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Why Slavery Reparations Are Good for Civil Procedure Class

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WHY SLAVERY REPARATIONS ARE GOOD FOR CIVIL PROCEDURE CLASS

I. INTRODUCTION

As a 1L, I found much of Civil Procedure class to be mundane and boring.[1] Although Civil Procedure is key to any successful litigation, few that I know in the legal world find it interesting, and it rarely comes up when lawyers discuss their favorite things about law. Rarer still is the attorney who would enjoy nothing more than reading and writing *in rem* jurisdiction cases all day long. By the time class actions roll around on the syllabus, the masses of 1Ls have probably found it more exciting in Civil Procedure class to do anything rather than to pay attention to whatever topic is being discussed. But a current, controversial issue can suddenly relegate the distractions to their rightful insignificant place in the law student's world. I suggest that the slavery reparation lawsuits are good vehicles with which to teach class actions. While class actions are interesting by nature, a discussion about large class actions for slavery reparations is sure to elicit opinions from everyone. This creates the perfect union of discussion issues, frequently sought, but rarely achieved, in Civil Procedure classes.

The slavery reparation class action suits are the best examples of this perfect union for three reasons. First, the suits are hot, interesting topics at the intersection of two the most explosive and controversial issues today: race and (ab)use of lawsuits for many differing goals. Second, they give a good basic primer of class action issues by laying out each of the requisite elements in an understandable fashion. Third, the suits create an excellent base from which to explore larger questions about the usefulness and morality of reparations and the policy or practice of using the courts to accomplish larger societal goals. The slavery reparation suits truly represent the power of a lawsuit, in that it may be possible for a lawsuit to right wrongs so immense as slavery and racism. Of course, high-minded theoretical and moral discussions get nowhere with exam-minded 1Ls. Therefore, in order to make this concept relevant to Civil Procedure classes, it seems best to discuss it with class actions.

To show how the slavery reparation lawsuits can be used in class, this essay will be divided into three parts. Section II will give a basic summary of

1. This is a fictional example having no relation on the wonderful experience I had in my Civil Procedure class.

the slavery reparation class actions and similar suits. Section III will discuss the formal requirements of class actions. Section IV will discuss how the slavery reparation suits illustrate the larger implications of class actions.

II. BASIC SUMMARY OF SLAVERY REPARATIONS AND OTHER RACIAL CLASS ACTIONS

A. The Current Slavery Reparation Class Actions

The basis of reparations is that labor is property, and those who wrongfully took that labor should give up the property and the benefits produced by it. The complaints are presented in terms of unjust enrichment and conversion of property.[2] The defendants are alleged to have been unjustly enriched by the institution and should be held liable for their slavery based profits. It is also alleged that African-Americans who descended from slavery are still feeling the effects of its legacy. For instance, the complaint in *Paellmann v. FleetBoston Financial Corp.* cites 1998 Census figures, which report that 26% of African-Americans live in poverty, compared with 8% of whites.[3] Additionally, only 14.7% of African-Americans have four-year college degrees, compared with 25% of whites, and life expectancy for African-Americans is 6.6 years shorter.[4]

A primary motivation behind the filing of these class actions is that the idea of reparations has been around a long time without much progress being made. It started in 1865 with General Sherman's pledge and field order allotting forty acres and a mule for every freed slave.[5] This field order was later revoked under political pressure by President Andrew Johnson.[6] In modern times, Representative John Conyers (D-Mich.) has introduced a bill to study the issue each year, but the bill has yet to make it out of committee.[7] Suing the federal government for damages resulting from slavery also failed, when the Ninth Circuit dismissed *Cato v. United States*[8] for lack of a legal theory on which to base its claims. The current class representative, Ms. Deadria Farmer-Paellmann, through previously working with Aetna, convinced the insurance giant to publicly apologize for its predecessor's role in slavery,

2. *See, e.g.*, Complaint at ¶¶ 62-70, Paellmann v. FleetBoston Fin. Corp. (E.D.N.Y. Mar. 26, 2002).

3. *Id.* at ¶ 18.

4. *Id.*

5. V. Dion Haynes, *Report Names Slaves, Owners and Insurers*, CHI. TRIB., May 2, 2002, at N1, *available at* LEXIS, News Library, CHTRIB File.

