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peal. . . ."[55] The purpose of this statute is to ensure that the court consist of only impartial judges.[56] Under predecessor statutes[57] a disqualified judge could cast no vote and if he sat with another judge as a circuit court, the decision of the court was that of the other judge.

If a majority vote were needed to reverse and the disqualified judge were included in the count of the above two-man court, a majority could never be reached and any appeal would have been automatically affirmed. This result was negated by the clear wording of the statute.

By including Chief Judge Friendly in the count of the court, the decisive-minority increased the number of votes needed to en banc as if the Chief Judge had voted against en bancing the case. Such a procedure flies in the face of the clear mandate of the Judicial Code which exempts a disqualified judge from "determining" a case. Upon disqualification, the Chief Judge should have properly been accorded no weight; his vote should have been neutralized by reducing the count of the regular active bench to seven and, thus, the four judges who voted for en banc reconsideration of *Zahn* should have carried the day.

Class Action as a Pendent Claim

Almenares v. Wyman

Almenares v. Wyman[58] is the first federal court of appeals decision to uphold the extension of pendent jurisdiction to a class action wherein the subject class did not qualify as a plaintiff in the primary suit.[59] Although the holding was "severely limited,"[60] the doors to the

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55 28 U.S.C. § 47 (1970).

56 *Cf.* Moran v. Dillingham, 174 U.S. 153, 157 (1899).

57 Act of Sept. 24, 1789, c. 20, § 4, 1 Stat. 74 and Act of Apr. 29, 1802, c. 31, § 5, 2 Stat. 153.

58 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972). *Almenares* was a direct result of the landmark decision in Goldberg v. Kelly, 397 U.S. 254 (1970), which mandated due process hearings for recipients of welfare benefits prior to termination of said benefits. The plaintiffs in *Almenares* contended that the *Goldberg* hearing requirements were equally applicable to reductions in and suspensions of their welfare benefits. Two causes of action were stated. The first and primary claim alleged a violation of due process rights enunciated in *Goldberg* in that benefits to the three women plaintiffs had been reduced, suspended or terminated prior to a fair hearing. The secondary claim, which was the subject of the district court's pendent jurisdiction, averred that the New York State fair hearing procedures, modified after *Goldberg*, did not comply with HEW regulations. Additional plaintiffs were permitted to intervene. The complaint was lodged against both the New York State and New York City Commissioners of Social Services as a class action in which all New York welfare recipients under the AFDC and AABD (*see* notes 75 & 76 *infra*) programs were sought to be represented. 453 F.2d at 1080.

59 *Id.* at 1083. Chief Judge Friendly expressed some uncertainty as to whether the primary claim had been allowed as a class action in the court below. However, the opinion noted that the novelty of the situation presented was not dependent on whether the primary claim was afforded class action treatment since, in any event, the two

federal courts were opened sufficiently to admit a previously unencountered plaintiff body.

While the doctrine of pendent jurisdiction is commonly deemed to have its origin in *Hurn v. Oursler*,[61] decided by the Supreme Court in 1933, the foundation on which it is based can be traced as far back as 1824.[62] However, it wasn't until *Hurn* promulgated the "single cause of action" test[63] that the doctrine came to be recognized as an effective jurisdictional predicate.

Concurrent with the maturity of the pendent jurisdiction doctrine was the development of another device to minimize litigation by parties to a common dispute. The class action, a creature of equity,[64] was recognized by the Supreme Court as early as 1853.[65] Four years after *Hurn*

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classes were not co-extensive. The constitutional (primary) claim only alleged due process violations in New York City, thus limiting its plaintiff class to New York City welfare recipients, whereas the pendent claim asserted the invalidity of a New York State statute, thereby joining as plaintiffs New York State welfare recipients residing outside New York City. *Id.* at 1083-84 n.11a.

60 *Id.* at 1085.

61 289 U.S. 238 (1933).

