Boston College Law Review

Volume 10
Issue 3 *A Symposium Federal Rule 23 - The Class Action*
Article 3

4-1-1969

A Preparatory Note

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I had intended to say little more by way of an introduction to this issue of the *Review* than that the revised Federal Rule 23 was receiving a tolerably good and understanding reception by the courts. But the Supreme Court has put that estimate somewhat in doubt by its recent decision of *Snyder v. Harris* (March 25, 1969).[1] So I must reconnoiter for a paragraph or two.

The reform of Rule 23 was intended to shake the law of class actions free of abstract categories contrived from such bloodless words as "joint," "common," and "several," and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties. Hence the new articulations of the permissible types of class actions which appear in subdivision (b) of the revised Rule. As part of the change, that old perverse anomaly, the "spurious" class action, was jettisoned. And whereas the old Rule had paid virtually no attention to the practical administration of class actions, the revised Rule dwelt long on this matter—not, to be sure, by prescribing detailed procedures, but by confirming the courts' broad powers and inviting judicial initiative. The entire reconstruction of the Rule bespoke an intention to promote more vigorously than before the dual missions of the class-action device: (1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.

In this view of what the revision was all about,[2] the *Snyder* case makes a hollow sound. Technically the case holds that where a class action of the (b)(3) type—the most adventuresome of the new types —happens to be grounded jurisdictionally upon diversity of citizenship, the requisite "amount in controversy,"[3] an amount in excess of $10,000,

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1 89 S. Ct. 1053 (1969).

2 See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 375-400 (1967).

3 28 U.S.C. § 1332(a) (1964).

is not to be figured by aggregating what the class as a whole is demanding. Rather each individual representative must himself have a demand over $10,000. This reading resulted in dismissal of the *Snyder* action. It is true that, in practice, the bulk of class actions lodged in federal courts are based on jurisdictional statutes in which amount in controversy plays no part.[4] Still the analysis employed in the *Snyder* case is discouraging. The majority opinion by Justice Black, when it pulverizes the class to examine the interest of each named plaintiff, harks back to terminological distinctions that one would have thought inapposite to the new Rule; indeed Justice Black seems *pro tanto* to resurrect the "spurious" action. The net effect of the decision is to disfavor the small fellow and thereby to defeat a main purpose of the Rule revision. These and other iniquities of the majority opinion are set out in Justice Fortas' discerning and persuasive dissent. We may hope that the Supreme Court's aberration will be temporary.

Putting *Snyder* to one side, the (b)(3) grouping has presented some nice issues, but the lower courts have prevailingly met them with patient good will. Subdivision (b)(3) authorizes class-action treatment when the court finds,[5] first, "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and, second, "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." A considerable variety of situations have been tendered to the courts under these provisions—various cases of roughly parallel rights and duties, held or sustained by a sizable group, arising from some congeries of facts—and we have already a body of judicial work elucidating the criteria which is by and large far more to the point, far more interesting, than the run of opinions under the predecessor Rule.

The "predominating-common-question" criterion looks to important themes running pervasively through the entire litigation. Without such themes a purported class action would, in the actual course of its preparation and trial, fractionate into numerous separate actions. The problem of sensing which situations are suitable in this respect for class-action treatment can be tough but it seems manageable especially in the light of accumulating experience. The "superior-method" criterion reminds us that a class action is only one of a number of procedural devices for handling multiple litigation, ranging from the test case, through the "coordinated pretrial" of new section 1407 of title 28, to the consolidation of actions. Why should a class action be preferred over the other available devices in a particular situation?

[4] See the remarks of Justice Fortas, dissenting in Snyder v. Harris, 89 S. Ct. at 1060 & n.2.

[5] Other prerequisites, common to all class actions, are set out in subdivision (a) of the Rule.

This question needs to be put squarely and answered openly. So Judge Weinstein argued in his academic writing,[6] from which the draftsmen of the new Rule took encouragement; and he has elaborated this view in his imaginative and important opinion in *Dolgow v. Anderson.*[7]

Litigants and judges are thus to project themselves imaginatively into the future course of the lawsuit and try to foresee the likely management snarls. One such tangle can arise in providing the notice to the (b)(3) class which alerts the class members to their right to "opt out" of the class and go it alone. Where the class is large and dispersed, effective notice-giving can be difficult and expensive. But the notice, according to the Rule, is to be "the best . . . practicable," not the best imaginable. We should not swing quixotically from the extreme of the old Rule where no notice to the class was required in any case, to insistence in the (b)(3) situation upon a triple-plated form of notice which may turn out to be prohibitive.[8] Fair play to the class comes about through adequacy of representation more than through notice. In singular cases great difficulty with the notice may suggest that no class action should be attempted; on the other hand it may suggest upon deeper thought that the action should preferably be typed as a (b)(1) or (b)(2) class action, the more conventional types, where opportunity to opt out is neither needed nor afforded. Finally I refer again to the *Dolgow* opinion which considers the conditions under which the burden of the notice, including the expense, can fairly be put upon a party opposing the class or be shared by both sides.

Another management problem lurks at the end, not the beginning of the (b)(3) action, namely, the problem of securing final relief for class members. After findings favorable to a plaintiff class, say in a fraud or antitrust action, the members would ordinarily have somehow to prove the amounts to which they are entitled, and provision must then be made for payment to them individually. These procedures can have a nightmarish look when the members are very many and their stakes very modest. On these matters we are not without analogies and precedents,[9] though some may prove on examination to be examples from which one learns in reverse, so to speak. I expect the problems will appear less formidable when they actually arise than they do now in anticipation. Yet imagination and even daring may be required of counsel and courts in devising abbreviated but fair procedures leading to hand-tailored relief which may well be quite novel

[6] Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433 (1960).

[7] 43 F.R.D. 472 (E.D.N.Y. 1968).

[8] See Comment, Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws, 116 U. Pa. L. Rev. 889 (1968).

[9] For example, the distribution to members of the class following settlement of the *Transitron* action. See Cherner v. Transitron Electronic Corp., 221 F. Supp. 48 (D. Mass. 1963).

in form. To all this I should add that insofar as class actions will enhance the forensic opportunities of hitherto powerless groups, they will tend to probe the *terrae incognitae* of substantive law.

There are some who are repelled by these massive, complex, unconventional lawsuits because they call for so much judicial initiative and management. We hear talk that it all belongs not to the courts but to administrative agencies. But by hypothesis we are dealing with cases that are not handled by existing agencies, and I do not myself see any subversion of judicial process here but rather a fine opportunity for its accommodation to new challenges of the times. The class action takes its place in a larger search for pliant and sensitive procedures. I confess that I am exhilarated, not depressed, by experimentation which spies out carefully the furthest possibilities of the new Rule. The first three years of the Rule have already produced some innovative opinions which engage sympathetic analysis regardless of their final merits. It should perhaps be counted a measure of the quality of the Rule that it provokes such opinions.

No one, I suppose, expects of a Rule that it shall solve its problems fully and forever. Indeed, if the problems are real ones, they can never be solved. We are merely under the duty of trying continually to solve them.