 COLUM. L. REV. 818, 824 (1946); *accord,* Knowles v. War Damage Corp., 171 F.2d 15 (D.C. Cir. 1948).

26. See 1 STREET, FEDERAL EQUITY PRACTICE § 549 (1909).

27. *Id.* §§ 550–52.

28. Equity R. 48, 210 U.S. 524 (1907); see HOPKINS, FEDERAL EQUITY RULES 105 (8th ed. 1912). The courts tended to disregard this provision. See, *e.g.,* Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853); American Steel & Wire Co. v. Wire Drawers' Unions, 90 Fed. 598 (N.D. Ohio 1898).

29. Equity R. 38, 226 U.S. 659 (1912); see HOPKINS, *op. cit. supra* note 28, at 239–42.

30. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). The Court in that case reasoned that according to the holding in Stewart v. Dunham, 115 U.S. 61 (1885), there would have been ancillary jurisdiction over the absent members if they had intervened in the first class action; consequently, the decree in that action was binding on the rights of every member of the class. See DOBIE, FEDERAL PROCEDURE § 177, at 687 (1928).

31. This is exemplified by a creditors' bill to force a corporation into receivership. If a new corporation is formed to buy up the remaining assets, all creditors with notice are bound by the receivership proceedings. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 GEO. L.J. 551, 574 (1937).

32. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 364–67

Consistent with this categorical approach, courts have generally followed the rule that a judgment in a spurious class action is not binding upon the absent members of the class.[33] Consequently, the doctrine of ancillary jurisdiction will not justify intervention by nondiverse parties in spurious class actions on the basis of the res judicata effect of the judgment; such intervention can only be justified in terms of the nature and function of the spurious class suit.

This use of a categorical approach to res judicata in class actions, however, is unsatisfactory for several reasons. The difficulty courts have had in classifying suits as either true, hybrid, or spurious would seem to make the differences in these three types of class suits, as defined by Rule 23,[34] of questionable value in determining the application of res judicata to judgments in class actions.[35] In one case, after a class action had been characterized as hybrid by one court and spurious by another, the Third Circuit gave up and simply declared that "names are not important."[36] In addition, the terms joint, common, and several, which are used to differentiate the types of class actions in Rule 23, have acquired meanings in dissimilar contexts that courts have carried over into the area of class suits.[37] Also, the determination under a categorical approach that a judgment in a spurious class action is not binding on absent members of the class seems irreconcilable with the requirement of adequate representation in Rule 23(a) since this requirement is applicable to all three class suits. The same possibility of inadequate representation would seem to exist regardless of the type of class suit involved.[38] In any class

(1921); Stewart v. Dunham, 115 U.S. 61 (1885); Boesenberg v. Chicago Title & Trust Co., 128 F.2d 245 (7th Cir. 1942).

33. See Wabash R.R. v. Adelbert College, 208 U.S. 38, *rehearing denied*, 208 U.S. 609 (1908); 3 MOORE, FEDERAL PRACTICE ¶ 23.11, at 3465 (2d ed. 1948); 1 STREET, *op. cit. supra* note 26, § 552, at 345.

34. FED. R. CIV. P. 23(a).

35. *Developments* 931. *But see* VanDercreek, *The "Is" and "Ought" of Class Actions Under Federal Rule 23*, 48 IOWA L. REV. 273, 283 (1963), where the author proposes a "simple test" to distinguish a true from a spurious class action: where joinder would be required if the suit were not brought as a class action, it is a true class action; otherwise, it is a spurious class action.

36. Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Deckert, 123 F.2d 979, 983 (3d Cir. 1941), *reversing sub nom.* Deckert v. Independence Shares Corp., 39 F. Supp. 592 (E.D. Pa. 1941), *on remand from* 311 U.S. 282 (1940), *reversing* 108 F.2d 51 (3d Cir. 1939), *reversing* 27 F. Supp. 763 (E.D. Pa. 1939). *Compare* Pentland v. Dravo Corp., 152 F.2d 851, 853 (3d Cir. 1945), *with* Sexton v. W. S. Askew Co., 35 F. Supp. 519, 521 (N.D. Ga. 1940).

