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RULE 23 CLASS ACTION ENFORCEMENT OF THE CLEAN AIR ACT OF 1970

This country has recently taken a great interest in air pollution, and the extent of its concern has manifested itself in federal legislation to help abate this growing menace. The most significant legislative attempt to clean up the air is the Clean Air Act of 1970.¹

Because air pollution from any given source affects such a large number of citizens, it is only natural to turn to the time-tested, proven friend of the masses, the class action, to attempt more vigorous enforcement of the standards promulgated by the Clean Air Act. The class action has proved to be an effective ally of special interest groups in diverse areas of mutual concern.² The purpose of this comment is to examine objectively the prac-

¹ Air Pollution Control Act, 42 U.S.C. § 1857 (1970). Congress delineated the findings that prompted this legislation, noting:

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

The objectives of the act are:

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

The Act provides for the institution of primary and secondary ambient air quality standards to be implemented by the States. It goes on in § 1857c-8 to provide for federal enforcement procedures.

² It has been utilized by taxpayers to recover money appropriated wrongfully, *McKenna v. McHaley*, 62 Ore. 1, 123 P. 1069 (1912); by wage earners to recover pay wrongfully withheld, *Morschauser v. American News Co.*, 6 App. Div. 2d 1028, 178 N.Y.S.2d 279 (1958); to protect the civil rights of minority groups, *Parker v. Univer-*

ticality of this application of the class action as constrained by rule 23(b) of the Federal Rules of Civil Procedure.

I. JURISDICTION

This comment involves three alternative methods of obtaining a federal forum for the class action where the liberal rules of 23(b) abound: diversity of citizenship, jurisdiction under the Clean Air Act itself, and pendent jurisdiction.

A. Diversity of Citizenship

The federal district courts have original jurisdiction of civil actions where the matter in controversy exceeds \$10,000 and the suit is between citizens of different states,³ but the \$10,000 requirement cannot be satisfied by adding the claims of the class members.⁴ However, when individual claims approach this magnitude, the need for a class action diminishes, unless the complexities of proof are great or the judicial savings, because of the large number of plaintiffs, is significant.

In addition, the diversity of citizenship mode of gaining access to a federal court is of no value when the source of the pollution and the multitude of plaintiffs reside within the same sovereign. Only if the pollution is so great as to injure residents of a neighboring state is jurisdiction by virtue of diversity of citizenship applicable.

Normally, for purposes of jurisdiction, diversity means that all parties on one side must be of citizenship diverse from all parties on the other side.⁵

sity of Delaware, 31 Del. Ch. 381, 75 A.2d 225 (1960); by depositors in a savings and loan association to recover against the association for misrepresentation in the sale of stock, *Harris v. Jones*, 41 F.R.D. 70 (D. Utah 1966); to recover damages on behalf of all "odd-lot" purchasers on the New York Stock Exchange for overcharges, *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); by taxpayers to obtain equitable relief against a corporation for a fraudulent conspiracy to gain the inexpensive use of government owned land, *Booth v. General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967); by welfare recipients to challenge welfare regulations, *King v. Smith*, 392 U.S. 309 (1968); to recover punitive damages for purchasers and sellers from a brokerage firm that had violated a securities act, *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); by stockholders of a corporation to recover punitive damages from its directors for manipulating stock prices, *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D. N.Y. 1968); and to recover damages for all property owners within a given geographical area which was infiltrated by coal dust from a railroad, *Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354 (N.D. Ohio 1969).

³ 28 U.S.C. § 1332 (1970). This section also states that a corporation is "a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

⁴ *Snyder v. Harris*, 394 U.S. 332 (1969).

⁵ *Knoll v. Knoll*, 350 F.2d 407 (10th Cir. 1965), *cert. denied*, 383 U.S. 909 (1965), *reh. denied*, 383 U.S. 973 (1965).

However, this rule is relaxed for a class action where diversity is determined by citizenship of the named representatives of the class.⁶ Thus, if the class action is instituted by citizens of a state meeting the diversity of citizenship requirements, jurisdiction will not be defeated merely because the class represented contains members who are residents of the same state as the defendant polluter.⁷

B. *Jurisdiction by Virtue of the Clean Air Act*

Because the Clean Air Act provides for the institution of civil actions,⁸ clearly it confers jurisdiction to grant injunctive relief. However, a suit for injunction to abate a pollution nuisance does not readily justify a class action, as does a suit to recover money damages, especially in light of subsection (d) of the Act which allows recovery of the costs of litigation.⁹ Whether or not the comprehensive wording of the Clean Air Act confers jurisdiction for the awarding of damages is yet to be decided by the courts.

