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## THE MUMBO JUMBO OF CLASS ACTIONS— AN ATTEMPT TO ALLEVIATE

What ultimate benefit does the law derive from a rule of procedure which is confused and misapplied by bench and bar alike?<sup>1</sup> This question is proposed as a starting point in an attempt to analyze the usefulness of Rule 23(a) of the Federal Rules of Civil Procedure as an instrument by which the court can determine the rights of a numerous class by one common final judgment. This is the same Rule 23(a) which is part of Wyoming Rules of Civil Procedure.

The purpose of a class action "is to avoid a multiplicity of suits and to settle the rights of all parties having a common or general interest in one suit without their actual appearance in court as litigants."<sup>2</sup>

The concept of class actions as the legal profession knows it today is not new. During the quarter of a century before 1938 (the year 23(a) was adopted) federal class suits seemed to get on well under the somewhat similar provisions of Equity Rule 38: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."<sup>3</sup>

As can be seen, there is a close similarity between the old Equity Rule 38 and the first paragraph of the present Rule 23(a). However, this is where the similarity ends and the differences begin.

After the introductory paragraph of 23(a), the rule goes on to list the types of rights that can be enforced by class actions. The first is where the rights are "joint or common or secondary"; the second is where the right is "several" and an adjudication "may affect specific property"; the third is where the right is "several and there is a common question of law or fact and a common relief is sought."<sup>4</sup> These three subheadings of Rule 23(a) were indirectly given labels by Professor Moore after the Drafting Committee rejected his suggested labels.<sup>5</sup> Professor Moore suggested (and subsequent case law has adopted) the terms "true," "hybrid," and "spurious" as corresponding to subheadings one, two, and three, respectively of Rule 23(a).<sup>6</sup>

In each class action arising under any one of the three sub-headings under Rule 23(a), the following basic requirements must be met; "the persons constituting the class must be so numerous as to make it impracticable to bring them all before the court, in which case, such number of them, one or more, as will fairly insure the adequate representation of all, may, on behalf of all, sue or be sued."<sup>7</sup>

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1. 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §562 at 262 (Wright ed. 1961) [Hereinafter cited as *Barron & Holtzoff*.]
  2. 67 C.J.S. *Parties* §13 (1950).
  3. CHAFEE, SOME PROBLEMS OF EQUITY 244 (1950).
  4. Fed. R. Civ. P. 23(a) (1938).
  5. CHAFEE, *op. cit. supra* note 3 at 251.
  6. *Beadle v. Daniels*, 362 P. 2d 128, 133 (Wyo. 1961). Court quoted *Salt Lake City v. Utah Lake Farmers Ass'n.*, 286 P.2d 733, 779-780 (Utah 1955).
  7. 2 *Barron & Holtzoff* §562 at 260.

The big area of contention and confusion in regard to class suits is the effect of the judgment on absent class members. Applying Professor Moore's terminology; a true class action judgment is conclusive on all members of the class represented, a hybrid judgment effects only the rights of the class members in the particular res, a spurious judgment effects only those persons actually named.<sup>8</sup> Thus, with reference to spurious class action, it is suggested that it is not a class action at all due to its non-binding effect on absent parties.<sup>9</sup> A "spurious class suit is presently but a permissive joinder device. . . ."<sup>10</sup>

The under-lying principle which governs the area of Anglo-American jurisprudence in regard to the binding effect of judgments radiates from the case of *Pennoyer v. Neff*.<sup>11</sup> This case is noted for the proposition that an in personam judgment rendered against a person neither served with process nor appearing before the court is invalid and therefore has no binding effect.