6. *Id.*

7. Eric Bailey, *Slave's Sons Seek to Heal Wounds With Reparations*, L.A.TIMES, Sept. 8, 2002, at Cal. Metro, pt. 3, at 1, *available at* LEXIS, News Library, LAT File.

8. 70 F.3d 1103 (9th Cir. 1995).

but Aetna stopped short of making reparations. Thus, the movement had not made the progress it desired and needed more effective solutions.

The latest solution was a series of class action lawsuits filed against large corporations. The first action was filed on March 27th, 2002, amidst heavy media coverage, by Deadria Farmer-Paellmann, as a representative of a class of African-Americans who descended from slaves. It named three corporations, Aetna, CSX, and FleetBoston, and 1,000 corporate John Does as defendants. Another suit was filed in early May 2002 in New Jersey by Richard E. Barber against Brown Brothers Harriman and Norfolk Southern Railway.[9] These are the first of many similar suits that may be filed by the end of the year.

B. Previous Racial and Ethnic Class Actions

Racial and ethnic class actions are not without precedent. Other ethnic groups have brought claims for past injustices and received reparations. However, very few, if any, ever reached trial stage. Instead, they were settled on the verdict of public opinion. Public opinion can have a powerful effect in pressuring settlement.[10] Examples include: Holocaust survivors, Native American tribes reclaiming land, and Japanese-Americans who were detained in prison camps during World War II.[11]

However, slavery reparations have far greater hurdles to overcome than previous suits did because the acts alleged in the complaint took place over 139 years ago, there are no living survivors, and slavery was legal at the time. In the Native American cases, the land had been wrongfully taken in the first place. The Holocaust cases were decided under International Law, treaties and, especially, public opinion.[12] Most importantly, other ethnic and racial classes were composed of living survivors of either the Holocaust or the Japanese-American detentions, not their descendants.[13] As for the legality at the time of occurrence, the detainment of Japanese-Americans was legal at the

9. Corey Dade, *Slavery Suit to Target Bank, 2 Firms Predecessors Said to have Conspired to Dedge Trade Ban*, BOSTON GLOBE, May 1, 2002, *available at* LEXIS, News Library, BGLOBE File.

10. *See* James Cox, *Special Report: Activists Challenge Corporations That They Are Tied To Slavery*, USA Today, February 21, 2002, at 1A. *See also* Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. Rich. L. Rev. 1, 25 (2000).

11. A good example of the holocaust litigation is *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000). Other examples include *Opatowski v. Opel*, No. 99-2228, filed on May 17, 1999; *Michelin v. Opel*, No. 99-2229, filed on June 7, 1999; *Gross v. Volkswagen AG*, No. 98-4104, filed on Aug. 31, 1998; and *Rosenfeld v. Volkswagen AG*, No. 98-4429, filed on Sept. 22, 1998, all in the United States District Court of New Jersey. A Japanese-American reparation lawsuit was *Hohri v. United States*, 782 F.2d 227 (D.C. Cir. 1986).

12. *See* Cox, *supra* note 10, at A1. *See also* In re Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 143-44 (E.D.N.Y. 2000).

13. *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139; *Hohri*, 782 F.2d 227.

time it occurred.[14] However, reparations were made to the Japanese-Americans by an act of Congress mandating the reparations and not a court judgement.[15]

It was the court of public opinion, driven in part by the class actions, that coerced the eventual payments.[16] Slavery reparations advocates are similarly hoping for public opinion to influence the verdict or settlement negotiations, but this, too, will be difficult. There is only a little precedent for reparations to African-Americans, in 1995, the state of Florida paid two million dollars in reparations to the victims of the 1923 Rosewood Race Riot.[17]

III. THE FORMAL IN-COURT REQUIREMENTS OF CLASS ACTION CERTIFICATION

As interesting and explosive as the topic is, it would be useless for teaching purposes if the suits did not relate to Civil Procedure by providing a good example of the requirements of Rule 23 of the Federal Rules of Civil Procedure. To be certified as a class, the four requirements of Rule 23(a) must be met, and the class must fall into one of the three requirements Rule 23(b).[18]