37. CHAFEE, SOME PROBLEMS OF EQUITY 200–01 (1950); *Developments* 931.

38. See Keeffe, Levy & Donovan, *supra* note 23, at 333.

suit, the absent members would seem to run the risk of poor counsel or that the interests of those in court are in some way inconsistent with their own interests.

C. AN EMPIRICAL APPROACH

These problems arising from the "ineptitudes of categorization"[39] might be avoided if courts would abandon their categorical approach and determine the binding effect of judgments in class suits on the basis of such factors as the relationship of the parties,[40] the protection of absent members of the class, and judicial economy.[41] If the parties have some extra-legal relationship, such as being from the same town, school, athletic team, or club, there may be more justification for treating them as bound by the judgment than if they are merely litigating a "common question of law or fact." However, even if the relationship between the parties is tenuous, it should be considered in the light of other tenuous relationships that are regarded as sufficient for a binding judgment. Thus, in a large tort action arising from a plane accident, the relationship between individuals who bought tickets on the same plane is no more tenuous than the relationship between individuals who buy an insurance policy from a fraternal benefit society.[42] Buying such a policy in no way indicates a greater desire to be treated or thought of as a class than buying a plane or train ticket.[43]

The protection of absent members that courts should consider include the feasibility of giving them adequate notice[44] and the

39. Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905, 945 (1962).

40. See *Developments* 937.

41. *Id.* at 936.

42. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), where some 70,000 members of the fraternal benefit society constituted a "true" class and were bound by the judgment in an action brought by 523 members of the class. Keeffe, Levy & Donovan, *supra* note 23, at 337.

43. After the accident, moreover, the parties, either through their own actions or through those of their attorneys, may indicate a desire to be treated as a class. For example, some may join together to hire one attorney; they may initiate joint discovery procedures; or their attorneys may cooperate with regard to the whole case.

44. Rule 23 could provide for giving notice to absent parties. In fact, the Advisory Committee for the Rules on Civil Procedure made such a suggestion. They proposed that the court "may order that notice be given . . . including notice to absent persons that they may come in and present claims and defenses if they so desire." 3A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE: RULES EDITION 551 (rev. ed. Wright 1958); see Simeone, *supra* note 39, at 957–58; *cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). A similar approach was taken with interpleader. See 28 U.S.C. § 2361 (1958).

adequacy of the representation of their interests.[45] The latter inquiry entails specifically examining the various interests of all members of the class to ensure that those litigating have interests that are "co-extensive with and not antagonistic to"[46] the interests of those members not in court.[47] Before a court decides to make the judgment binding on absent members, it should also consider the judicial economy of settling similar claims in a single action, the possibility that the absent members' claims could be settled out of court, and the number of subsidiary claims that may have to be litigated individually.[48]

If courts would adopt this empirical approach to the binding effect of judgments in class actions, they could make judgments in spurious class actions binding on absent members.[49] Despite the fact that the members of a spurious class are bound together only by a common question of law or fact, the judgment in a spurious class action could be res judicata on all members and not be unconstitutional. A significant aspect of the decision in *Hansberry v. Lee*[50] was the Court's indication that if rights of absent parties are in fact adequately represented and adequate notice is given, a judgment in a spurious class action could constitutionally be made binding on absent members of the class.[51] The

45. See Hansberry v. Lee, 311 U.S. 32, 40–45 (1940); Knowles v. War Damage Corp., 171 F.2d 15 (D.C. Cir. 1948). Arguably, the decision in *Hansberry* casts some doubt on the validity of the body of res judicata law predicated on the principles announced in Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), where a judgment was made binding although there was no showing of notice to absent members nor was there any inquiry as to whether they acquiesced in the interests of those actually in court. *Cf.* Keeffe, Levy & Donovan, *supra* note 23, at 337; Simeone, *supra* note 39, at 947.