The Act does not specifically exclude recovery of damages, and it has long been the custom of our system of justice to make effective as possible a state's protection of its citizens' rights.¹⁰ Indeed, the United States Supreme Court has, in the past, found an implied right of action to recover damages for injury caused by violation of a statute which fails to expressly provide for

⁶ *Calagaz v. Calhoun*, 309 F.2d 248 (5th Cir. 1962).

⁷ See *McGarry v. Lentz*, 9 F.2d 680 (S.D. Ohio 1925), *aff'd*, 13 F.2d 51, (6th cir. 1926), *cert. denied*, 273 U.S. 716 (1926). See also *Huester v. Gilmour*, 13 F. Supp. 630 (M.D. Pa. 1936).

⁸ 42 U.S.C. § 1857h-2(a) (1970) provides in part that "any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be."

⁹ 42 U.S.C. § 1857h-2(d) (1970) provides:

"The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. . . ."

¹⁰ In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice John Marshall stated that "[t]he very essence of civil Liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

such recovery.¹¹ Such an implied right has been found in the National Banking Act;¹² the National Labor Relations Act;¹³ the Federal Communications Act;¹⁴ the Federal Aviation Act;¹⁵ the Securities Exchange Act;¹⁶ the Rivers and Harbors Act;¹⁷ and the Fair Labor Standards Act.¹⁸ However, there is some indication in the legislative history of the Act that its sponsors intended to exclude the private damages remedy.¹⁹ Whether this legislative intent will preclude a finding of an implied right to recover damages is yet to be decided.

C. *Pendent Jurisdiction*

A third possibility for gaining a federal forum applies the doctrine of pendent jurisdiction, the process whereby a state claim can be settled in a federal court in conjunction with a separate federal claim or action arising out of the same transaction or factual situation. The basic policy underlying pendent jurisdiction is judicial economy and fairness to the litigants.²⁰

In a case involving violation of the Clean Air Act, clearly the federal courts have jurisdiction over an action for injunctive relief, and this could be the basis for obtaining pendent jurisdiction over the state damage claim, which would probably be based on common law nuisance. Both actions

¹¹ In *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916), the court said:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied

See also *Bell v. Hood*, 327 U.S. 678, 684 (1946), in which the court noted that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

¹² *Deitrick v. Greaney*, 309 U.S. 190 (1940), *reh. denied*, 309 U.S. 697 (1940).

¹³ *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944).

¹⁴ *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947).

¹⁵ *Fitzgerald v. Pan American World Airways Inc.*, 229 F.2d 499 (2d Cir. 1956).

¹⁶ *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

¹⁷ *United States v. Perma Paving Co.*, 332 F.2d 754 (2d Cir. 1964).

¹⁸ *Fagot v. Flintkote Co.*, 305 F. Supp. 407 (E.D. La. 1969).

¹⁹ During a debate in Congress in which some senators expressed a fear that there might be a flooding of the federal courts with damage suits, Senator Muskie, a proponent of the Clean Air Act, responded that "the bill provides no action for damages, only for abatement of violation of standards. . . ." 116 Cong. Rec. 33103 (1970) (remarks of Senator Muskie).

²⁰ *See* *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), where a federal court, having jurisdiction based on violations of the Labor Management Relations Act, also assumed jurisdiction of the state law claim for damages based on an unlawful conspiracy and boycott arising from the same incident.

would require substantially the same proof, *i.e.*, that the statute regulating ambient air had in fact been violated.

If the federal question should be rendered moot by an abatement of the pollution, it usually becomes a matter of discretion with the trial judge as to whether or not sufficient time and effort has been spent on the matter to preclude returning the remaining state claim to a state court.²¹

II. CLASS ACTION

Once federal jurisdiction for the recovery of damages for a violation of the Clean Air Act has been obtained, one must consider the problems inherent in the utilization of a 23(b) class action to recover damages for numerous potential plaintiffs. Obviously, the sheer number of people affected by a substantial air pollution source assures satisfaction of the prerequisites to a class action.²² But, while the large number of potential

²¹ In *Rosado v. Wyman*, 397 U.S. 397, 405 (1970), when the federal claim became moot, the court stated:

We are not willing to defeat the commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.

The court declares this situation analogous to a party changing domiciles after institution of a suit wherein jurisdiction was based on diversity of citizenship. In such a case the court does not lose jurisdiction. *But see Wham-O-Mfg. v. Paradise Mfg. Co.*, 327 F.2d 748 (1964).

²² Fed. R. Civ. P. 23 provides in part:

(a) Prerequisites to a Class Action

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."