62 Chief Justice Marshall's classic opinion in Osborne v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), acknowledged the power of Congress to grant jurisdiction to the circuit courts over questions of law and fact not per se within the purview of federal judicial powers enumerated in the Constitution. This jurisdiction was deemed conditioned on the presence, in the same cause of action, of other issues constitutionally recognized as falling within the federal judicial power. On numerous occasions in the interim between *Osborne* and *Hurn*, the Supreme Court sustained federal jurisdiction over matters governed by state law which arose in the context of federal question controversies satisfying the statutory jurisdictional predicate. *See* Sterling v. Constantini, 287 U.S. 378, 393-94 (1932); Davis v. Wallace, 257 U.S. 478, 482 (1922); Louisville & N. R.R. v. Greene, 244 U.S. 522, 527 (1917); Greene v. Louisville & Interurban R.R., 244 U.S. 499, 508 (1917); Ohio River & W. Ry. v. Dittey, 232 U.S. 576, 586-87 (1914); Louisville & N. R.R. v. Garrett, 231 U.S. 298, 303 (1913); Siler v. Louisville & N. R.R., 213 U.S. 175, 191 (1909).

In 1948, Congress exercised the power previously noted by Chief Justice Marshall and provided statutory authority for pendent jurisdiction of claims alleging unfair competition in the context of an action arising under the patent, copyright or trademark laws. 28 U.S.C. § 1338(b) (1970) provides, in pertinent part:

> The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.

Section 1338(b) does not limit the doctrine of pendent jurisdiction to the causes of action it enumerates. Strachman v. Palmer, 177 F.2d 427, 432 (1st Cir. 1949) (Magruder, C.J., concurring).

63 289 U.S. at 246. The "single cause of action" test served as the criterion for determining pendent jurisdiction for some 33 years. The single cause of action test provided that "where two distinct grounds in support of a single cause of action are alleged . . . . the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*. . . ." *Id.* at 246.

64 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 561 at 254 (rules ed. 1961).

65 Smith v. Swormstedt, 57 U.S. (16 How.) 288, 301-02 (1853).

The rule is well established, that where the parties interested are numerous,

gave birth to the modern doctrine of pendent jurisdiction, Rule 23 of the Federal Rules of Civil Procedure was promulgated authorizing the maintenance of class actions[66] and clarifying Rule 38 of the Equity Rules of 1912.[67]

Nineteen sixty-six witnessed major developments in both the pendent jurisdiction and class action arenas. In that year, the Supreme Court, in *United Mine Workers of America v. Gibbs*,[68] revised the test for pendent jurisdiction. The *Hurn* "single cause of action" test was discarded in favor of the current test for presence of a "common nucleus of operative fact" between the primary and pendent claims.[69] At approximately the same time, Rule 23 of the Federal Rules of Civil Procedure underwent substantial revision.[70] The continuous expansion in the scope of pendent jurisdiction[71] both before and after *Gibbs* and the increased popularity of class suits as an economical means of distributing justice set the stage for *Almenares*.

Although the courts, until this time, had not exercised pendent

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> and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others. . . .

Id. at 302. The class action can be traced back in English jurisprudence some 300 years. 3B J. MOORE ¶ 23.02[1] at 23-72 (2d ed. 1971). *See, e.g.*, Knight v. Knight, 24 Eng. Rep. 1088 (Ch. 1734).

[66] *See* 3B J. MOORE ¶ 23.01[1], at 23-15 (2d ed. 1971).

[67] Rule 38 of the Equity Rules of 1912 provided:

> 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.

Quoted in J. MOORE ¶ 23.02 [1], at 23-74.

The prior restrictions of class actions to claims in equity was lifted by the 1937 version of Rule 23 which extended the device to all civil actions whether formerly categorized as actions at law or equity. J. MOORE ¶ 23.02[1], at 23-75. In addition, the scope of the class action under the 1937 changes was increased to cover permissive as well as compulsory joinder. J. MOORE ¶ 23.02[2], at 23-77[2].

[68] 383 U.S. 715 (1966).

[69] *Id.* at 725. *See* Rosado v. Wyman, 397 U.S. 397, 423 (1970) (Douglas, J., concurring). Justice Douglas emphasized the fact that the exercise of pendent jurisdiction necessitates deference to the principles of federal-state comity. However, "[s]ince the claim involved here is one of federal law, the reasons for the exercise of pendent jurisdiction are especially weighty, and exceptional circumstances should be required to prevent the exercise." *Almenares* presents a similar situation, *i.e.*, the pendent claim is federal. *Id.* at 425.