46. *Developments* 938.

47. Although this might present an administrative problem with a large class, such an inquiry seems to be constitutionally required regardless of the type of class suit involved. See Hansberry v. Lee, 311 U.S. 32 (1940).

48. *Developments* 936–39.

49. *Cf.* CHAFEE, *op. cit. supra* note 37, at 257–58.

50. 311 U.S. 32 (1940).

51.

> Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.

Id. at 43.

Generally courts have declined to accept the invitation advanced by the dictum in *Hansberry v. Lee.* See All Am. Airways, Inc. v. Eldred, 209

extension of res judicata to spurious class actions is also supported by such policy considerations as economy of litigation and sympathy for the position of the opposing party.[52]

Under the categorical approach, the judgment in a spurious class action is not binding on absent parties and thus precludes operation of the doctrine of ancillary jurisdiction to justify intervention by nondiverse members of the spurious class, but this categorical approach is unsatisfactory for many reasons. If courts were to use an empirical approach and make judgments in many spurious class actions binding on absent members of the class, the doctrine of ancillary jurisdiction could then be used to justify intervention by nondiverse parties.

II. THE NATURE AND FUNCTION OF THE SPURIOUS CLASS ACTION

A. As a Group Remedy

Whether courts continue to use a categorical approach or adopt an empirical approach to res judicata, intervention by nondiverse parties may be justified in terms of the function served by the spurious class action. The major importance of the spurious class action is that it serves as an effective group remedy. Since industrial, commercial, and technological changes in modern society increase the frequency of group injuries, plaintiffs need a procedural device that will enable them to assert their rights as a group.[53] From the standpoint of judicial economy, such a group remedy is desirable.[54] Occasions appropriate for the use of the spurious class suit as a group remedy include actions under the Fair Labor Standards Act,[55] treble damage suits under the antitrust laws,[56] race relations litigation,[57] major air and rail disaster litigation, and fraudulent activities injuring numerous individuals.[58] In many

F.2d 247, 248 (2d Cir. 1954); Farmers Co-op. Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101 (8th Cir. 1942); Hunter v. Southern Indem. Underwriters, Inc., 47 F. Supp. 242, 244 (E.D. Ky. 1942). See Keeffe, Levy & Donovan, *supra* note 23, at 342; Simeone, *supra* note 39, at 953–56; Note, 46 COLUM. L. REV. 818, 833 (1946).

52. See Keeffe, Levy & Donovan, *supra* note 23, at 343; Simeone, *supra* note 39, at 953–56; VanDercreek, *supra* note 35, at 287–89.

53. See Kalven & Rosenfield, *supra* note 15, at 686; Simeone, *supra* note 39, at 906.

54. *Ibid.*

55. See, *e.g.*, Pentland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945).

56. See, *e.g.*, P. W. Husserl, Inc. v. Simplicity Pattern Co., 25 F.R.D. 264 (S.D.N.Y. 1960).

57. See, *e.g.*, Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962). See generally Note, 1 RACE REL. L. REP. 991 (1956).

58. See, *e.g.*, Society Milion Athena, Inc. v. National Bank, 281 N.Y.

of these areas, the existence of constitutional and statutory rights indicates a public policy encouraging the enforcement of these rights.[59] These cases often involve complex facts and intricate law and the types of injuries that affect the interests of many people.[60] Moreover, redress for such injuries may involve expenses that are totally disproportionate to any of the individual claims.[61] Consequently, most of the class suits that are "socially important" are spurious class actions.[62] These reasons underscore the need to provide plaintiffs with effective procedural means of securing redress.