The four requirements of Rule 23(a) are: (1) Numerosity, (2) Commonality, (3) Typicality and (4) Adequacy.[19] Numerosity means that the class representative must show that there are enough persons in the class to make joining them individually impractical.[20] Commonality requires that the members of the class have enough in common to justify class certification.[21] Typicality requires that the class representatives stand, in significant respects, in the same shoes as the average class member.[22] Lastly, adequacy of representation is achieved if the class representative has some stake in the litigation, and the lawyers have no conflicts and are sufficiently skillful enough to handle such litigation.[23]

Applying the requirements to the slave reparation class action suits aptly demonstrate the application of the four factors of Rule 23(a).

14. Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations*, 40 B.C. L. REV. 429, 449 (1998).

15. *Id.* at 451.

16. Cox, *supra* note 10, at A1.

17. *Id. See also* C. Jeanne Bassett, Comment, *House Bill 591: Florida Compensates Rosewood Victims and Their Families For a Seventy-One-Year-Old Injury*, 22 FLA. ST. U.L. REV. 503 (1994).

18. FED. R. CIV. P. 23.

19. FED. R. CIV. P. 23(a).

20. 32B AM. JUR. 2D *Federal Courts* § 1807 (1996).

21. *Id.*

22. *Id.*

23. *Id.*

Numerosity. The class is defined as all African-Americans who descended from slaves, and while the exact number is not known, it is estimated to be millions.[24] For the purposes of class certification, the amount must only be such that individual joining is impractical.[25]

Commonality. The common questions of law and fact in the *Paellmann* complaint are:

1. Whether the Defendants knowingly, intentionally and systematically benefited from the use of enslaved laborers;
2. Whether Defendants' wrongly converted to their own use and for their own benefit, the slave labor and services of the plaintiffs' forbearers, as well as the products and profits of such slave labor;
3. Whether the Defendants knew or should have known that they were assisting and acting as accomplices in an immoral and inhuman deprivation of life and liberty;
4. Whether Defendants have been unjustly enriched by their wrongful conduct;
5. Whether, as a result of this horrific and wrongful conduct by the Defendants, the Plaintiff class is entitled to restitution or other equitable relief, or to compensatory or punitive damages.[26]

There are deeper questions as to effects of slavery and the wrongs alleged above on all possible members of the class. This is a broad class making broad allegations, and the effects surely have been felt differently by those who are poor and on the margins of society contrasted to those members who have become affluent. The source of the trouble is that broad allegations have been made about a variety of individuals 139 years after the cessation of the practice, which caused the detrimental effects. A key question is whether merely the plaintiffs are automatically assumed to be detrimentally affected by the legacy of slavery because a plaintiffs' ancestors were slaves. However, total uniformity within the class is not needed, but how much difference in regards to the wrongs alleged should be allowed?[27]

Typicality. A typical African-American affected adversely by the actions of the corporate defendants with respect to slavery is required to champion the cause. The representative of the first suit filed, Ms. Farmer-Paellmann, identified herself as a typical African-American "similarly affected by the Defendants common course of conduct . . . ."[28] Despite the fact she is middle class and holds a law degree,[29] she does qualify because she is a descendant

24. Complaint at ¶ 34, Paellmann v. FleetBoston Fin. Corp. (E.D.N.Y. Mar. 26, 2002).

25. FED. R. CIV. P. 23(a)(1). *See also* 32B AM. JUR. 2D *Federal Courts* § 1807 (1996).

26. Complaint at ¶ 35, Paellmann v. FleetBoston Fin. Corp. (E.D.N.Y. Mar. 26, 2002).

27. *See* 32B AM. JUR. 2D *Federal Courts* §§ 1856-1867 (1996).

28. Complaint at ¶ 36, Paellmann v. FleetBoston Fin. Corp. (E.D.N.Y. Mar. 26, 2002).

29. Robert Trigaux, *Putting a Price on Corporate America's Sins of Slavery*, ST. PETERSBURG TIMES, Apr. 14, 2002, at 1H, *available at* LEXIS, News Library, STPETE File.

who has been adversely affected in some way with respect to the wrongs alleged in the complaint.