[70] 3B J. MOORE ¶ 23.01[1], at 23-15 (2d ed. 1971). The 1966 revision brought within its scope maritime claims. *Id.* ¶ 23.02[1], at 23-121.

[71] *See, e.g.*, Price v. United Mine Workers of America, 336 F.2d 771 (6th Cir. 1964), *cert. denied*, 380 U.S. 913 (1965) (pendent jurisdiction upheld in action against association not amenable to process under state law); Miller v. Bargain City, U.S.A., Inc., 229 F. Supp. 33 (E.D. Pa. 1964) (pendent claim for less than jurisdictional amount allowed); Cooper v. New Jersey Trust Co., 226 F. Supp. 972 (S.D.N.Y. 1964) (pendent jurisdiction supported extraterritorial service of non-resident defendant in action alleging a non-federal claim); Bradford Novelty Co. v. Manheim, 156 F. Supp. 489 (S.D.N.Y. 1957) (venue of primary claim changed to comply with patent laws supported accompanying venue change of pendent claim).

jurisdiction over a class action where some of its members were not the plaintiffs in an associated primary action, in 1966 the Third Circuit took a step in that direction by admitting the pendent claim of an individual plaintiff not a party to the primary action.[72] To add the final stepping stone, the Supreme Court, four years later in *Rosado v. Wyman*,[73] sustained pendent jurisdiction over a class action subordinate to a primary class action, the identical class being plaintiff to both actions. This was the state of the law concerning pendent jurisdiction over class actions when the Second Circuit, late in 1971, was confronted with *Almenares*.

Of immediate import was the question whether the district court was empowered to hear the *Almenares* pendent claim[74] which alleged that reduction of plaintiffs' benefits under the federally aided AFDC[75] and AABD[76] programs violated HEW regulations.[77] The State of New York contended that it was not subject to the pendent jurisdiction of the court since it could not be properly joined as a defendant to the primary claim which was addressed only to alleged violations by New York City of constitutionally required welfare procedures. The district

72 Wilson v. American Chain & Cable Co., 364 F.2d 558, 564 (3d Cir. 1966), *reversing*, 216 F. Supp. 32 (E.D. Pa. 1963). In this diversity action, the Third Circuit allowed a father's claim pendent to his son's personal injury action notwithstanding that the pendent claim failed to meet the requisite jurisdictional amount. *See also* Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971) (defendant in pendent action not a party to primary suit); Newman v. Freeman, 262 F. Supp. 106 (E.D. Pa. 1966). Previous cases had upheld the addition of parties who, alone, could not be subject to the jurisdiction of the federal courts. *See, e.g.*, Phelps v. Oaks, 117 U.S. 236, 240-41 (1886); Dery v. Wyer, 265 F.2d 804, 807-08 (2d Cir. 1959); Walmac Co. v. Isaacs, 220 F.2d 108, 110-11 (1st Cir. 1955).

73 397 U.S. 397 (1970). Like *Almenares*, this action was brought to invalidate a statute which reduced welfare benefits payable to plaintiffs. During the course of the action, New York amended its statute rendering moot plaintiff's primary cause of action under the equal protection clause. Notwithstanding this development, the district court adjudicated the pendent claim which alleged conflict of the state statute with the Social Security Act and held for the plaintiffs. The Second Circuit reversed, finding that the mootness of the primary claim deprived the district court of jurisdiction over the pendent claim. The Supreme Court granted certiorari and upheld the jurisdiction of the district court to hear the pendent claim. *Id.* at 402-07.

74 Although the pendent claim asserted a "federal question," the $10,000 jurisdictional amount required by 28 U.S.C. § 1331 was not satisfied. The only alternative access to the federal courts was under the doctrine of pendent jurisdiction. While that doctrine is commonly associated with state claims which by themselves are not subject to the limited jurisdiction of the federal courts, the rationale favoring the doctrine applies equally, if not more so, to federal question disputes which lack an independent jurisdictional predicate. *See* notes 69 *supra* & 81 *infra*.