The spurious class action is effective as a group remedy for several reasons. It constitutes an invitation to individuals in similar positions to join in the action.[63] It enables persons with small claims who otherwise could not afford to bring suit to secure relief because they can share the expenses with other parties or substantially mitigate expenses by taking advantage of a favorable decree.[64] In addition, such a suit offers an economic advantage because a plaintiff who initiates the suit can offer a potential fee based on the recovery in the class suit and can thereby obtain more competent counsel than if he brought the suit for himself.[65]

Although the spurious class suit and permissive joinder under Rule 20[66] are similar in operation, the spurious class suit functions better as a group remedy. The need for a group remedy exists most often where individuals actively wish to enforce their rights rather than when they are passively brought into court.

282, 22 N.E.2d 374 (1939); Brenner v. Title Guarantee & Trust Co., 276 N.Y. 230, 11 N.E.2d 890 (1937); Simeone, *supra* note 39, at 960.

59. *Cf.* Note, 1 RACE REL. L. REP. 991 (1956).

60. Kalven & Rosenfield, *supra* note 15, at 684.

61. *Id.* at 684–85.

62. *Id.* at 698–99; see, *e.g.*, Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

63. Kalven & Rosenfield, *supra* note 15, at 688; *accord*, All Am. Airways, Inc. v. Eldred, 209 F.2d 247, 248 (2d Cir. 1954).

64. See Kalven & Rosenfield, *supra* note 15, at 686–88.

65. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 435 (1960), which also enumerates a psychological advantage in that a person is part of a group, and a procedural advantage in that "there may be greater control of other lawyers seeking to assert related rights so that rational tactics in prosecuting the suit are made possible." In areas where federal policy favors enforcement of rights, such as in the school segregation cases, the use of a spurious class suit eliminates the possibility that the situation of a single plaintiff may change and thereby render the issue "moot," thus avoiding the likelihood of dismissal or compromise. See McKay, *"With All Deliberate Speed," A Study of School Desegregation*, 31 N.Y.U.L. REV. 991, 1085 (1956); *cf.* Jackson v. Rawdon, 135 F. Supp. 936 (N.D. Tex. 1955), *rev'd on other grounds*, 235 F.2d 93 (5th Cir. 1956).

66. FED. R. CIV. P. 20.

Since, by definition, more individuals are involved in class actions than in permissive joinder situations, there will be more people to defer the cost of litigation and to contribute and assist in gathering knowledge. To the extent that intervention after the determination of liability is possible,[67] the spurious class suit preserves the benefits of a favorable decision for those who have not intervened in the action. Moreover, if courts adopt an empirical approach to res judicata, the spurious class action can be made even more effective since the knowledge that a decree can bind an absent member of the class is likely to be more of an "affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it."[68]

B. As a Justification for Intervention by Nondiverse Parties

The function of the spurious class suit as a group remedy thus justifies intervention by nondiverse parties and may also explain why complete diversity is still required for permissive joinder. If the nondiverse members of the class are denied intervention, they are denied the benefits of a favorable judgment and the effectiveness of the group remedy is thereby impaired.[69] If such members wish to assert their rights, they must instigate a new action and will benefit from the judgment in the spurious class action only as it constitutes favorable precedent.

The importance of intervention as a means of ensuring the effectiveness of the spurious class action as a group remedy, however, must be balanced against the resulting expansion of federal diversity jurisdiction through the relaxation of the complete diversity requirement. Since the present statutory provision for diversity jurisdiction is itself often criticized,[70] any expansion of

67. See, *e.g.*, Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1962). This case involved a spurious class action brought by certain miners on behalf of other miners to recover damages for injuries arising from defendants' violations of the Sherman Act. The jury returned separate verdicts for the named plaintiffs and for the unnamed miners. The trial court then allowed these miners six months to appear and file their claims for damages. This procedure was affirmed by the circuit court because it viewed the spurious class action as intended "to allow a final determination of common questions of law and fact." *Id.* at 589; see Simeone, *supra* note 39, at 956–57.