Adequacy. The list of attorneys involved is basically a who's who of superstar plaintiff's lawyers and scholars. The suit brought by Ms. Farmer-Paellman is lead by Edward Fagan, who had a leading role in the Holocaust reparation lawsuits.[30] Other attorneys include Willie Gary, who received a $240 million judgement against Disney and a $500 Million jury verdict from the Loewen Group; Alexander Pires, who obtained a billion dollar judgment from the Department of Agriculture for discrimination against African-American farmers; and Dennis Sweet, who won a $400 million dollar verdict in the fen-phen diet pill case.[31] Additionally, Professors Charles Ogletree and Cornel West along with Randall Robinson are other big players in the larger movement of slave reparations cases.[32] Ogletree formed a committee with Johnnie Cochran to bring their own reparations suit at some point in the future.[33]

Rule 23(b), additionally, specifies three types of class actions into, at least, one of which the action must fall.[34] Rule 23(b)(3) is applicable to slavery reparation lawsuits, as shown above, as it includes claims in which "the questions of law and fact common to the members of the class predominate over any questions of affecting only individuals. . . ."[35]

IV. CLASS ACTIONS AS PART OF A LARGER MOVEMENT

Any well plead class action can demonstrate the legal requirements of a class action, it is the use of the class action as part of a large, controversial movement that makes the slavery reparation classes good for Civil Procedure class. The goals of the actions, as part of a movement, are not primarily verdicts, but to use the class action to further the reparations movement. The class action becomes a voice of the class as one aspect of the movement and can give legitimacy to what was once considered a goofy and fringe idea.[36] In

30. *See id.*; Tatsha Robertson, *Reparations For Slavery: Old Idea Goes Mainstream*, BOSTON GLOBE, Apr. 4, 2002, at A1, *available at* LEXIS, News Library, BGLOBE File.

31. Trigaux, *supra* note 29, at 1H.

32. *Id.*

33. Robertson, *supra* note 30, at A1.

34. FED. R. CIV. P. 23(b). Rule 23(b)(1) approves of a class action where individual actions would risk inconsistent results and incompatable standards of conduct for the class opponent, where individual actions would be dispositive of the interests of other class members, or would impair the other class members' ability to protect their own interests. *Id.* Rule 23(b)(2) approves of a class action where the class opponent has acted or refused to act on grounds generally applicable to the class, and the class is seeking injunctive or declaratory relief for the whole class. *Id.*

35. FED. R. CIV. P. 23(b)(3).

36. *See* Trigaux, *supra* note 29, at 1H; Robertson, *supra* note 30, at A1.

effect, this voice speaks for the movement in the court of public opinion. This is especially true in the slave reparation lawsuits in which the class actions are merely part of a larger movement.

Second, the goal of the class as a whole is not always to win in court, but to use the courtroom to create other victories. Most experts give the slavery reparation lawsuit itself slim chances for courtroom success, and most of those chances are grounded in the public relations aspect of the suit.[37] Instead, advocates of the cause have described the class actions as the first round in a long battle.[38] Class attorney, Willie Gary, said that this should be a negotiated action providing the opportunity to make right the past wrongs.[39] In previous cases, such as the Holocaust reparations, the victories did not come from court verdicts, but from the publicity surrounding them.[40] Even without a courtroom victory the class actions could accomplish other goals as they are the voice of a very large class, and this voice will create pressure in many ways. For instance, Representative John Conyers call for a resolution to allocate eight million dollars to study the problem could be bolstered by the lawsuits. The suits could also be smart political moves because they change "the notion of reparations from payments to individuals to remediating the consequences of slavery, and put the burden on companies that have profited from slavery."[41] The class action, unlike publicity alone, forces the companies to act. Companies become more willing to pay in the structured lawsuit setting.[42]

Another goal of the large class actions is to educate—not just the judge and jury but also the public—about the movement's grievances. The slavery reparation movement seeks to promote the idea that slavery is not a piece of the past but something whose legacy is alive and well today. The reparation complaint itself reads like a short story describing the history of slavery and describes the myriad ways slaves were taken advantage of and what their contributions were to the nation of today. For instance, the lawsuits pray for monetary reparations reaching $1.4 trillion dollars. The real point of this astronomical number is to draw attention to the cause, and educate people on the horrible continuing legacy of slavery. Public acknowledgment of the

37. Matthew Kaufmann & Kenneth R. Gosselin, *Slavery Reparation Effort Just Beginning; Win or Lose, Legal Experts Say the Discussion is Worth Having*, HARTFORD COURANT, Apr. 2 2002, at E1, *available at* LEXIS, News Library, HTCOUR File.