75 Aid To Families With Dependent Children, 42 U.S.C. § 601 *et seq.* (1970).

76 Aid To The Aged, Blind Or Disabled, 42 U.S.C. § 1381 *et seq.* (1970).

77 45 C.F.R. § 205.10 (1972) provides, *inter alia*:

> (3) An opportunity for a fair hearing before the state agency will be granted to any individual requesting a hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, or because he is aggrieved by any other agency action affecting receipt, suspension, reduction, or termination of such assistance or by agency policy as it effects his situation.

court had rejected this argument, holding that the State Commissioner bore responsibility for related acts of local officials. However, the Second Circuit found it unnecessary to determine whether the State was a proper party to the constitutional action in upholding pendent jurisdiction of the subordinate claim. Citing its recent decision in *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*,[78] the court reaffirmed the sufficiency of pendent jurisdiction to support claims against defendants not joined in a primary action.

Having found 1) the statutory authority for accepting the primary civil rights claim;[79] 2) satisfaction of the *Gibbs* criterion of a "common nucleus of operative fact;"[80] and 3) no restriction in Rule 23 excluding pendent claims from the scope of permissible class actions, the Second Circuit upheld the pendent jurisdiction of the district court over the subordinate action notwithstanding the absence of a squarely applicable precedent.[81] In reaching this decision, the court allowed both plaintiffs and defendants who were not parties to a jurisdiction-granting action to be joined in a pendent suit.

After conceding the power of the district court to hear the pendent claim, the Second Circuit focused upon the district court's exercise of discretion in accepting the action. Again the lower court was upheld, the Second Circuit finding it to be the proper forum for adjudication of the secondary cause.[82]

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78 441 F.2d 621 (2d Cir. 1971). *See* note 71 *supra*.

79 Plaintiffs brought their primary claim in the district court under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) (1970). Almenares v. Wyman, 334 F. Supp. 512 (S.D.N.Y. 1971). Section 1343(3), the jurisdictional predicate for a cause of action created by § 1983, does not require that a jurisdictional amount be met. *See* 28 U.S.C. § 1331 (1970).

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1343 provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
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> . . . .

80 383 U.S. at 725. *See* text accompanying note 69 *supra*.

81 453 F.2d at 1084.

82 *Id.* at 1085. Although the *Almenares* pendent claim alleged the impropriety of state procedures, the interpretation of a federal regulation (45 C.F.R. § 205.10) was critical to the outcome. Furthermore, the subject welfare programs were heavily dependent upon federal subsidies. The court also noted that a declaration of the invalidity of state procedures which resulted in reduction of plaintiff's benefits would eventually affect

The Second Circuit was careful to emphasize the limitation of its holding to situations closely analogous to the one at bar. In dicta, the court implied that class actions prosecuted as pendent claims, notwithstanding satisfaction of the *Gibbs* criterion, might not be assertable in a federal court absent some other independent jurisdictional predicate.[83]

Despite the *Almenares* court's warnings concerning the narrowness of its holding, the extension of pendent jurisdiction to class actions representing parties not plaintiffs in associated primary actions provides unprecedented opportunity for conserving legal resources while distributing justice to large numbers of litigants.[84]

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equally all the other members of the class named in the action without any need to consider additional issues. Therefore, acceptance of the suit would be advantageous to both the defendants and the courts by precluding additional suits wasteful of time and legal resources. *Id.*

[83] *Id.* at 1085-86.

Six months after *Almenares*, the Third Circuit was given the opportunity to voice its policy concerning pendent jurisdiction of class actions. In a per curiam opinion, the Third Circuit affirmed Serritella v. Engleman, 339 F. Supp. 738 (D.N.J.) *aff'd*, 462 F.2d 601 (1972), a case closely paralleling *Almenares* and one which relied on the latter's precedent in deciding a similar pendent jurisdiction-class action issue. 339 F. Supp. at 748.

[84] Although *Almenares* provides the first reported instance of a pendent claim brought pursuant to Rule 23 on behalf of a class not plaintiff to the primary claim, the allowance of the action is not unusual nor is it unexpected. The federal courts have left no doubt concerning the propriety of this type of action. *See* Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

In addition, the courts of appeals have allowed pendent suits wherein non-class parties were not included in the associated primary actions. *See* note 72 *supra*. What argument could favor the acceptance of an individual as a litigant in a pendent suit who is not a party to the primary action and, at the same time, deny like status to two or more persons, a corporation, partnership or any other legal entity? *Almenares* was merely a logical extension of the law applied to date. On the pendent jurisdictional issue, it is totally consistent with the relevant case law and is supported by the Federal Rules of Civil Procedure.

