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## PHRASING THE QUESTION: THE USE OF *THE BUFFALO CREEK DISASTER* IN TEACHING CIVIL PROCEDURE

After being given the opportunity to write an essay for this issue on teaching Civil Procedure, I focused my attention on the use of *The Buffalo Creek Disaster*<sup>1</sup> due to its effect on the way I learned Civil Procedure.<sup>2</sup> As I read the book again to refresh my memory, I came across a passage that sums up, for me, what Civil Procedure encompasses. In this passage, the author stated that he recalled a professor in law school who told him, “I can win any argument—if you let me phrase the question.”<sup>3</sup> Civil Procedure is the process of phrasing the question that the judge or jury will decide. The parties to the lawsuit, the forum in which the case is heard, the damages that are sought, and what type of suit is to be filed are all components in this question. *The Buffalo Creek Disaster* shows that, in many situations, the question posed to the judge or jury can be pivotal in the result of the case.

The author alluded to the fact that an attorney’s focus on procedure, rather than the merits of the case, appears to laypersons to be far removed from the real issues of assigning blame and obtaining justice for the victims.<sup>4</sup> Most laypersons do not understand why these prolonged debates occur regarding venue, defendants and the type of suit filed. The answer as to why these procedural issues are so hotly contested, as demonstrated in the book, is that in some cases they can be determinative as to the outcome of the case. Thus, the law professor’s statement, “I can win any argument—if you let me phrase the question,”<sup>5</sup> sums up why, in many cases, the procedural issues are at the heart of the controversy.

### I. INTRODUCTION

It would be easy to write an essay on each and every topic arising in *The Buffalo Creek Disaster*; however, I have concentrated on the parts of the book that offered me the most insight in terms of procedural strategy. Those parts of the book are the choices regarding: who to name as defendant; what court to file in; and what type of suit to file. I found the use of *The Buffalo Creek*

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1. GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1977).

2. My first-year Civil Procedure class was taught by Assistant Professor Melissa Cole, Saint Louis University School of Law.

3. STERN, *supra* note 1, at 81.

4. *Id.*

5. *Id.*

*Disaster* helpful in terms of teaching procedural strategy and, in a rule-based class, the learning process in general. There are three reasons why I feel the book was helpful in the learning process and in teaching procedural strategy.

First, the use of the book brought depth to the subject that was helpful in a rule-based class. In reading the book, students were bombarded with the imagery of the unfortunate residents of Buffalo Creek, some of whom were forced to watch as their family members and close friends were swept away in a flood of mining waste that tore through the valley. Rather than reading the case in a textbook, the student was introduced to the situation before it became a case. This background was helpful because, rather than backing into the case as you do in a textbook, you were able to watch it evolve. In the same vein, my Civil Procedure class was taught by reading the relevant parts of *The Buffalo Creek Disaster* as the topics were presented in the casebook. This was also an effective tool in the learning process. In addition, my class was provided with some of the court documents from the case, which were very helpful in understanding exactly what was being referred to in the book.<sup>6</sup>

Second, the book was instrumental in providing a seamless framework for a class that could easily have become capsulated and disjointed, being a year-long course with such definite, and sometimes difficult to integrate subtopics. By providing a fact pattern to which students could apply the various topics learned in class, students were given a reference point to which they could always return. My professor utilized the book's fact pattern to assign my class to draft a motion for summary judgment on behalf of the victims. This was not only useful practice for the course, but also provided valuable practical experience for summer employment. The use of the book provided a coherent framework that was extremely valuable in a class such as Civil Procedure,

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6. The other materials provided by the professor were also helpful in giving more background to the book, which was useful in teaching the class to law students, many of whom, including myself, had never seen such documents previously. These materials included: Complaint, *Prince v. Pittston Co.*, 63 F.R.D. 28 (S.D. W. Va. 1974) (No. 3052); Memorandum of Law in Support of Defendant's Motion (A) for Judgment on the Ground that Defendant is not a Proper Party to this Action, (B) for a More Definite Statement as to Certain Allegations Contained in the Complaint, and (C) to Strike Certain Allegations Contained in the Complaint, *Prince*, 63 F.R.D. 28 (S.D. W. Va. 1974) (No. 3052); Plaintiffs' Motion to Order Production of Documents, *Prince*, 63 F.R.D. 28 (S.D. W. Va. 1974) (No. 3052); Defendant's Memorandum in Opposition to Plaintiffs' "Motion to Order Production of Documents," *Prince*, 63 F.R.D. 28 (S.D. W. Va. 1974) (No. 3052); Defendant's Response to Plaintiffs' Request to Produce Documents, *Prince*, 63 F.R.D. 28 (S.D. W. Va. 1974) (No. 3052); Defendant's Interrogatories, First Series, *Prince*, (S.D. W. Va. 1974) (No. 3052); Plaintiffs' First Answers to Defendant's Interrogatories—First Series, *Prince*, 63 F.R.D. 28 (S.D. W. Va. 1974) (No. 3052). We were also provided a memorandum that was given to the plaintiffs explaining the settlement of the lawsuit. These documents added depth to the discussion of the issues in class due to the extended background that these documents provided.

which relies so heavily on a student's understanding of the application of new and abstract rules and a step-by-step process.<sup>7</sup>

Finally, and perhaps most importantly, I found the book provided insight into what is lacking in many classes—a discussion of strategy. *The Buffalo Creek Disaster* gave many examples of the considerations inherent in the decisions made in the lawsuit and how these decisions affected the course of the lawsuit and the outcome of the case.

