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Considerations for Bringing a Class Action Suit in Oklahoma State Courts

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CONSIDERATIONS FOR BRINGING A CLASS ACTION SUIT IN OKLAHOMA STATE COURTS

I. INTRODUCTION

The following analysis of the Oklahoma class action statute[1] is intended to highlight various pitfalls to be avoided and to point out salient factors to be considered in bringing a class action suit in Oklahoma state courts. Materials available on class action suits are substantial and no attempt is made in this comment to present an in-depth discussion of class action suits in general. The class action suit has been used with increasing regularity. While consumer-oriented and environmental groups have found it to be valuable, it has been most frequently used in Oklahoma in connection with taxpayer and property suits.

II. LEGISLATIVE HISTORY

The purpose of section 233 is to prevent a multiplicity of suits and to enable many persons to have their rights determined without their actual apperance in court as litigants.[2] Under the doctrine of "virtual representation," class actions may be brought by one or a few and be binding on many. The doctrine is based on sense of justice, necessity and paramount convenience to all parties.[3]

Section 233 originates from a Kansas statute.[4] The language of both statutes was taken from the phraseology of Justice Story in *Commentaries on Equity Pleadings*,[5] where he discussed class action statutes

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1. OKLA. STAT. tit. 12, § 233 (1971) provides:
When the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.
Related statutes include OKLA. STAT. tit. 12, § 230 (1971) (mandatory joinder of parties) and OKLA. STAT. tit. 12, § 232 (1971) (permissive representatives).
2. State *ex rel.* Tharel v. Board of Comm'rs, 188 Okla. 184, 107 P.2d 542 (1940).
3. *Id.* at —, 107 P.2d at 553.
4. GEN. STAT. KAN. 1889, para. 4115.
5. J. STORY, COMMENTARIES ON EQUITY PLEADINGS (10th rev. ed. 1892).

and summarized the development of class actions in English equity courts.[6]

Justice Story's language in the *Commentaries* was first used by the New York legislature in 1849. The language soon spread to other states.[7] The Kansas and Oklahoma statutes reflect the intent of the respective legislatures to provide for this equitable tool first listed in the New York statutes. The language has been attacked, however, as wholly inadequate and giving no information at all.[8]

III. Analysis Of Oklahoma Class Action Statute

A. Requirements in General

The major Oklahoma decision interpreting section 233 is *State ex rel. Tharel v. Board of Commissioners.*[9] The state, for the plaintiff class, brought suit against the defendant class of taxpayers and Board of County Commissioners to enjoin the Board from proceeding under a statute authorizing reassessment of property on which taxes were delinquent.

The *Tharel* court, in concluding that a class action was applicable, listed, albeit somewhat obliquely, the elements necessary to satisfy section 233. First, a community of interest must exist between the members of the plaintiff class. (This is the common and general question.) Second, the plaintiff class must number several hundreds. (Thus, the parties must be very numerous, or it must be impracticable to bring them all before the court.) Third, the plaintiff class members must have a direct financial interest in the issues presented. (The plaintiff class members must have standing to sue.) Finally, the defendants must be representatives of their class.[10]

An analysis of Oklahoma and Kansas decisions, prior and subsequent to *Tharel,* indicate that a section 233 class action is not available when a community of interest, impracticable number of parties or standing to sue is absent. However, the decisions reveal that judicial concern has focused primarily on the community of interest-common and general question criteria. Little attention has been paid to the other elements, specifically the question of representation.

6. *See* Simeone, *Procedural Problems of Class Suits,* 60 Mich. L. Rev. 905, 909 (1962).
7. Homburger, *State Class Actions and The Federal Rule,* 71 Col. L. Rev. 609, 612-13 (1971).
8. Sunderland, *The Federal Rule,* 45 W. Va. L.Q. 5 (1938).
9. 188 Okla. 184, 107 P.2d 542 (1940).
10. *Id.* at 195, 107 P.2d at 553-54.

B. Specific Elements

1. Common and General Questions: A Community of Interest

To determine and establish that a common and general question exists is perhaps the most difficult of the requirements to satisfy. It is clear from *Tharel* that when there is a "community of interest," there is a common and general question. In defining a "community of interest," the court relied on a three part test provided in *Skinner v. Mitchell*:[11]

> [T]he community of interest lies in the legal questions involved, the similarity of the situation of the several taxpayers, and in the fact that the character of the relief sought would be applicable to all . . . .[12]

The *Skinner* test separates the legal question from the "similarity of the situation" from which one can conclude that the latter may be factual. However, the courts have not made the distinction between law and fact. In practice, the two have been combined and discussed as a common question of law and fact.