There is little added danger that the courts will be flooded with unmanageable numbers of litigants. It is the quality of the party classes rather than the number of classes admitted that bears upon the burden of the court. Two classes may be equivalent to one when their interests are co-extensive or their causes of action arise from identical fact situations.

The major difficulty that accompanies the extension of the federal courts' jurisdiction noted here is the potential for abuse of the courts' liberal attitude. As Chief Judge Friendly indicated in *Almenares*, the court must be alert to situations wherein the primary claim serves only as a vehicle for affording jurisdiction to an otherwise non-admissable claim, *i.e.*, where the former claim is not brought by parties having any interest at all in the latter or the interest of the parties to the primary claim is inconsequential when compared with that of the class in the pendent claim. 453 F.2d at 1085.

The *Almenares* holding was limited to situations wherein the subject matter of the pendent action was suitable for adjudication by a federal court, the court suggesting that similar application in another situation might be an abuse of the district court's discretion. *Id.* at 1086. Yet, following the logic which finds support for *Almenares* in earlier pendent cases, a future extension of pendent jurisdiction to class actions involving non-federal questions cannot be deemed inconceivable since such an extension has already occurred with respect to individuals who are parties to a pendent, but not to a primary,

SECURITIES FRAUD LITIGATION — CLASS ACTIONS

Korn v. Franchard Corp.

Recently, the Second Circuit again demonstrated its inclination to permit liberal use of the class action device[85] in private securities fraud litigation.[86] In *Korn v. Franchard Corp.*[87] the court held that, as a matter of law, class action status could not be denied in a suit to which there were at least 70 outstanding parties-plaintiff.[88] Finding that allegations of untruths and inaccuracies in the defendant's prospectus presented common questions of law,[89] the court asserted that proceeding by means of a class action was a superior technique "for the fair and efficient adjudication of the controversy."[90] Alleging fraud[91] in the

claim. *See* Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966), discussed *supra* note 72.

85 FED. R. CIV. P. 23.

86 For earlier indications of this inclination, *see e.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968). The court in *Green* wrote:

> Rule 23 now emphasizes the flexibility which a trial court exercises in the management of the action. . . . It is this flexibility which indeed enables us to view liberally claims which assert a right to a class action in 10b-5 cases at the early stages of the litigation.

Id. at 294. *See generally* Note, *Class Action Treatment of Securities Fraud Suits Under the Revised Rule 23*, 36 GEO. WASH. L. REV. 1150 (1968).

Most such litigation, as does most antitrust litigation, arises from private, not governmental, initiative. *See* Ford, *The History and Development of Old Rule 23 and the Development of Amended Rule 23*, 32 A.B.A. ANTITRUST L. J. 254 (1966).

The Second Circuit's pronouncements in this area are particularly important because a scanning of the cases indicates that the circuit has a rather large share of the class action suits involving private securities fraud cases.

87 456 F.2d 1206 (2d Cir. 1972).

88 *Id.* at 1209.

89 *Id.* at 1210. The issue of common questions and common reliance is problematic since different members of the class may have relied in different ways upon the representations. This was noted by the Advisory Committee on the Proposed Rules of Civil Procedure in its discussion of Rule 23:

> The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. . . . [A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.

Notes of the Advisory Committee on the Proposed Rules of Civil Procedure, 39 F.R.D. 98, 103 (1966). *See* Cannon v. Texas Gulf Sulphur Co., 53 F.R.D. 220 (S.D.N.Y. 1971) (mem.) for an implication that oral representations coupled with a uniform written statement may operate to derogate from the existence of a class.

90 456 F.2d at 1213-14.

91 Plaintiff contended that the prospectus issued by the defendant was tainted by numerous omissions and misstatements including overvaluation of property; undisclosed benefits to the seller, a stockholder of appellee Glickman (Glickman was one of the general partners of 63 Wall Associates); erroneous projections of income; and undisclosed