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Federal Procedure - "Spurious Class" Plaintiffs Allowed To Intervene after Clayton Act Liability for Treble Damages Was Fixed - State Wholesale Grocers v. Great Atlantic & Pacific Tea Co., 136 CCH Trade Reg. Rep. 53 (N.D. Ill., 1959)

DePaul College of Law

FEDERAL PROCEDURE–"SPURIOUS CLASS" PLAINTIFFS ALLOWED TO INTERVENE AFTER CLAYTON ACT LIABILITY FOR TREBLE DAMAGES WAS FIXED

The plaintiffs instituted a suit against the defendants charging a violation of the Clayton Act, Section 2(d). In the trial court the issues were to be considered separately: (1) the determination of liability for a violation of the Act and (2) if liability was found, a determination of damages by a Master.[1] The trial court then held that the defendants had not violated the antitrust laws and dismissed the action. The plaintiffs appealed, and the appellate court affirmed the trial court's decision as it pertained to two of the defendants, Great Atlantic and Pacific Tea Co. and Women's Day, Inc., but found that the other three defendants had violated the Clayton Act.[2] The case was remanded to the lower court where the plaintiffs will have to prove the fact of damage as required by Section 4 of the Clayton Act. Upon remand, the plaintiffs moved for a ruling on the so-called "spurious class" suit issue which had not been adjudicated by either the trial or appellate courts. In a memorandum and order, the trial court held that the plaintiffs' action was a "spurious class" action and ordered that a pre-trial conference be held to set a reasonable time within which additional plaintiffs must intervene or be barred. *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*, 136 CCH Trade Reg. Rep. 53 (N.D. Ill., 1959).

Class actions are allowed by Rule 23 of the Federal Rules of Civil Procedure.[3] There are three types of class actions created by rule 23(a): the true, the hybrid and the spurious.[4] The three types have one thing in common; the persons constituting the class in each type of action must be so numerous as to make it impracticable to bring them all before the court. If that is the case, then such number of them, as will fairly insure the adequate representation of all, may sue on behalf of all. It should be understood that class actions are allowable only at the courts' discretion. If the class is limited in membership so that joinder of all members is practicable, a class action is not permissible.[5] At this point resemblance among the types of class actions ceases with agonizing abruptness and

[1] State Wholesale Grocers v. Great Atlantic & Pacific Tea Co., 154 F. Supp. 471 (N.D. Ill., 1957). Liability determined under § 2(d) of Clayton Act, 15 U.S.C.A. § 13(d) (Supp., 1958). Requirements of damage found in § 4 of Clayton Act, 15 U.S.C.A. § 15 (Supp., 1958).

[2] State Wholesale Grocers v. Great Atlantic & Pacific Tea Co., 258 F.2d 831 (C.A. 7th, 1958).

[3] 28 U.S.C.A., Rule 23 (Supp., 1958).

[4] 2 Barron & Holtzoff, Federal Practice and Procedure § 562 (Supp., 1958).

[5] Hudson v. Newell, 172 F.2d 848 (C.A. 5th, 1949).

the differences between them must be understood in order to comprehend the effect of various findings and judgments of courts.

The differences arise in regard to the character of the right which is being enforced.[6] The so-called true class action is brought to enforce a right which is "joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it."[7]

The so-called hybrid class action involves the enforcement of rights accruing to several parties, individually as opposed to jointly, in an action the object of which is the deciding of claims which may affect specific property involved in the action.[8] Hybrid actions are not common, but they are well suited to relief of bondholders and in certain types of creditors' suits.

The spurious class action allows a suit where the right is "several and there is a common question of law or fact affecting the several rights and a common relief is sought."[9] The rule creating this type of class action is equivalent, for all intents and purposes, to the permissive joinder rule, Rule 20(a).[10] It allows numerous persons having separate or several rights for which a common relief is sought, *based on common questions of law or fact*, to bring their actions before the courts at one time. Under this rule, as under the permissive joinder rule, efficiency is at its maximum because multiplicity of suits is avoided where possible.