May one element of the *Skinner* test be absent and a community of interest still exist? An analysis of the decisions reveals that the absence of one defeats the attempt to establish a community of interest. And, failure to establish a community of interest results in no common and general question. (For ease of discussion the cases will be separated into three categories: taxpayer suits, property suits and other suits.)

Taxpayer Suits

Taxpayer suits brought pursuant to class action statute have most often failed for lack of application to all parties. It is clear that class action suits cannot be maintained when the action challenges a valid tax as improperly or illegally applied to several plaintiffs. A case illustrative of this principle is *Stiles v. City of Guthrie*.[13] The court in *Stiles* stressed that the common interest of the plaintiffs " 'must be in the subject-matter of the action, and not merely in the legal questions involved in their separate causes of action. . . .' "[14] The success of one plaintiff who challenged the improper collection of the tax would

11. 108 Kan. 861, 197 P. 569 (1921).
12. *Id.* at —, 197 P. at 571.
13. 3 Okla. 26, 41 P. 383 (1895).
14. *Id.* at 40-41, 41 P. at 388.

not have established that the application of the tax to another plaintiff was improper. Therefore, the relief demanded was not applicable to nor binding on all parties. Had each plaintiff had an interest in the same taxed property, the result would have been different. *Stiles* involved a suit to enjoin the collection of a valid tax for construction of a road and bridge. However, the principle illustrated in *Stiles* is applicable to other suits involving a valid tax collected for other purposes.[15]

While taxpayers may not bring a class action as a taxpayer class challenging the illegal collection of a valid tax, taxpayers' class action suits may be maintained when the tax is challenged as illegal.[16] The legal question and subject matter of the action is the constitutionality of the tax. If one taxpayer establishes the tax as unconstitutional, then its unconstitutionality is established for all taxpayers. Relief applies to all even though each taxpayer owns separate property.

Property Suits

Plaintiffs in property class actions have had substantially better success in bringing a class action suit. There is apparently less difficulty in establishing the interest in the subject matter through the same factual situation and legal questions, as well as in applying the relief to all parties.

It is important to note that in property class action suits it is not necessary that all plaintiffs jointly own the property in question for the action to lie. Class action suits have been allowed when various parcels of real property have been injured by a common nuisance.[17] In addition, class actions have been maintained to establish ownership to land.[18]

15. Felten Truck Line v. State Bd. of Tax Appeals, 183 Kan. 287, 327 P.2d 836 (1958) (action by several motor carriers to recover taxes paid under protest to State Commission of Revenue and Taxation); Hudson v. Comm'rs of Atchison County, 12 Kan. 115 (1873) (action by corporation shareholders of building and savings association to enjoin the collection of a tax on certain shares of stock owned by plaintiffs separately); Wyandotte & Kansas City Bridge Co. v. Board of County Comm'rs, 10 Kan. 247 (1872) (action to enjoin a tax to pay interest on bonds for construction of a bridge); Davenport v. Snyder, 185 Okla. 160, 90 P.2d 653 (1939) (action to enjoin a tax resale).

16. State *ex rel.* Tharel v. Board of Comm'rs, 188 Okla. 184, 107 P.2d 542 (1940); Skinner v. Mitchell, 108 Kan. 861, 197 P. 569 (1921).

17. Atchison St. Ry. v. Nave, 38 Kan. 744, 17 P. 587 (1888) (obstruction of entrance way to plaintiffs' property by construction of street railroad); Palmer v. Waddell, 22 Kan. 248 (1879) (water overflow caused by obstruction of a natural water course).

18. Fink v. Umsheid, 40 Kan. 271, 19 P. 623 (1888) (action by members of Catholic Church at Rock Creek, Kansas to have certain land placed in trust for the church).

The traditional property class action suit in Oklahoma involves an action by owners of several and distinct lands for some injury to the land or to some aspect of land ownership. Typically, the action has been brought by owners of land in an oil and gas unit organization for failure of the unit and its operators to obtain the highest sale or market price for oil produced in the unit.[19]

Other Suits

Very few class action suits have been brought pursuant to section 233 other than property and taxpayer suits. It is questionable whether class actions are allowed in tort actions. In one case a class action was not maintained because of the nonapplication of relief to all parties in the class.[20] Section 233 has been used successfully by employees of a common defendant[21] to recover overtime wages denied them in violation of the Fair Labor Standards Act of 1938.[22]

2. An Impracticable Number of Parties

There has been no test developed by the courts as to what constitutes an impracticable number of parties. Nor, in the opinion of this writer, should there be. The determination of this issue is properly within the discretion of the trial court.