68. Kalven & Rosenfield, *supra* note 15, at 688.

69. See *id.* at 695; Note, 1 RACE REL. L. REP. 991, 1009 (1956).

70. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520 (1928); Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A.J. 243 (1958). *But see* Parker, *Dual Sovereignty and the Federal Courts*,

such jurisdiction will be closely scrutinized by the courts.[71] In fact, allowing intervention by nondiverse parties is not a great expansion of diversity jurisdiction. The jurisdiction of the court is established when diverse parties initiate their action; the only expansion is in the number of parties asserting claims.[72]

The justification for intervention by nondiverse parties in spurious class actions in terms of the function that suit is intended to serve must also meet a more fundamental objection—why must that action be brought in the federal court to serve as an effective group remedy? While conceivably a spurious class action could be as effective in a state court, the federal court seems superior for practical reasons. First, not all states provide for such a procedural device.[73] Second, federal judges are usually more experienced in handling the problems of multiparty actions.[74] Third, parties bringing an action in the federal courts will have the benefit of the federal rules. For example, the pre-trial conference, which could be useful in spurious class actions involving numerous parties and complicated facts, is more widely used in federal courts than in state courts.[75] Fourth, some cases may involve ultimate federal questions, although it may be impossible to comply with the

51 NW. U.L. REV. 407, 409 (1956), for the view that local prejudice against the nonresident litigant is still a valid argument for the continued existence of diversity jurisdiction.

71. See, *e.g.*, Burford v. Sun Oil Co., 319 U.S. 315, 337 (1942) (Frankfurter J., dissenting). See also Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 41 (1958), where Mr. Justice Brennan, in dissent, said that "a distaste for the diversity jurisdiction" was a possible explanation for the holding of the majority.

72. See Berman v. Herrick, 30 F.R.D. 9 (E.D. Pa. 1962), a non-class action in which the court defended its allowance of intervention by nondiverse parties against the argument that this extended the jurisdiction of the federal courts in violation of FED. R. CIV. P. 82; *accord,* Heintz & Co. v. Provident Tradesmens Bank & Trust Co., 30 F.R.D. 171 (E.D. Pa. 1962). *But cf.* Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (D. Mass. 1943) (Wyzanski, J.):

> Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair.

73. If the forum state does not provide for spurious class actions and the federal court does, whether the federal court can allow the spurious class actions in light of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), may be questionable. However, it would seem in these situations that the federal rule should apply. *Cf.* Byrd v. Blue Ridge Elec. Co-op., 356 U.S. 525 (1958); Note, 46 MINN. L. REV. 913, 931–32 (1962).

74. Since federal statutes such as the Clayton Act, the Sherman Act, and the Fair Labor Standards Act have presented frequent occasions for multiparty actions, federal judges have developed much expertise in handling such problems of multiparty litigation as recognizing and providing for the issues that must be tried separately.

75. See Murrah, *Pre-Trial Procedure,* 14 F.R.D. 417, 422 (1953).

requirements of federal question jurisdiction.[76] In such cases, a sympathetic fact-finder is useful to preserve federal policy, and diversity jurisdiction provides plaintiff with the necessary federal forum. Finally, despite the present criticism of diversity jurisdiction, spurious class actions often present appropriate occasions for its use. Federal courts may be necessary in class suits since state courts probably cannot effectively resolve the problems presented by the large number of parties of diverse citizenship in such suits.[77]

III. PREJUDICE TO ORIGINAL PARTIES

Although intervention by nondiverse parties in a particular spurious class action may be justified by the res judicata effect of the judgment or by the group-remedy function, a federal court must consider whether such intervention "will unduly delay or prejudice the adjudication of the rights of the original parties"[78] before granting permission to intervene. Examples of prejudice that a defendant could suffer include the loss of a defense based on the state statute of limitations, the inability to assert a permissive counterclaim because it lacks independent jurisdictional grounds, and the lack of mutuality of estoppel.