However, with increasing use of class actions since this case, it was found to be impractical to serve persons involved in the case. Professor Chafee went so far as to suggest that a "formal service is out of the question; that would defeat the chief advantage of a class suit."<sup>12</sup> Thus, the landmark case of *Hansberry v. Lee*<sup>13</sup> held that class actions, which required that all parties be served with process or be voluntarily present to be bound, were an exception to the *Pennoyer* rule. "To these general rules (*Pennoyer* case) there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a class or representative suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it."<sup>14</sup> The court went on to say that a person was not adequately represented if there was a failure of due process and that there is "failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."<sup>15</sup>

Since the *Hansberry v. Lee* case, the text writers have agreed that the Moore approach is of little value in determining the binding effect of judgments. No longer can one automatically classify an action "true," "hybrid" or "spurious" and predict, with certainty, the binding effect of the judgment on absent membership.<sup>16</sup> However, in *Beadle v. Daniels*, the Wyoming court used the Moore classification in arriving at the conclusion that the action was spurious in nature and that the judgment will bind only those before the court.<sup>17</sup> In this case, there was a money judgment rendered and although the court classified the action

8. *Id.* at 347.

9. Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 825 (1946).

10. Van Dercreek, *The "Is" and "Ought" of Class Actions Under Federal Rule 23*, 48 IOWA L. REV. 273, 274 (1963).

11. 95 U.S. 714 (1877).

12. CHAFEE, *op. cit. supra* note 3, at 231.

13. 311 U.S. 32 (1940).

14. *Id.* at 41.

15. *Id.* at 42.

16. See *Barron & Holtzoff* §572 at 349; Van Dercreek, *supra* note 10, at 277.

17. *Beadle v. Daniels*, *supra* note 6.

as spurious, it went on to suggest that those persons not parties to the original suit, could, if they expressed a desire to intervene, "be allowed to do so during a time and under circumstances which the trial court deems to be reasonable."<sup>18</sup> It is to be noted that this intervention would enable them to share in the money judgment without participation in the litigation.

At times the courts have applied different labels to the same case.<sup>19</sup> In one case and its related appeals,<sup>20</sup> the various courts called the same cause of action, hybrid, then spurious, then reached the conclusion that names were not important and arrived at a result without giving the class action a name.<sup>21</sup> As Professor Chafee so eloquently put it: "It is not uncommon, when a case goes through several courts, for one court to call it spurious, and another hybrid, and sometimes the judges throw up their hands in despair and frankly say they do not know what it is."<sup>22</sup> It should thus be apparent that there is, in fact, a great deal of confusion in regard to class actions in the minds of both judges and lawyers.

Due to this confused state of Rule 23(a), there has been much written proposing various plans which purport to have the panacea formula.<sup>23</sup> The fair and adequate representation test which is given in *Hansberry v. Lee* would seem to be the simplest solution to the problem, but like all case law it is piecemeal in nature and has not been adopted by all jurisdictions as was illustrated in the Wyoming case of *Beadle v. Daniels*.<sup>24</sup> It is suggested that some type of amendment would be the solution for the procedural revision of Rule 23(a). The major question remains which theory of reform is to be adopted?

Before a meaningful approach can be launched towards a statutory revision of Rule 23(a), two major problems of the present rule must be borne in mind. Namely, who is a member of the class and what is the binding effect of the judgment on the class members who are not present?

There have been several suggested approaches to these two problems, but the underlying solution seems to be one of providing notice. In an excellent note in the *Columbia Law Review*, it is suggested that, "without notice to him (member of the class) constitutional due process is not guaranteed by denominating the action 'true' or 'hybrid'. On the other hand, when timely notice

18. *Ibid.*

19. *Deckert v. Independent Shares Corp.*, 27 F.Supp. 763 (D. C. Pa. 1939).

20. *Independent Shares Corp. v. Deckert*, 108 F.2d 51, 55 (3d Cir. 1939); *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940); *Pennsylvania Co. for Ins. v. Deckert*, 123 F.2d 979, 983 (3rd Cir. 1941).

21. See Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum. L. Rev. 818, 822 (1946), for additional cases in which the courts have confused these terms.