As briefly stated in the facts, Rule 23(a) (3) was applied in the instant case in the following manner: The issue of statutory liability had been established by the appellate court and the case was remanded for the purpose of proving the fact of damage as required by Section 4 of the Clayton Act. Before proceeding further, the court, in a memorandum ruling, held that all plaintiffs similarly situated would be allowed to intervene, if they did so by a reasonable date to be established at a pretrial conference.

The question of the effects of a judgment necessarily arises at this point. Where a class action is brought and judgment is made, upon whom is the judgment binding? Is the judgment *res judicata* upon the entire class or only those members of the class who appeared in court? It is interesting to note that during the Congressional Advisory Committee proceedings held in 1937 a proposal was suggested which would add to

[6] 2 Barron & Holtzoff, Federal Practice & Procedure § 562 (Supp., 1958).

[7] 28 U.S.C.A., Rule 23(a) (1) (Supp., 1958).

[8] 2 Barron & Holtzoff, Federal Practice & Procedure § 562 (Supp., 1958).

[9] 28 U.S.C.A., Rule 23(a) (3) (Supp., 1958).

[10] 28 U.S.C.A., Rule 20 (Supp., 1958); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (C.A. 7th, 1952); Shipley v. Pittsburgh & L. E. R. Co., 70 F. Supp. 870 (W.D. Pa., 1947).

Rule 23 a provision pertaining to the effect of judgments under Rule 23.[11] It was proposed that a judgment in a case brought under subsection (a)(1) of Rule 23(a), the so-called true class action would be conclusive upon the class; a judgment in the hybrid type class action would be conclusive upon all parties and privies to the action, and upon all claims, whether or not presented in the action, to the degree that they do or may affect specific property, unless such property is conveyed to or retained by the debtor who is defendant in the action; and a judgment in a spurious class action would be conclusive only upon the parties and privies to the proceeding. This proposal was rejected by the Advisory Committee because they felt it was a matter of substance and went beyond the scope of procedure. However, the courts have taken the position, as to the effect of judgments in true and spurious class actions, that was contained in the proposed and rejected section of the rule.[12] Therefore, it is settled that no member of a spurious class suit is bound by a judgment unless he joins as plaintiff or as intervenor.[13]

The novel point in this *Wholesale Grocers'* case is that it has allowed members of the class to intervene once trial has begun and after liability has been established. The intervention was merely to prove the fact of damage and obtain a judgment therefor. In other words, it becomes a question of whether the intervention is timely.

If the court had not allowed members of the class to intervene, the judgment would not be binding upon them. Their only alternative would be to institute another action unless such new action would be barred by the Statute of Limitations. If new proceedings are brought, there is clearly a multiplicity of suits. If their action is barred by the Statute of Limitations, there exists a right without a remedy. Therefore, it was in the interests of justice that the court allowed intervention at that point, being assured that the defendant's position was not prejudiced. The determination of the defendant's liability would have been the same regardless of the number of plaintiffs joined in that determination. Liability of the defendant is predicated upon the act of placing advertisements in a publication owned by one of its customers. Although the presence of all of the plaintiffs was not necessary for the establishment of liability,

[11] Advisory Committee on Rules for Civil Procedure (1937) p. 60. For an excellent discussion of this point consult Moore and Cohn, Federal Class Actions, Jurisdiction and Effect of Judgments, 32 Ill. L. Rev. 555 (1938).

[12] Judgment in true class actions binding on the class: Kentucky Home Mutual Life Insurance Co. v. Duling, 190 F.2d 797 (C.A. 6th, 1951); U.S. v. American Optical Co., 97 F. Supp. 66 (N.D. Ill., 1951). Judgment in spurious class actions binding upon only those who join as plaintiffs or intervenors: Schatte v. International Alliance, 183 F.2d 685 (C.A. 9th, 1950); Pennsylvania R. Co. v. U.S. 111 F. Supp. 80 (D.C. N.J., 1953).

[13] California Apparel Creators v. Wieder of California, 162 F.2d 893 (C.A.2d, 1947); Weeks v. Bareco Oil Co., 125 F.2d 84 (C.A. 7th, 1941).

it is clear that their appearance is necessary for proof of damage since the law requires that each party must prove his damage.