No maximum limit to the plaintiff or defendant class has been established. In taxpayer suits, plaintiff-classes have represented those similarly situated within a county, city or town.[23] Outside of taxpayer

19. Harding v. Cameron, 220 F. Supp. 466 (W.D. Okla. 1963); West Edmond Hunton Lime Unit v. Young, 325 P.2d 1047 (Okla. 1958); Young v. West Edmond Lime Unit, 275 P.2d 304 (Okla. 1954); *appeal dismissed*, 349 U.S. 909 (1955). *See also* Bloch v. Sun Oil Corp., 335 F. Supp. 190 (W.D. Okla. 1941) (alleged sale of extracted by-products from the production of the wells on plaintiffs' land); Hall Jones Oil Corp. v. Claro, 459 P.2d 858 (Okla. 1969) (suit by several mineral lessors to recover for breach of implied covenant by defendants who jointly operated an offset well).

20. Holland Oil & Gas Co. v. Holland, 144 Kan. 863, 220 P. 1044 (1923) (suit by several plaintiffs who each claimed that a common defendant made the same false representations to them; the court held that no single plaintiff was affected by the cause of action of any other plaintiff nor interested in the relief demanded by any other plaintiff).

21. Hargrove v. Mid-Continent Oil Corp., 36 F. Supp. 233 (E.D. Okla. 1941).

22. 29 U.S.C. §§ 201-19 (1970), *as amended*, (Supp. IV, 1974).

23. Oklahoma: Morton v. Oklahoma City, 477 P.2d 58 (Okla. 1970); State *ex rel.* Tharel v. Board of Comm'rs, 188 Okla. 184, 107 P.2d 542 (1940); Davenport v. Snyder, 185 Okla. 160, 90 P.2d 653 (1939); Stiles v. City of Guthrie, 3 Okla. 26, 41 P. 383 (1895); Kansas: Skinner v. Mitchell, 108 Kan. 861, 197 P. 569 (1921); Nixon v. School District No. 92, 32 Kan. 510, 4 P. 1017 (1884); Center Township v. Hunt, 16 Kan. 430 (1876); Hudson v. Comm'rs of Atchison County, 12 Kan. 115 (1873); Wyandotte & Kansas City Bridge Co. v. Board of County Comm'rs, 10 Kan. 247 (1872).

suits, an action by an unspecified number of members of a church congregation was allowed.[24]

No minimum limit has been set by either Kansas or Oklahoma courts. Two earlier Kansas decisions allowed three plaintiffs to constitute the class[25] without discussing the reasons for allowing so small a number to make up the class. It is unclear whether the Kansas Supreme Court was establishing a judicial policy allowing class actions by such a small number. We are without the benefit of recent decisions interpreting the statute as Kansas adopted the Federal Rules of Civil Procedure in 1964. In Oklahoma class actions by as few as fifteen[26] and eleven[27] plaintiffs have been allowed. However, the Oklahoma Supreme Court declared that it did not look with favor upon a class action with such a small class.[28]

3. STANDING

The *Tharel* court required that each member of the plaintiff class have a direct financial interest in the issues presented to the court.[29] As thus stated, the court was pointing to a basic requirement for maintaining an individual action as well as a class action: the plaintiff must have standing. To represent others who are similarly situated for alleged wrongs they have suffered, the plaintiff must first show that he has suffered a redressable wrong. He must prove that some legally protected right has been violated or that he has suffered some injury for which the law provides him redress. Thus, the plaintiff must establish his own standing to sue before he may attempt to sue for others.

In several cases a class action was denied where the plaintiff failed to maintain his right to sue.[30] Although the United States Supreme Court has expanded the concept of what constitutes a redressable injury, the plaintiff must still allege that he has suffered injury before he can pursue his action.[31]

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24. Fink v. Umsheid, 40 Kan. 271, 19 P. 623 (1888).
25. Cases cited note 17 *supra*.
26. Harding v. Cameron, 220 F. Supp. 466 (W.D. Okla. 1963).
27. Hall Jones Oil Corp. v. Claro, 459 P.2d 858 (Okla. 1969).
28. *Id.* at 862. The court found no prejudicial error, however, and allowed the suit.
29. 188 Okla. at 195, 107 P.2d at 554.
30. Center Township v. Hunt, 16 Kan. 430 (1876); Craft v. Comm'rs of Jackson County, 5 Kan. 313 (1870).
31. Sierra Club v. Morton, 405 U.S. 727 (1972).