22. CHAFEE, *supra* note 3, at 249.

23. There has been a host of law review material written in this area of suggested reform of 23(a) coupled with the suggestions of Professor Chafee. For an exclusive bibliography, see Van Dercreek, *The "Is" and "Ought" of Class Actions Under Federal Rule 23*, 48 IOWA L. REV. 273 n.2 (1962); and see also Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for U. S. Dist. Ct. by the Committee on Rules of Practice and Procedure of the Judicial Conference of the U. S., March 1964, 34 F. R. D. 325, 384-395 (1964).

24. *Beadle v. Daniels*, *supra* note 6.

is required an opportunity for participation given, due process is insured."<sup>25</sup> The writer suggests that the court should direct the type of notice to be given and that this can be done under the provision of present Rule 23(a) and judicial decisions.<sup>26</sup> It is further suggested that if all members are given notice "the way is then free to attach conclusive effect by way of collateral estoppel to the class judgment on the issue of law or fact common to the group and actually litigated."<sup>27</sup> Thus the two major problems are solved. The class is determined by the extent and scope of the notice. The class is bound and the judgment is *res judicata* on an estoppel theory.

At first blush this suggested approach looks like the answer to the problem, but upon closer analysis, one sees that to insure adequate notice, the purpose of class action is defeated. Not all members of the purported class can be effectively determined and served with notice. Secondly, the writer concludes the note with the comment that a succeeding action could be instituted by a person supposedly bound in the class action if he could show "that he had claims or defenses other than those litigated in the representative action."<sup>28</sup>

If the suit were successful from the class standpoint, a member of the class would be content to be bound by the judgment, but if the class lost, he would attempt to be excused from the judgment on the theory that he had a distinguishable claim or defense from those presented in the principal suit. This same unrealistic notion was expounded and subsequently rejected in an article written by Messrs. Kalven and Rosenfield.<sup>29</sup> As Professor Chafee pointed out, this approach is totally "inconsistent with the long-settled rule that *res judicata* always cuts both ways."<sup>30</sup> It is apparent that the simple and uncomplicated approach is ineffectual.

Another proposed solution to the basic problems of the current Rule 23(a) is set forth in an article appearing in the *Iowa Law Review*.<sup>31</sup> Here, Professor Van Dercreek suggests that two sections be amended to the present Rule 23(a) to alleviate the problems of jural relationship and *res judicata*. In Van Dercreek's proposed subsection (d) entitled "Notice," he suggests that notice of the suit be given to all class members under the terms and conditions set out by the court and that once notice is given, any class member who believes his right to be several or adverse may move the court for dismissal. Proposed subsection (e) entitled "Res Judicata" states that once notice is given and the class is adequately represented, it is binding on all members except those properly dismissed.<sup>32</sup>

Professor Van Dercreek overcomes one basic objection to the approach as

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25. Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 833 (1946).

26. *Id.* at 834.

27. *Id.* at 835.

28. *Id.* at 836.

29. Kalven & Rosenfield, *The Contemporary Function of Class Suit*, 8 U. CHI. L. REV. 684 (1941).

30. CHAFEE, *supra* note 3, at 280.

31. Van Dercreek, *supra* note 10.

32. Van Dercreek, *supra* note 10, at 290.

set forth in the *Columbia Law Review* note. Under Professor Van Dercreek's approach, once the class is determined and all excludable members accounted for, the judgment is *res judicata* to all class members and no outside claims or defenses will be permitted to upset the decision. However, the chronic problem of notice is still present. Professor Van Dercreek does not purport to set up what type of notice is to be given or how one determines the exact members of the class entitled to receive notice. He seems to suggest that this is the function of the various courts throughout the land.<sup>33</sup> Here again the view of Professor Chafee should be borne in mind; namely, to insure adequate notice defeats the purpose of class actions. Also, if the job of determining class membership is left up to the courts without any basic criteria upon which to rely, the bench and bar are in no better position, if not in fact in a worse position, than they are now under present Rule 23(a) in determination of class membership.