A closer scrutiny of Rule 23(a)(3) will reveal as a matter of logic that the intervention was timely. The requirements for bringing a class action are: "(1), the parties must be so numerous as to make it impractical to bring them all before the court; (2), the plaintiffs must adequately represent the class, and (3), there must be some community of interest."[14] To first say that the plaintiff must show that there is such a great number of plaintiffs that a class action must be brought, and then to say that any member of the class not a party before trial cannot join after determination of an issue common to all members of the class, is a contradiction. To bar non-participating members of the class after it has been shown that it is impractical for them to participate defeats the purpose of Rule 23.

Whether intervention is to be allowed is a matter for the court's discretion. "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."[15] To show how far the court can go in exercising its discretion, a recent case allowed intervention by a member of the class after judgment and during the appellate proceedings. In *Hurd v. Illinois Bell Telephone*,[16] the good faith of the plaintiff in representing the class was doubted and the petitioner sought to intervene in order to protect his rights. The court said:

> But, although intervention after judgment is not to be lightly permitted this cause is so fraught with elements of possible prejudice to petitioner and other petitioners similarly situated, that we, in the exercise of a sound discretion conclude that our order permitting petitioner to intervene should be allowed to stand.[17]

Seemingly contra to the *Wholesale Grocers* memorandum opinion is a 1957 decision, *Hess v. Anderson, Clayton & Co.*[18] In that case, twenty-six plaintiffs filed suit for violation of the antitrust laws, on behalf of themselves and others similarly situated. The entire class consisted of approximately 8,000 cotton growers in the San Joaquin Valley. The court did not allow the spurious class action because the plaintiffs did not prove they were representative of the class. It appeared that within the class there were different types of relationships with the defendant. Also, 2,038 members of the class filed affidavits specifically stating that they were *opposed* to participation in the suit and were unwilling to be represented by the plaintiffs. The court did not stop there, however, and proceeded *in*

[14] Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 740 (C.A. 7th, 1952).

[15] 28 U.S.C.A., Rule 24(b) (Supp., 1958).

[16] 234 F.2d 942 (C.A. 7th, 1956).

[17] Ibid., at 944.

[18] 20 F.R.D. 466 (S.D. Cal., 1957).

dictum to set up a procedural question of timeliness of joinder similar to the situation in the *Wholesale Grocers* opinion. It then said that joinder after the determination of liability would not have been allowed in such a case.

Consideration of the cases ruling on intervention by a member of a class, keeping in mind the legislative purposes for which Rule 23 was adopted, leads to the conclusion that the intervention in the *Wholesale Grocers* opinion was a proper exercise of the court's discretion. The presence of all the members of the class at the determination of the issue of liability, while hampering the court's process, would not have had any effect upon their decision. Therefore, the defendant's position was not prejudiced. The intervention of all the members of the class would not now prejudice the defendants because the factual situation upon which the determination of liability is based was adequately represented by the original plaintiffs.

A court in exercising its discretion should carefully consider the factual situation in each case. It is conceivable that intervention during or after trial might prejudice a party. This is most apparent where a trial by jury has been demanded. However, as noted in the *Hurd* case, intervention at the appellate level might be a proper exercise of the court's discretion. Let each ruling stand or fall on the facts.

LABOR LAW—"AGENCY SHOP" CLAUSE NOT VIOLATIVE OF RIGHT-TO-WORK LAWS UNLESS EXPRESSLY PROHIBITED

The business manager of Local 697, International Brotherhood of Electrical Workers, and Meade Electric Company negotiated a contract in which they agreed on all terms except a provision commonly known as the "agency shop" clause. The proposed "agency shop" clause provided that union membership was not mandatory but, as a condition of continued employment, all employees must pay the union an amount equal to that paid in fees by the union members.

The company contended this clause was in violation of the Indiana Right-To-Work Act. They filed a complaint in the Superior Court of Lake County to enjoin the union from insisting that this clause be included in the collective bargaining agreement. The Superior Court of Lake County entered judgment for defendant and the plaintiff appealed. The Indiana Appellate Court affirmed holding that the "agency clause" did not violate the Indiana Right-To-Work law. *Meade Electric Company v. Hagbert,* 159 N.E.2d 408 (Ind. App., 1959).

The issue raised in this case is one of first impression. Although nineteen states have such Right-To-Work laws there appears to be no case law on