

CPLR 1005: Use of Class Action Continues To Be Restricted by the Courts

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sion because in the ordinary case the defendant confers the requisite jurisdiction on the court by appearing in the action. *Bides v. Abraham & Straus, Inc.*⁷² illustrates the outer limits of this point. In *Bides* defendant moved successfully to dismiss the plaintiff's action on the ground that the court lacked personal jurisdiction. However, in its answer to a cross-claim asserted by a codefendant, defendant failed to reallege its jurisdictional objection. Hence, the curious result ensued whereby defendant was deemed no longer a party to the action by the plaintiff but very much a party to the defendant's cross-claim.

Will *Einstoss* lead to a judge-made limited appearance in the *Everitt* situation? An affirmative response is perhaps attributable to a strong opposition to the *Everitt* outcome. Or, perhaps it reflects an acquiescence in the observation that with the emergence of a minimum contacts theory of jurisdiction the wholly fortuitous act of catching a nonresident within the state should no longer serve as a jurisdictional predicate.⁷³ Nevertheless, it is possible that in the future *Einstoss* will be read conservatively and distinguished by focusing on the fact that the administrator was not made a party to the Alaskan action. It is submitted, however, that it is an excellent time for, at least, restricting the adversary's right to amend against unwary nonresidents to claims based on the same occurrence or transaction that underlies the initial cause of action.⁷⁴

ARTICLE 10 — PARTIES GENERALLY

CPLR 1005: Use of class action continues to be restricted by the courts.

In this age of consumerism, there has been an increased awareness not only of the plight of the consumer but also of the availability of many legal devices to aid in the effort to remedy that plight. One such device is the class action prescribed in CPLR 1005.⁷⁵ While advantages to the plaintiff utilizing the class action include those of an economic and procedural nature, imagine the profound impact upon public opinion, the jury, and the opposing party when there exists a class of 1,000 plaintiffs suing for \$500 each, instead of a single plaintiff prosecut-

⁷² 33 App. Div. 2d 569, 305 N.Y.S.2d 336 (2d Dep't 1969); see also *Wajzman v. Brooklyn E. Dist. Terminal*, 276 App. Div. 853, 93 N.Y.S.2d 586 (2d Dep't 1949).

⁷³ See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

⁷⁴ Cf. Frumer & Graziano, *Jurisdictional Dilemma of the Nonresident Defendant in New York — A Proposed Solution*, 19 FORDHAM L. REV. 125, 142-43 (1950).

⁷⁵ For a comprehensive survey of the use of the class action in consumer suits, see Starrs, *The Consumer Class Action — Part I: Considerations of Equity*, 49 BOSTON L. REV. 211 (1969); Starrs, *The Consumer Class Action — Part II: Considerations of Procedure*, 49 BOSTON L. REV. 407 (1969).

ing his action in the conventional manner.⁷⁶ Moreover, the class action, if properly exploited, could foster a more economical deployment of judicial manpower.⁷⁷

Unfortunately, the class action in New York has been attended by legislative inertia⁷⁸ and judicial ambivalence. Mandating a requirement of both a common interest and common facts among all the members of the class,⁷⁹ the courts have largely limited actions to cases involving "closely associated relationships growing out of trust, partnership or joint venture, and ownership of corporate stock."⁸⁰ Meanwhile, other types of class actions have been dismissed on the theory that "[s]eparate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not create a common or general interest in those who are wronged."⁸¹

In *Hall v. Coburn Corporation of America*⁸² the Court of Appeals disallowed the attempt of a consumer to bring a class action which had as its basis the similarity of the instruments utilized in creating the individual contract for each member of the class. The form contracts in question were sales agreements for the purchase of carpeting, it being alleged that the size of the print in certain clauses was unlawful.⁸³ Defendant prepared the contracts and later purchased the executed installment agreements from various retailers. Plaintiff suing on behalf of herself "and all other persons who bought merchandise by entering into retail installment contracts," sought to recover the credit service charge under the contract.

Admitting that there is inconsistency in the cases, the Court nonetheless ruled that in any event "there must be more of a common interest than the fact a number of persons made a number of quite different and unrelated contracts with a number of different and

⁷⁶ See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 435 (1960).