Professor Chafee has proposed yet another avenue upon which to approach the problem of Rule 23(a). Professor Chafee's approach is guided by the underlying principle that "formal service (of notice) is out of the question; that would defeat the chief advantage of a class suit."<sup>34</sup> Yet even Professor Chafee believes that there ought to be some kind of notice in the guise of a postcard or an "advertisement on the financial page of the *New York Times*."<sup>35</sup> He feels, however, that "when the interests of the unnamed persons are closely identified with the interests of the representatives and when the representatives put up a real fight, their day in court is accepted as if the unnamed persons were in court, too."<sup>36</sup>

Like all generalities the quotation sounds good, but is filled with danger—chief of which is inconsistency, *i.e.*, the inconsistency of the fifty state courts and various federal courts in regard to what individuals constitute a class. This is based on the subjective analysis of different fact patterns by various judges. This would lead to different results depending on the jurisdiction. Here again this is the same problem of the current Rule 23(a) which is sought to be corrected. Professor Chafee's proposed rule is simple in content and is quite similar to the old Equity Rule 38. Chafee's rule states:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.<sup>37</sup>

Professor Chafee relies quite heavily on the Restatement of Judgments<sup>38</sup> and says "that the Restatement of Judgments provides for class actions without the tripartite division of Rule 23 and with none of the distinctions as to *res judicata* which have been urged in connection with that rule. The Restatement gives the court, where a class action is properly brought, juris-

33. Van Dercreek, *supra* note 10, at 289.

34. CHAFEE, *supra* note 3, at 231.

35. *Ibid.*

36. *Ibid.*

37. CHAFEE, *supra* note 3, at 249.

38. RESTATEMENT JUDGMENTS §§26, 86, 116 (1942).

diction to bind unnamed members, even if not personally within the jurisdiction of the court."<sup>39</sup>

Acting upon the basic concept of the Restatement of Judgments, Professor Chafee proposes two types of class suits. One is entitled "Solid Class Suits" and it attempts to carry out the ideas of the Restatement of Judgments, sections 26, 86, 116. "All the members of the class are virtually in the suit from start to finish, simply because they belong to the class."<sup>40</sup> Thus members in this type of action are bound permanently just as under the present "true" class action. But Professor Chafee feels the need for protection of unnamed members at times and so provides the class action entitled, "Invitation to Come In" which is quite similar to the present spurious class action and binds only those persons actually before the court—a type of permissive joinder.<sup>41</sup>

Professor Chafee seems to present a rather broad basic rule, except again the problem of notice is not satisfactorily met. A passing comment in regard to notice by way of postcards or advertisements in the New York Times is not the kind of statement which reflects a workable solution to the problem of notice. Too many times this type of notice never reaches parties who are to be bound. The Chafee approach smacks of legal categorization which he has condemned Professor Moore for instituting. His approach in regard to "Solid Class Suits" and "Invitations to Come In" is nothing more or less than saying "true" and "spurious" actions.

The above examination of the various approaches should lead one to the conclusion that to this point the major problems of class suits and Rule 23(a) still have not been completely solved by any one view. Namely, who is a member of the class and what is the binding effect of the judgment on absent members?

It is suggested that there is a possible solution to these two basic problems and it is found in the present proposed amendment to Rule 23(a) submitted by the Committee on Rules of Practice and Procedure in March of 1964. The proposed amendment would completely supersede the present Rule 23(a). The proposed amendment is a rather lengthy rule, due to the fact that it attempts to codify, in subdivision, the general substantive law on class actions. Subdivision (a), entitled "Prerequisites to a Class Action," states:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>42</sup>

In subdivision (b) there are some further prerequisites which must be met, in

39. CHAFEE, *supra* note 3, at 258.

40. *Id.* at 259.

41. *Id.* at 260.

42. Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for U. S. District Court. By the Committee on Rules of Practice and Procedure of the Judicial Conference of the U. S. at 95 (March 1964).

addition to those of subdivision (a), before a class action can be maintained.