38. *Id*.

39. Cox, *supra* note 10, at A1.

40. Trigaux, *supra* note 29, at 1H.

41. Seth Stern, *Slave Reparations are Unlikely, But the Lawsuit May Prod Companies*, CHRISTIAN SCI. MONITOR, Mar. 28, 2002, at 2, *available at* LEXIS, News Library, CSM File (quoting Robert Sadler, law professor at Wayne State University).

42. Lewis Beale, *Seeking Justice for Slavery's Sins: A class-action suit pursuing reparations from companies began with a woman's personal quest to understand history*, L.A. TIMES, Apr. 22, 2002, S. Cal. Living pt. 5, at 1, *available at* LEXIS, News Library, LAT File.

problem is considered the first step, and the class action lawsuits are excellent centerpieces and vehicles for getting attention. These considerations are what form the basis of the larger aspect of class action lawsuits, when the class action is a part of a larger movement.

Class actions can make people consider the deeper messages of the grievance. Inherent in the slavery reparation lawsuits is the relationship between history and justice, pitting past against present.[43] How do people atone for these wrongs, how far back in time does justice go? The class actions force the nation to confront one of the worst parts of its history. The idea that slavery played a part in our economy and, thus, our prosperity causes discomfort.[44]

Slavery's lasting legacy on people is shown by the social statistics mentioned above, and slavery's effect on the economy is exemplified by the list of companies that have been, will be, or could be sued. The list includes many prominent companies and universities. It is a broad list, from investment banks such as Brown Brothers Harriman and Lehman, to railroads such as CSX, Norfolk Southern, Union Pacific, and Canadian National.[45] Textile makers, such as WestPoint Stevens, processed the cotton picked by slaves.[46] Newspaper publishers who once ran ads for slaves and runaways could be targets, thus, including media companies such as Knight Ridder, Tribune Media Services, Advance Publications, E.W. Scripps and Gannet. Insurance companies, such as Aetna's predecessors, who used to issue policies on the lives of slaves, have already been included.[47] Aetna is an example of how today's companies are alleged to have been liable. Aetna bought US Life which in turn bought Charter Oak Insurance. Charter Oak had issued policies in the 1850's insuring the lives of slaves.[48] It could also include mining companies that used slave labor and energy companies that once laid oil lines beneath southern cities.[49] Also, many of the original benefactors of leading universities such as Harvard, Yale, Brown, Princeton and the University of Virginia produced their wealth with slave labor.[50] Part of the education is the sheer broadness, which shows how deeply slavery was ingrained in the economy.

43. Ted Gup, *Paying Out Isn't the Same as Owning Up*, WASH. POST, Apr. 7 2002, at B01, *available at* LEXIS, News Library, WPOST File.

44. *Id*.

45. Cox, *supra* note 10, at 1A.

46. *Id*.

47. *Id*.

48. *See generally* Virginia Groark, *Slave Policies*, N.Y. TIMES, May 5, 2002, at C1, *available at* LEXIS, News Library, NYT File.

49. Cox, *supra* note 10, at 1A.

50. *Id*.

The movement behind the class action extends far beyond the court room as other tactics could include pressuring shareholders, swaying companies, blocking mergers, or enlisting African-American job recruits to harass recruiters on campus, which may become the seed or launching pad for the greater movement. Through the suit, people can see the continuing effects on African-Americans and the economy.

V. CONCLUSION

Discussion of slavery reparations is not a cure all to the distraction and boredom problems expressed at the outset, but discussion of reparations can make, at least, a Civil Procedure class more interesting. For the issue is very controversial one and has different aspects easily amenable to a Civil Procedure class. For the slavery reparation class actions show not just the formal legal side of class actions, but also lead to discussion about their use and possibilities, and show how far a class action can reach.

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