These problems of prejudice to original parties, however, will not materially affect a court's determination of whether to allow nondiverse parties to intervene in spurious class actions. Such problems may be either resolved or outweighed by the importance of intervention to the group-remedy function. For example, a court could allow the defendant to assert the expiration of the state statute of limitations against the intervenors[79] or it could

76. See, *e.g.*, American Well Works Co. v. Lane & Bowler Co., 241 U.S. 257 (1916); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

77. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 897 (1953). This is analogous to the interpleader area. 28 U.S.C. §§ 1335, 2361 (1958); *cf.* Kalven & Rosenfield, *supra* note 15, at 704 n.66.

> It would seem that the spurious class suit is neither a class suit nor a mere permissive joinder device. Rather, it is an attempt to provide a remedy to dispose of a multiple party problem as efficiently as can be done under present rules.

Simeone, *supra* note 39, at 923–24.

78. FED. R. CIV. P. 24(b).

79. Courts have divided over the question of whether the state statute of limitations is to be applied in this situation. *Compare* Kam Koon Wan v. E. E. Black Ltd., 75 F. Supp. 553, 564–65 (D. Hawaii 1948), *with* Pennsylvania Co. v. Deckert, 123 F.2d 979, 985 (3d Cir. 1941). The Supreme Court, however, has held in a class action that where a plaintiff was barred from bringing suit in the state court, the federal court was bound to apply the state statute of limitations. Guaranty Trust Co. v.

regard the commencement of the class action as tolling the statute of limitations for all members of the class.[80] While a permissive counterclaim may be barred for a lack of independent jurisdictional grounds,[81] the court may use its discretion to deny intervention if the defendant will, in fact, be prejudiced.[82] Mutuality of estoppel is a consideration if absent members of a spurious class are not bound by an unfavorable decision, but may intervene after a determination of liability to benefit from the favorable decision.[83] The extent to which this prejudices the defendant is not great, however, because even without intervention, absent members of the class are in effect given two days in court,[84] for they may observe the defense presented in the spurious class action before commencing their own action. Furthermore, the decision of the court on the legal questions involved in a separate action may accord with the decision in the spurious class action under the doctrine of stare decisis.[85]

York, 326 U.S. 99 (1945). "As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law." *Id.* at 110. In this case, the Supreme Court did not consider the important function that the class suit serves as a group remedy, but the circuit court pointed out that where absent members relied upon the supposed "class" aspect of the spurious class suit, imposing the state statute of limitations as a bar would turn the suit into a "trap" for these absent members. York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944). Logically, the same rule should apply to intervenors as well as original parties in the class action. "Under Rule 24 of the Federal Rules of Civil Procedure, . . . an intervenor in an action or proceeding is, for all intents and purposes, an original party." *In re* Raabe, Glissman & Co., 71 F. Supp. 678, 680 (S.D.N.Y. 1947).

80. This is the way the statute of limitations is treated in true and hybrid class suits. See *Developments* 942. The difficulty of distinguishing between different kinds of class suits suggests that the same rule with respect to the statute of limitations, as with res judicata, should be applied uniformly to all three types of class suits. See text accompanying notes 34–35 *supra.*

81. See Green, *Federal Jurisdiction Over Counterclaims*, 48 NW. U.L. REV. 271, 282 (1953).

82. *Cf.* Finck v. Gilman Bros. Co., 11 F.R.D. 198 (D. Conn. 1951).