⁷⁷ *Id.* at 438.

⁷⁸ There has been little change in the New York concept of the class action since it first appeared in the Field Code in 1848. 7B MCKINNEY'S CPLR 1005, *supp. commentary* at 62 (1970).

⁷⁹ *Id.*

⁸⁰ *Hall v. Coburn Corp. of America*, 26 N.Y.2d 396, 402, 259 N.E.2d 720, 722, 311 N.Y.S.2d 281, 284 (1970), *citing* *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966); *Leibert v. Clapp*, 13 N.Y.2d 313, 196 N.E.2d 540, 247 N.Y.S.2d 102 (1963); *Case v. Indian Motorcycle Co.*, 300 N.Y. 513, 89 N.E.2d 246 (1949).

⁸¹ *Society Million Athena v. National Bank of Greece*, 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939). *Compare* *Kovarsky v. Brooklyn Union Gas Co.*, 279 N.Y. 304, 18 N.E.2d 287 (1938) *with* *Onofrio v. Playboy Club, Inc.*, 15 N.Y.2d 740, 205 N.E.2d 308, 257 N.Y.S.2d 171 (1965) (mem.) *and* *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965).

⁸² 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

⁸³ See N.Y. PERS. PROP. L. § 402 (McKinney 1962).

unrelated sellers using the same written form.”⁸⁴ In essence, the Court did not believe that this was the proper time to enlarge the scope of the class action in New York, primarily because many of the injustices inherent in the sales contracts before it were perfectly legal. Given this assumption, the need for a consumer class suit loses some of its apparent urgency and the need for legislative relief becomes more obvious.

CPLR 1007: Case illustrates Mendel's effect on third-party claims.

It has been projected that one of the more unfortunate ramifications of *Mendel v. Pittsburgh Plate Glass Co.*⁸⁵ would be its impact on third-party actions.⁸⁶ For example, if a retailer purchased an item in June of 1968 and sold it in August of the same year, an action for breach of warranty commenced by an injured plaintiff in July of 1972 would be timely.⁸⁷ But, the retailer's impleader claim for breach of warranty on the part of the manufacturer, accruing on the date of the original purchase by the retailer, would be barred by the statute of limitations.⁸⁸ A further illustration of the difficulty of dealing with third-party claims is provided by *Perez v. Chutick & Sudakoff*.⁸⁹

In *Perez* plaintiff was injured when a ladder on which he was working slipped. He commenced a negligence action against the general contractor of the project on which he was employed and the subcontractor in charge of installing the floors, Circle Floor Co. (Circle). Subsequently, plaintiff sought leave to amend his complaint so as to assert a cause of action for breach of warranty against Circle, alleging that the excessively slippery nature of the floor caused his ladder to fall.

At this point, the court was faced with countervailing equities. Undoubtedly, plaintiff's claim related back to the service of the initial pleading since it arose out of the same occurrence set forth in the complaint.⁹⁰ Yet, Circle did not manufacture the floor and, under *Mendel*, the statute of limitations had already run on any breach of warranty claim that Circle might attempt to interpose against the manufacturer. This factor caused the court to deny plaintiff's motion on the ground that the amendment would result in substantial prejudice to defendant.

⁸⁴ 26 N.Y.2d at 400, 259 N.E.2d at 721, 311 N.Y.S.2d at 282.

⁸⁵ 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

⁸⁶ Siegel, *Procedure Catches Up—And Makes Trouble*, 45 ST. JOHN'S L. REV. 63, 69-70 (1970).

⁸⁷ See N.Y. U.C.C. § 2-725 (McKinney 1964).

⁸⁸ See *C.K.S., Inc. v. Helen Borgenicht Sportwear, Inc.*, 22 App. Div. 2d 650, 253 N.Y.S.2d 56 (1st Dep't 1964); *City & County Sav. Bank v. M. Kramer & Son*, 43 Misc. 2d 731, 252 N.Y.S.2d 224 (Sup. Ct. Albany County 1964).

⁸⁹ 50 F.R.D. 1 (S.D.N.Y. 1970).

⁹⁰ FED. R. CIV. P. 15(c) (1964).