4. REPRESENTATION

Oklahoma and Kansas courts have seldom dealt with the issue of representation.[32] *Tharel* required that a defendant must represent his class but did not mention the plaintiff as a representative. What constitutes proper representation under section 233? What qualifications must a plaintiff have to represent a class? How is the composition of the alleged class to be determined? What effect does the alleged representation have on the ability of unnamed members of the class to bring suit on the same issues at some future date? Are unnamed and unidentified members of the class bound by the decision? If so, how do the courts identify those members? Must members, who can be reasonably identified, be given individual notice of the action? Do individual members of the class have an opportunity to opt out or to challenge the plaintiff as representative of the class? The language of section 233 and the judicial interpretations of the statute do not clearly answer these questions. At best, the answers are merely suggested by the cases.

The proper plaintiff should be one who represents the interests of the class without each class member being physically present in court. Does it necessarily follow that unnamed and unidentified members of the class are bound by the decision? If the purpose of section 233 is to avoid a multiciplicity of suits binding on many,[33] then the answer would appear to be in the affirmative. However, Oklahoma courts have never clearly decided this issue. In addition, it is unclear as to what "virtual representation" means. *Tharel* mentions but does not define the doctrine.[34] Also unclear is the effect of *Eisen v. Carlisle & Jaquelin*[35] on actions brought pursuant to section 233. *Eisen* is a recent United States Supreme Court case on the question of individual notice in class actions. Various factors strongly suggest that *Eisen* has a limited effect on a section 233 suit because unnamed, unidentified class members are not bound by a decision in a section 233 action.

32. In one of the few Kansas cases found on representation, the plaintiff failed to establish his right to represent others in a quiet title action involving one hundred and forty-four sections of land. Taylor v. Focks Drilling & Mfg. Co., 144 Kan. 626, 62 P.2d 903 (1936). The only Oklahoma decision found by this writer discussing representation is *Tharel*, where the Oklahoma Supreme Court mentioned the "virtual representation" doctrine. 188 Okla. at 194, 107 P.2d at 553.

33. *See* text accompanying notes 2-8 *supra*.

34. Apparently this doctrine is " 'a means of enabling many persons to have their rights determined without their actual appearance in court as litigants.' " 188 Okla. at 194, 107 P.2d at 553. As discussed, virtual representation is synonymous with class action. The definition is of no aid in resolving any questions concerning representation.

35. 417 U.S. 156 (1974).

Eisen v. Carlisle & Jacquelin

The United States Supreme Court reached a decision on *Eisen* after eight years of litigation.[36] Plaintiff brought a class action for himself and other odd-lot traders against brokerage firms and stock exchanges for alleged violations of antitrust and security laws. The Supreme Court held that individual notice to identifiable class members was mandatory, that notice requirements could not be tailor-made to fit the financial situation of the particular plaintiff, and that the plaintiff was required by Rule 23[37] to bear the cost of notice to members of the class.[38] Whether *Eisen* was merely an interpretation of Rule 23 affecting only class actions brought in federal court or a constitutional mandate of due process reaching all class actions is not clearly defined by the opinion. However, the Court's language suggests that due process considerations require notice to individual members of the class who can be identified through reasonable efforts when the judgment would be binding on these members. Whether the notice requirements of *Eisen* apply to section 233 depends on the binding effect on absent members of the class of a judgment reached under an action brought pursuant to the Oklahoma statute.

Eisen was held to be a subsection (b)(3) class action[39] subject to

36. The litigation history of *Eisen* is as follows: 41 F.R.D. 147 (S.D.N.Y. 1966) (district court determined that a class action was not maintainable); 370 F.2d 119 (2d Cir.), *cert. denied*, 386 U.S. 1035 (1967) (Eisen I) (the order dismissing the class action held appealable); 391 F.2d 555 (2d Cir. 1967) (Eisen II) (court of appeals reversed district court, retained jurisdiction and remanded case); 50 F.R.D. 471 (S.D.N.Y. 1970) (district court determined more information was needed); 52 F.R.D. 253 (S.D.N.Y. 1971) (district court determined that the action was maintainable as a class action); 54 F.R.D. 565 (S.D.N.Y. 1972) (district court ordered defendant to bear 90 percent of the cost of notice); 479 F.2d 1005 (2d Cir. 1973) (Eisen III) (court of appeals reversed the rulings allowing prosecution of the case as class action).

