

## COMMENT

# Fact Determination in Rule 23 Class Actions

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Considerable complication and difficulty has been experienced in Rule 23 litigation because of uncertainty about the authority of the court to make fact determinations, particularly in connection with the issue of class certification. The assumption has been that the Supreme Court's pronouncements in *Beacon Theatres, Inc. v. Westover*<sup>1</sup> properly define and restrict the authority of a judge in equity litigation to determine issues of fact.<sup>2</sup> I suggest that this position should be reexamined and modified.

In Rule 23 litigation there can be fact issues at various stages of a case. There are the ultimate substantive issues of injury, damage, and liability, as in any other type of litigation. But there are also preliminary issues peculiar to class suits, such as qualification under Rule 23(a),<sup>3</sup> class definition,<sup>4</sup> possibility of subclasses,<sup>5</sup> adequacy of repre-

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<sup>1</sup> *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

<sup>2</sup> See, e.g., Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 207 (2000) (stating that the Court in *Beacon Theatres* "preserved and even expanded the jury's fact-finding function" and "determined that procedural changes resulting from the merger of law and equity reduced the need for issues to be tried in equity").

<sup>3</sup> FED. R. CIV. P. 23(a).

<sup>4</sup> FED. R. CIV. P. 23(c)(1)(B).

<sup>5</sup> FED. R. CIV. P. 23(c).

sentation,<sup>6</sup> and intervention by third parties.<sup>7</sup> Now that discovery has been recognized as appropriate in exploring such issues,<sup>8</sup> there are often issues concerning discovery itself. Another question is whether the trial judge may properly be involved in settlement discussions.<sup>9</sup>

The relevance of *Beacon Theatres* to these issues is evident. The broad dictum in *Beacon Theatres* is well-known:

[T]he justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action. . . .

. . . [T]he trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.<sup>10</sup>

This proposition became a holding in *Dairy Queen, Inc. v. Wood*,<sup>11</sup> which involved juxtaposition of the equitable remedy of accounting and the legal remedy of damages.<sup>12</sup>

However, *Beacon Theatres* was a gross distortion of the historical record and of the effect of the Federal Rules. Justice Stewart, along with Justices Harlan and Whittaker, said so in dissent at the time, and subsequent scholarship has been to the same effect.<sup>13</sup> It may be noted that several state courts have rejected the thesis in *Beacon Theatres* and accordingly have retained the historic province of equity in their

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<sup>6</sup> FED. R. CIV. P. 23(a)(4).

<sup>7</sup> FED. R. CIV. P. 23(d)(3).

<sup>8</sup> See FED. R. CIV. P. 23 advisory committee's notes to 2003 amendment ("[I]t is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision."); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011) (allowing lower courts to consider the merits of a suit in precertification discovery).

<sup>9</sup> See generally Daisy Hurst Floyd, *Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45 (1994).

<sup>10</sup> *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509–10 (1959) (footnote omitted).

<sup>11</sup> *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

<sup>12</sup> *Id.* at 471–73.

<sup>13</sup> *Beacon Theatres*, 359 U.S. at 517–19 (Stewart, J., dissenting); see also GEOFFREY C. HAZARD, JOHN LEUBSDORF & DEBRA LYN BASSETT, *CIVIL PROCEDURE* 544–48 (6th ed. 2011); John C. McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 10–15 (1967).

own procedural systems, notwithstanding that those systems were as fully “merged” as in the Federal Rules of Civil Procedure.<sup>14</sup>

The Supreme Court subsequent to *Beacon Theatres* took quite a different tack in *Ross v. Bernhard*.<sup>15</sup> That decision addressed a derivative action brought by corporate shareholders for the benefit of the corporation.<sup>16</sup> The shareholders’ derivative action is historically within equity jurisdiction,<sup>17</sup> and the question was whether the right to jury trial nevertheless applied to fact issues in the case.<sup>18</sup> The district court had held that the right to jury trial “was to be judged as if the corporation were itself the plaintiff. Only the shareholder’s initial claim to speak for the corporation had to be tried to the judge.”<sup>19</sup> The court of appeals reversed, holding that the whole case was for the judge.<sup>20</sup>

The Supreme Court agreed with the district court, and in doing so carefully distinguished two phases of the derivative suit:

[O]ne precondition for the [stockholders’] suit was a valid claim on which the corporation could have sued; another was that the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions. Thus the dual nature of the stockholder’s action: first, the plaintiff’s right to sue on behalf of the corporation and, second, the merits of the corporation’s claim itself.<sup>21</sup>

The class suit, like the shareholder’s derivative suit, also derives from historic equity.<sup>22</sup> The classic class action cases in the federal courts are of course *Smith v. Swormstedt*<sup>23</sup> and *Supreme Tribe of Ben-Hur v. Cauble*.<sup>24</sup>

By reasoning parallel to that in *Ross v. Bernhard*, the class suit has a dual nature: first, whether the suit may be maintained as a representative action—in this context the representative acts on behalf of members of the class, whereas in the derivative suit it is the shareholder who acts on behalf of the corporate entity—and second, the

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<sup>14</sup> See, e.g., *Weltzin v. Nail*, 618 N.W.2d 293, 297, 300 (Iowa 2000) (citing other state decisions).

<sup>15</sup> *Ross v. Bernhard*, 396 U.S. 531 (1970).

<sup>16</sup> *Id.* at 531–32.

<sup>17</sup> *Id.* at 534.

<sup>18</sup> See *id.* at 537–38.

<sup>19</sup> *Id.* at 532.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 534–35 (footnote omitted); see also *id.* at 538–39.

<sup>22</sup> See 1 THOMAS ATKINS STREET, FEDERAL EQUITY PRACTICE, ch. XII (1909).

<sup>23</sup> *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853).

<sup>24</sup> *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

trial of the class members' claims against the defendant.<sup>25</sup> In particular, it would be appropriate to hold individual trials to establish the proper estimate of damages for class members as a basis for class-wide settlement.<sup>26</sup> Under the analysis in *Ross v. Bernhard*, these trials would be before a jury.<sup>27</sup>

Again, by reasoning parallel to that in *Ross v. Bernhard*, it would be appropriate for issues of fact in the first phase of a class suit to be decided by the judge.<sup>28</sup> Those determinations would have the same force and effect as similar preliminary determinations made in connection with a temporary restraining order or preliminary injunction: they would be preclusive in the subsequent stages except as reconsidered by the judge.<sup>29</sup> As with the preliminary determinations in *Ross*, there would be no concern that the judge was inappropriately determining issues that might later come before a jury in the second phase.<sup>30</sup> So limited, preliminary determinations in the first phase of a class suit would not run afoul of parties' jury trial rights as expounded upon in *Beacon Theatres*.

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<sup>25</sup> See *Ross*, 396 U.S. at 534–35.

<sup>26</sup> Cf. *id.* at 534.

<sup>27</sup> Cf. *id.* at 542.

<sup>28</sup> Cf. *id.* at 538.

<sup>29</sup> See, e.g., FED. R. CIV. P. 23; FED. R. CIV. P. 65.

<sup>30</sup> Cf. *Ross*, 396 U.S. at 538.