Subdivision (b), entitled "Class Actions Maintainable," states:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matter pertinent to the findings include: (A) the interest of members of the class in prosecuting or defending separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action.<sup>43</sup>

These two subdivisions taken together set up a very objective criteria from which a judge can determine the legal basis for a class action. If these criteria are not met, then there is no basis for a class action.

Subdivision (c) (1) provides that at an early date in the proceedings before the case is decided on the merits, the court will determine whether an action brought as a class action is to be maintained. The court determines whether or not the action is a class action by the objective criteria established in subdivisions (a) and (b).<sup>44</sup> Individuals who find that their interest falls into the objective categories set forth in subdivisions (a) and (b) are members of the class and the judgment is binding upon them. Subdivision (c) (2) states:

The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.

In any class action maintained under subdivision (b) (3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.

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43. *Id.* at 96.

44. *Id.* at 109.



However, the drafters of the amendment are aware of the weakness of the present Rule 23(a) in setting up categories which are the sole determiner of class membership. Many times in large class suits, such as civil rights suits or consumer rate case suits, many members of the class are uninformed of the particular suit and inequities sometimes arise. Thus under the proposed amendment subdivision (d) (2), the court has complete discretion to require notice to be given to protect non-parties.<sup>45</sup> Under this subdivision (c) (2) notice is required if the class action is maintained under the rather broad subdivision (b) (3). This is the subdivision which states that, if the question of law or fact is predominate over any question affecting only individuals, then the action can be maintained as a class action. If this subdivision is used, the court shall exclude those members who request exclusion, unless they are found to be essential to fair adjudication. To ensure that individuals have the opportunity to be excluded, they *must* receive notice of the action as required by subdivision (c) (2).

These two subdivisions of notice, (c) (2) and (d) (2), in the proposed Rule 23(a) led the drafters to conclude: "This mandatory notice pursuant to subdivision (c) (2), together with any discretionary notice which the court may find it advisable to give under subdivision (d) (2), will thoroughly fulfill requirements of due process in class actions . . . ."<sup>46</sup>

The drafters went on to say that the notice to be given is to be determined by the court and it (notice) "should be accommodated to the particular purpose but need not comply with the formalities for service of process."<sup>47</sup> Thus it seems that the proposed Rule 23(a) overcomes one of the basic criticisms of the former proposals to reform the present Rule 23(a) by providing a standard by which notice can be given.

Thus subdivision (c) (2) and (d) (2), coupled with the provisions in subdivision (a) and (b), will adequately insure and formulate objectively which individuals are members of the class.<sup>48</sup>

Secondly, due to the explicit terms of subdivision (c) (2), the judgment in a class action shall extend to members of the class whether or not the judgment is favorable to them. Hence, the *res judicata* problem is also solved. It is apparent that the amended rule is a culmination of the best of the prior proposals, plus some added views of the drafters. To put it in the words of the drafters: "The amended rule described in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgment extending to the class, as defined, whether or not favorable to it; and refers to the measures which can be taken to assure the fair conduct of these actions."<sup>49</sup>

It is suggested that the adoption of this proposed substitution for the present Rule 23(a) will alleviate several of the above mentioned problems that have arisen in the Wyoming courts and in the other federal and state courts.

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45. See, *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961).

46. Preliminary Draft, *supra* note 42, at 113.

47. *Id.* at 114.

48. *Id.* at 109.

49. *Id.* at 101.

The proposed rule establishes a criteria which will aid courts in arriving at uniform decisions in regard to class actions. Undoubtedly there will be some difficulties which will arise due to the adoption of this proposed rule, but it seems that a new approach would be welcomed at this time. As things stand today, there is inconsistency and confusion in all corners in regard to the application of Rule 23(a) and consequently bench and bar alike shy away from a very useful tool of procedural law.<sup>50</sup> In closing, it is suggested that "justice will be better served the more one adjudication can fairly and effectively resolve conflicts for all interested persons."<sup>51</sup>

*John B. Speight*

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50. CHAFEE, *supra* note 3, at 249.

51. Van Dercreek, *supra* note 10, at 299.