37. FED. R. CIV. P. 23.

38. 417 U.S. at 177-79.

39. FED. R. CIV. P. 23(b)(3) provides:

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

the notice requirements defined in subsection (c)(2).[40] Prior to the 1966 Amendments, Rule 23 provided for a "true," "hybrid," and "spurious" class action. The spurious class action was merely considered a permissive joinder device and the judgment in such cases bound only the original parties of record and those who intervened and became parties to the action.[41] Under the amended rule the tri-part division of class actions listed above was abolished and the judgment is now binding on all members of the class who do not opt out.[42]

Subsection (b)(3), which has language similar to the previously known spurious class action, reaches those cases where "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results."[43] Under this subsection the class may be less unified in their interests than the other subsections. Rule 23(b)(3) requires only that there be questions of law or fact which are common to the class, that these questions predominate over the questions affecting individual members and that the class action be the superior means of adjudicating the controversy.[44]

From the *Eisen* decision it is clear that, in subsection (b)(3) class actions, the express language and intent of Rule 23(c)(2) requires individual notice to be provided to those members of the class who are reasonably identifiable.[45] This notice requirement is included in the Rule for several reasons. Class members do not receive notice by service of process. Also, subsection (b)(3) class actions give members

40. Subdivision (c)(2) provides in full:

> (2) 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.

41. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966); Proposed Rules of Civil Procedure, 39 F.R.D. 69, 98 (1966) [hereinafter cited as Proposed Rules]; Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1968); Comment, *Notice, Preliminary Hearing, and Manageability in Federal Class Actions*, 11 HOUSTON L. REV. 121 (1973) [hereinafter cited as *Federal Class Actions*].

42. Proposed Rules, *supra* note 41, at 99; *Federal Class Actions, supra* note 41, at 121; Note, *Federal Jurisdiction and Practice: The Notice Requirement in Class Actions—The Eisen Controversy*, 27 OKLA. L. REV. 70, 74 (1974).

43. Proposed Rules, *supra* note 41, at 102-03.

44. Note, *Eisen v. Carlisle & Jacquelin—Fluid Recovery, Mini-hearings and Notice in Class Actions*, 54 B.U.L. REV. 111 (1974) [hereinafter cited as *Notice in Class Actions*].

45. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974).

the privilege of requesting exclusion from the judgment.[46] However, the most important reason, as previously mentioned, is that members who fail to opt out are bound by the decisions. The Supreme Court, in relying on the Advisory Committee's Note to Rule 23 to support its conclusion, stated:

> The Advisory Committee described (c)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject."[47]

Eisen, therefore, is more than just an interpretation of Rule 23. The decision rests on due process considerations. Individual notice is required when the members of the class who are not original parties or intervenors are to be bound unless affirmatively acting to remove themselves from the judgment.

The Effect of Eisen and Due Process Considerations on Section 233 Actions

Because *Eisen* is based on due process considerations, state class actions which are similar in form or effect to subsection (b)(3) federal class actions also require individual notices to reasonably identifiable members of the class who would be bound by the judgment.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[48]

Prior to the 1966 amendments to Rule 23 and the *Eisen* decision in 1974, class actions as well as other actions were governed by due process standards established by the Supreme Court in a line of cases illustrated by two decisions, *Mullane v. Central Hanover Bank & Trust Co.*[49] and *Hansberry v. Lee.*[50] In *Mullane*, a judicial settlement case which would have been binding on the beneficiaries of a common trust fund, the Supreme Court held that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process, and that publication notice could not satisfy due

46. *Notice in Class Actions, supra* note 44, at 137.
47. 417 U.S. at 173.
48. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
49. 339 U.S. 306 (1950).
50. 311 U.S. 32 (1940).

process where the names and addresses of the beneficiaries were known.[51] Notice must be reasonably calculated to inform all interested parties in the action.[52] *Hansberry* implied that the essential requisite of due process is the adequate representation of the class.[53] *Eisen* reinforced *Mullane's* rejection of notice by publication where the name and address of the person affected is available[54] and merged *Hansberry's* adequate representation doctrine with notice as a due process and Rule 23 requirement.[55]

The requirements of Rule 23(b)(3) bear resemblance to those specified in section 233.[56] Therefore, one could conclude that *Eisen* requires that any suit brought under section 233 must satisfy individual notice requirements by notifying reasonably identifiable members of the class. However, there is a notable distinction between the circumstances in *Eisen* and any action brought pursuant to the Oklahoma statute. As noted above, an *Eisen*-type class action is binding on the members of the class who do not affirmatively opt out. Conversely, under section 233, it is not clear whether a judgment would bind those members of the class not mentioned as original parties or as intervenors. However, several factors suggest that unnamed, unidenfiied class members will not be bound by a section 233 action.