Section 23(b)(3), the most likely division under which to maintain a class action, provides:

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

... or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions 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 matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

plaintiffs is the catalyst that makes a class action seem feasible, it also creates formidable obstacles that must be overcome to make the class action practical.

A. Notice

Rule 23(c)²³ makes notice of paramount importance, determining who shall be bound by the outcome of the litigation as well as who shall share in the proceeds should the action be successful. This aspect raises serious questions of due process, because a person involuntarily included in the class because he has failed to receive notice and thus extricate himself will be bound by the outcome of the case without having participated in its litigation.²⁴ Of course, if the decision were not binding on all class members, a multiplicity of litigation would be encouraged—precisely the situation the class action was intended to prevent.

Since a composite list of citizens injured by a particular source of pollution is not likely to be available, the court immediately faces the problem of delineating the class. Next, it must decide whether to impose the burdensome yet desirable requirement of individual notice, and if so, who shall bear the cost: the plaintiffs, the defendant, or the court itself in the public interest. *Biechele v. Norfolk & Western Railroad*, facing these issues squarely, elected to allow geographical delineation of the class and, subsequently, notice by publication.²⁵ In fact, notice by publication has been allowed even in a case where a comprehensive list of persons damaged could have been compiled, simply because of the burden of individual notice.²⁶

One cannot avoid the possibility that the principles of due process will be violated, and that someone will be bound by a decision in which he has played no active part, or of which he may not have even been aware. However, one must balance this possible loss against the desirability of giving a large number of damaged citizens a mode of redress to recoup a loss that would otherwise go uncompensated.

²³ 23(c) (2) provides:

In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

²⁴ Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 105 (1966).

²⁵ *Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354 (N.D. Ohio 1969).

²⁶ *Booth v. General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967) allowed notice by publication to several hundred thousand taxpayers because individual notice would have been "[i]ethally burdensome."

In addition, there is the practical effect of this type of litigation—abatement of pollution. It seems only logical that once industry learns it cannot pollute with impunity, because the complexities of legal action have been overcome by concerted effort, it would make a greater financial commitment to reduce pollution, and thus damage claims.

B. Damages

Difficulty in ascertaining damages should not unduly influence the question of whether to allow the action.²⁷ If the award of damages should exceed the claim ultimately materializing, the surplus could be allocated among the participating class members, escheat to the state, or be returned to the defendant.²⁸

The most appropriate distribution would embrace some type of *Cy Pres*²⁹ concept whereby all of society could benefit by a pollution abatement device or research funded by the surplus. Since this involves the federal court system, and air pollution is not constrained by state borders, a nationwide slush fund could be established into which all surplus awards could be funneled for the public benefit.

If a court is not willing to allow a lump sum recovery for fear that not enough plaintiffs would file claims, then 23(c) (4) could be utilized.³⁰ The class action could thus be used to determine liability for violation of the federal standard, and the class could then be subdivided into smaller classes according to the type of injury sustained. The court would then be in a better position to evaluate the ramifications of a lump sum recovery as opposed to individual proof within each subclass.

²⁷ "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931).

²⁸ Returning the surplus to the defendant would be the least satisfactory solution for advancing the objective of deterring air pollution. This solution was used in a non-pollution case. *See Illinois Bell Tel. Co. v. Slattery*, 102 F.2d 58 (7th Cir. 1939).

²⁹ Instead of trying to effectuate testamentary charitable gifts, the same concept could be used to construe legislative intent. For a detailed analysis of this and other alternative methods, see Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972).

³⁰ This subsection of Rule 23 provides:

When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

CONCLUSION

Although the use of the class action to collect damages for violation of the Clean Air Act of 1970 is fraught with difficulty, the technical complexity of proving liability and damages on an individual basis precludes the legislative objective of encouraging individual participation in abatement of air pollution. The class action is the best method we have for effectively stopping, by uppercuts to the pocketbook, the systematic destruction of our environment, yet we must proceed cautiously, to avoid knocking out of commission the safeguards developed over many years, which collectively form our concept of justice.

The ultimate solution does not lie in a strained process of forcing the class action device to work, but rather in legislative action to clarify the right of groups of citizens to collect damages for pollution via the class action route. But while we await such legislative action, we do have a right to clean air,³¹ and the use of the class action may be the only way we can effectively enforce that right. The usurpation of such a right without due process should do more violence to our sense of justice than stretching our existing judicial procedure with common sense.

J. D. T.

³¹ "If we have any right that is more important than any other right, it is the right to live in a clean and decent environment. . . ."
116 Cong. Rec. 83 (1970) (remarks of Senator Nelson).