83. See Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1962); Albrecht v. Bauman, 130 F.2d 452 (D.C. Cir. 1942); First Nat'l Bank v. Edwards, 134 S.C. 348, 355, 132 S.E. 824, 826 (1926) (dissenting opinion); 3 MOORE, FEDERAL PRACTICE ¶ 23.11[3] (2d ed. 1948); *Developments* 936; *cf.* Wabash R.R. v. Adelbert College, 208 U.S. 38, *rehearing denied*, 208 U.S. 609 (1908). See also *Developments in the Law —Res Judicata*, 65 HARV. L. REV. 818, 862 (1952). The validity of the principle of mutuality of estoppel has been criticized, however. See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957). Moreover, problems arising from the lack of mutuality of estoppel would be eliminated if courts would use an empirical approach to the res judicta effect of judgments in class actions.

84. See Kalven & Rosenfield, *supra* note 15, at 713.

85. See 3 MOORE, FEDERAL PRACTICE ¶ 23.11[3], at 3466 (2d ed.

CONCLUSION

The application of the complete diversity requirement to permissive joinder and permissive intervention but not to intervention in spurious class actions presents an anomaly. The common explanation of this anomaly, that the spurious class action is a procedural device to circumvent the complete diversity requirement,[86] is an oversimplification, for it does not explain why this requirement should be circumvented. This circumvention may, in fact, be justified because an empirical approach to the problem of res judicata in class actions or a consideration of the function of the spurious class action as a group remedy warrants the application of the doctrine of ancillary jurisdiction. Whether ancillary jurisdiction is based on the res judicata effect of the judgment or on the group-remedy function of the spurious class suit, however, it should logically extend to nondiverse persons as original parties as well as intervenors.[87] As courts have relaxed the complete di-

1948); *cf.* Clark v. Sandusky, 205 F.2d 915 (7th Cir. 1953). Another slight possibility of prejudice might exist if the district court allows intervention and the appellate court decides to impose the limitation of complete diversity and dismiss the entire proceeding. Existing principles do not compel this result. The problem may be solved by reference to permissive joinder since the status of intervenors is that of original parties. Misjoinder of a party who is not an indispensable party is not a ground for dismissal. See FED. R. CIV. P. 21. Intervenors in a spurious class suit are not indispensable parties since by definition this type of class action involves merely "several" rights. Thus, if the intervention is held to be improper, the claims of the intervenors can be dismissed with the court retaining jurisdiction over the original claims and parties. See Glover v. McFaddin, 99 F. Supp. 385 (E.D. Tex. 1951), which involved several motions for intervention. The court allowed intervention for those with diversity, but dismissed the claims of nondiverse parties. If such a suit might injure the proper parties, however, the court may have to dismiss as to all parties and grant a new trial to the diverse parties. See Dollar S.S. Lines, Inc. v. Merz, 68 F.2d 594 (9th Cir. 1934).

Another factor that the court should consider before it grants intervention is whether the forum state permits intervention in spurious class actions. If the state does not allow such intervention, granting intervention in the federal court would bring a conflict between federal and state law and contravene the principle of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and the outcome determinative test as set out in Guaranty Trust Co. v. York, 326 U.S. 99 (1945). The court must decide whether this difference in outcome outweighs the advantages to be gained by allowing intervention—especially those of effectuating a group remedy and of avoiding multiple litigation—in a spurious class action. *Cf.* Note, *Erie Doctrine and Federal Rule 13(a)*, 46 MINN. L. REV. 913, 931–32 (1962).

86. See 3 MOORE, FEDERAL PRACTICE ¶ 23.11[3] (2d ed. 1948).

87. Neither of these suggestions would really overburden the federal courts, for they would only involve additional parties in an existing suit. Moreover, they would prevent additional suits in the state courts and thereby increase judicial economy. *But see* Campbell, *Jurisdictional and Venue Aspects of Intervention Under Federal Rule 24*, 7 U. PITT. L.

versity requirement for intervention in spurious class actions, and even in non-class actions, they may begin to relax that requirement with permissive joinder. Only in this way will the anomaly be fully resolved.

REV. 1, 10–11 (1940); Petition for Certiorari, pp. 16–17, Black v. Amen, 355 U.S. 600 (1958).