As previously mentioned,[57] the class action was developed to avoid the strict requirements of joinder of parties. Many states appended their class action provisions to the compulsory joinder rules. Others, including Oklahoma, have separated the class action provisions from compulsory joinder and considered it a matter of permissible joinder.[58] The Oklahoma Supreme Court in *Tharel* discussed "virtual representation" as a device to allow, rather than require, many persons to have their rights litigated without their actual appearance in court.[59] The effect of this permissible representation and joinder is to remove those members not actually present or named in the action from the judgment. In addition, the wording of section 233 is similar to the spurious class action of Rule 23 prior to the 1966 amendments. One could argue

51. 339 U.S. at 313-15.
52. *Id.* at 314.
53. 311 U.S. at 42; *Notice in Class Actions, supra* note 44, at 140.
54. 417 U.S. at 174-75.
55. Id. at 176-77.
56. *Id.* at 173.
57. See notes 2-8 *supra* and accompanying text.
58. Homburger, *State Class Actions and the Federal Rule*, 71 COL. L. REV. 609, 615 (1971).
59. 188 Okla. at 194, 107 P.2d at 553.

by analogy that the judgment under section 233 binds only original parties as in the spurious class action. Furthermore, a Kansas decision suggests that a class action suit involving a large number of unnamed plaintiffs is not binding on those parties who have not participated in the actual trial, or who have not accepted the representation of the actual plaintiffs.[60] It is suggested that the acceptance of representation occurs when actual consent is given or plaintiff accepts the benefits of the judgment. It is not clear whether knowledge of the suit and failure to object to it is sufficient to constitute acceptance of representation.

It is submitted, therefore, that *Eisen,* although decided on due process grounds, will not affect an action under section 233 unless that section is held to be comparable to a Rule 23(b)(3) class action. This means that an action brought pursuant to section 233 must be considered binding on the unnamed members of the class, rather than just as a device for permissible joinder, before individual notice of all reasonably identifiable members will be required. It is further submitted that a section 233 class action will not bind unnamed, unidentified class members for the reasons discussed previously.[61] If an Oklahoma court decided that the class action was binding on all class members but that an *Eisen*-type notice was not required, at a minimum, the due process considerations of *Mullane* and *Hansberry* would have to be met. Even under such circumstances, in this author's opinion, section 233 would be subject to constitutional attacks.

IV. CONCLUSION

Section 233 is ambiguous in application and enforcement. The language has been attacked as wholly inadequate and giving no information at all.[62] The Kansas statute, upon which section 233 is based, has been abrogated and Federal Rule of Civil Procedure 23 has been adopted in its stead. It is submitted that section 233 is not adequate to fulfill the purpose for which it was promulgated. The statute, in the opinion of this writer, is woefully archaic and ineffective to deal with the complexity of issues involved in modern class actions.

The conclusion that section 233 is inadequate to fulfill its purported purpose is based on the following factors: the purpose of section 233 is to prevent a multiplicitly of suits and enable a few persons to sue for

60. Alber v. Kansas City, 138 Kan. 184, 25 P.2d 364 (1936).
61. See text accompanying notes 57-60 *supra.*
62. Note 8 *supra.*

and to bind many persons. To bind many persons not parties to the action, due process considerations must be met. Due process requires individual notice to those members of the class who are reasonably identifiable and adequate notice under the circumstances to the other members. Due process also requires some procedure whereby class members can remove themselves from the class or at least challenge those who seek to represent the class. No such procedure exists under section 233. In addition, section 233 has been removed from the compulsory joinder rules and has been considered a matter of permissible joinder. The result of this combination of factors is ambiguity and confusion.

This writer suggests that Oklahoma adopt Federal Rule of Civil Procedure 23 as amended in 1966. The confusion and ambiguity which has arisen from the language of section 233 would be curtailed. A substantial body of federal case law interpreting Rule 23 is available to fill a void currently existing in Oklahoma in relation to the questions raised above. Rule 23 is not without problems, but its origin and design is more modern than section 233. Therefore, it has a better chance of providing a workable framework for a solution to the complicated class actions of today.

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