COMMENTARY

Increased Participation by Non-Parties: The Need for Limitations and Conditions

By Jack H. Friedenthal*

The discussion this morning raises three serious problems that obviously are directly related to one another. First, no one has given a clear definition of what public interest litigation is. Second, the extent of the extraordinary procedural measures to be allowed in a public interest case has been left vague. Third, as to those special measures that have been mentioned, there has been little discussion of their impact on the original parties to the suit.

I do not believe one can assume that all persons are speaking of the same cases when they talk of public interest litigation. We just cannot duck the question of definition. Of course, we can joke about it, referring to Justice Stewart's famous remark about hardcore pornography — that we cannot define it, but we know it when we see it. One would hope, however, to avoid creation of another judicial morass such as exists in the field of censorship.

Just what is a public interest case? Are there really any actions that are completely private? Consider a suit for wrongful death arising out of an airline crash. Depending upon the outcome, it may affect a vast number of people. The court may shut down the airline, cause planes to be grounded or cause insurance rates to go up to a point that would make air travel prohibitively expensive.

The same type of questions arise as a result of the dramatic increase in medical malpractice suits. Are they public litigation cases because doctors now are paying $25,000 to $70,000 in insur-

---

* George E. Osborne Professor of Law, Stanford University.

This commentary is an edited version of Professor Friedenthal's extemporaneous remarks made in response to the speeches and comments of Professor Neil H. Cogan, Professor Emma Coleman Jones, Federal District Court Judge Jack B. Weinstein and Professor John Bilyeu Oakley at the January, 1980, Convention of the American Association of Law Schools in Phoenix, Arizona.

ance premiums that are ultimately passed on to the public? Surely they are public in the sense that legislatures have been considering ways to limit recovery and keep them under control. And yet it does not seem that these are the kinds of cases that are meant to be included in today's discussion.

The focus of concern of the previous panelists appears to be on issues involving civil rights of persons who are not parties to the suit, in particular on discrimination based on race or sex. If discussion could be confined to suits raising these matters, then it would be easier to determine the appropriate means by which protection of such non-parties could be afforded.

With regard to deciding what are appropriate procedural measures to be permitted in public interest cases, most of this morning's discussion has focused on the need for an expanded use of intervention, either by an alteration of current rules governing intervention or by creation of a new "participating amicus" status. If we are able carefully to limit the types of cases in which expanded intervention might be appropriate, I have no objection to a new set of rules to permit courts to hear from outsiders when that seems absolutely necessary. What is disconcerting, however, is a vague assumption that such expanded intervention should be a matter of right, outside the scope of the trial court's discretion. This stems from two apparent beliefs on the part of some panelists. The first is that trial judges cannot be trusted to permit participation of non-parties whose vital interests are at stake. The second is that those who seek to intervene, arguing that they represent a group whose rights are being destroyed, are usually correct and are fighting some powerful, collusive interests.

Each of these beliefs is questionable. But, even if they are true, it does not follow that some form of mandatory participation-as-of-right is the proper remedy. Why tie the hands of many judges who are willing and able properly to balance the needs of non-parties to protect their rights against the needs of the original parties to control the scope and direction of their lawsuits?

Those who seek mandatory intervention seem to operate on the assumption that once outsiders are allowed to participate, the results of the cases will be more satisfactory. They should remember that those same judges who are not to be trusted with decisions on participation are the ones who are expected to render the "right" decisions on the merits. If the president or a governor should appoint a large number of new judges whose political and social philosophies differ from the people who have been advocating increased participation, a whole new attitude might emerge.

There would be demands to shoot down intervention, curtail amici, and limit the cases to determinations among the original litigants.

If new, broader rules of participation are to be adopted, more emphasis should be placed on how they are to be limited, rather than on when they should automatically apply. Just because a case is of great interest in the community, broad intervention is not justified.[1] Only when it is clear that the rights of persons outside the case are directly at stake should the action be expanded to include them. Courts that go beyond that narrow compass are in danger of becoming quasi-legislative bodies, a development which raises a myriad of theoretical and practical questions.

Are the courts in such cases to hold "town meetings"? How can any interested citizen be excluded from presenting his or her point of view, or even from calling witnesses? Shouldn't lobbyists be allowed to contact judges outside of court? Perhaps that sounds extreme, but is it not extreme when Judge Weinstein this morning spoke with approval of a trial judge calling in members of the news media to discuss the issues in a public interest case? If judges are to act as politicians, shouldn't they be treated aspoliticians and be required periodically to stand for election (as they are in some states), winning or losing on the basis of their political and social beliefs and on the popularity of their decisions?

The *Bakke*[2] case, which has already been discussed this morning by Professor Jones, is a good example of an action in which a broad expansion could have caused serious difficulties. Virtually every applicant to medical school, regardless of his or her race, had an interest in the outcome of that suit. Indeed, every applicant or potential applicant to law school or other professional school had an important interest. In a sense, every citizen of California or even of the United States had a stake in the result.

As Professor Jones has noted,[3] the interests of minority applicants were not represented. As her excellent article points out, their intervention would not have been proper under existing rules.[4] But the interests of non-minority applicants were also

---

[1] *See* Yeazell, *Intervention And The Idea of Litigation: A Commentary On the Los Angeles School Case*, 25 U.C.L.A. L. REV. 244 (1977).

[2] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[3] Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31 (1979).

[4] *Id.* at 36-40.

unrepresented. Certainly Allan Bakke did not have any intention to provide such representation. From his perspective the result was ideal, but that is far from true from the perspective of other non-minority professional school applicants.

If Professor Jones is correct that minority applicants should have been permitted to intervene, wouldn't the judge also have been required to permit intervention by non-minorities? Where is the line to be drawn? Who is to be precluded from making argument or offering what he or she considers to be "vital" evidence?

The *Bakke*[5] case is a particularly important example because the decision is not as broad as advertised, and does not necessarily preclude minority applicants from arguing in favor of affirmative action plans in future suits. The issue most discussed in regard to lack of representation is that of past discrimination on the part of the University of California. Bakke had no reason to raise the issue as it could only have worked against him, and the University was obviously not going to admit that it engaged in any such improper activity. So that issue, on which the decision might well have turned, was never presented.

But so what? The next person who brings a similar suit — for example a minority student who challenges rejection of his or her medical school application — can raise the issue of past discrimination and, if it is proven, can prevail regardless of *Bakke*.[6] Only to the extent that issues cannot subsequently be raised, or when the result of the case will necessarily lead the parties to actions that will not be subject to subsequent challenge, should new broad rules of non-party participation be applicable.

Finally, the courts must pay careful attention to the rights of the original litigants before deciding to allow outsiders into the suit. An individual, such as Bakke, who merely wants to be accepted to medical school, and is not out to set a precedent or vindicate the rights of anyone else through use of a class action, should be given every fair chance to control his own lawsuit.

Such an individual will often have limited resources. As a result, he may enter into a number of stipulations just to reduce the potential costs and allow him to concentrate on key issues that will provide the relief he seeks. But what appears to be a very

---

[5] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
[6] *Id.*

good chance of victory may be swept away if the court then allows all sorts of interested outsiders to enter the case and raise not only the issues as to which stipulations were made, but a host of others as well. The original party may have insufficient funds to engage in additional discovery, hire necessary experts, and search for evidence to meet these new issues.

It would therefore seem appropriate as an integral part of any new statute or rule allowing broad participation of non-parties to require those who enter the case to pay the additional costs and attorney fees reasonably necessary for the original parties to deal with such new issues. Not only would such a provision protect the original parties' interests, it would also help to assure that those who enter a case will not do so frivolously.