## II. STRATEGY

### A. *Who to sue?*

Who the victims filed their claim against was an issue that demonstrated to me just how important the choices made in a lawsuit are. As will be discussed later, whether the victims chose to sue the parent, The Pittston Corporation (“Pittston”), or the subsidiary, The Buffalo Creek Mining Company (“BCMC”), had repercussions as to where the suit was filed. The author stated that, while he could have easily brought suit against BCMC in West Virginia, he decided to bring suit against Pittston, both because he was leery of fighting the coal company on its home turf, and because bringing the claim against Pittston would help him get into federal court, where he felt more at home.<sup>8</sup> While monetary considerations certainly played a role in the choice of Pittston as the defendant, the author stressed he did not choose Pittston because they had deeper pockets, but because it appeared the decisions were, in fact, made by Pittston. Seeing the process the author used to determine who the suit would be filed against was illustrative of the need to think strategically when determining how to phrase the question as to who the judge or jury will be asked to assign blame.

### B. *Where to sue?*

The next issue that was helpful to me in terms of procedural strategy was where the victims could, or should, file suit. This question was narrowed down to whether the victims could, or should, bring their suit in West Virginia, Washington, D.C. or New York. The author stated he could have brought the suit in Washington, D.C., where his firm was located, if he would have brought the suit under a federal statute.<sup>9</sup> The author also contemplated bringing the suit

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7. Civil Procedure was the first rule-based class first-year law students were exposed to at Saint Louis University School of Law.

8. STERN, *supra* note 1, at 53.

9. *Id.* As will be discussed later, bringing the suit under a federal statute was abandoned for strategic reasons.

in New York, where Pittston's headquarters was located.<sup>10</sup> The author finally decided to file suit in West Virginia.<sup>11</sup> The strategic choice to bring suit in West Virginia was made because the author's research warned him that if he attempted to file suit in Washington or New York, Pittston would be successful in having the case transferred to West Virginia.<sup>12</sup> From the reading in the casebook,<sup>13</sup> our class concluded that the victims could, in fact, bring their suit in West Virginia because under the victim's theory BCMC was acting on behalf of Pittston.<sup>14</sup>

Intertwined with what state to file the suit was the decision to take the case to federal court rather than to state court. Another question the book addressed was why the author favored filing the suit in federal court. The author stated he was leery of the judges in West Virginia due to the influence exerted by the mining companies in that state.<sup>15</sup> For this reason, the author felt it would be in the victim's best interest to file their case in federal court, where, truthfully or not, the judges are thought to be less prone to the influences of outside forces due to their lifetime appointments,<sup>16</sup> contrasted to state judges who are elected and, thus, concerned about re-election.<sup>17</sup> This point demonstrates all the issues that must be taken into consideration before filing the suit.

In addition to deciding to file in federal court, the author also noted there was the decision as to where to file in West Virginia's federal system because

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10. *Id.* The author had no question that personal jurisdiction would have existed for Pittston in the State of New York because it was where Pittston had its home base of operations. *See also infra* note 12.

11. *Id.* at 54.

12. *Id.* at 53-54. While not discussed in the book explicitly at this point, the decision must also have been informed by the circumstances of the victims, who were not in a position to accept any unnecessary delays, which a change in venue would have provided to Pittston. Thus, filing the suit in West Virginia negated a delay that would have resulted when Pittston made its motion to have the case transferred to West Virginia.

13. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945), reprinted in BARBARA ALLEN BABCOCK & TONI M. MASSARO, CIVIL PROCEDURE: CASES AND PROBLEMS 84, 87 (1997) (stating that in order to exercise personal jurisdiction there must be "sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there"); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Banguet Consol. Mining Co.*, 342 U.S. 437 (1952).

14. *Perkins*, 342 U.S. at 447-48 (maintaining office in state and conducting daily business of corporation in that office, including keeping files, holding directors meetings, carrying on correspondence and drawing on two active bank accounts of the corporation, also located with the state, satisfied systematic and continuous contacts with state as required by *Int'l Shoe*); *Helicopteros*, 466 U.S. at 411 (stating that defendant's failure to have agent acting on their behalf in the state was a factor in whether or not they had sufficient contacts with the state).

15. STERN, *supra* note 1, at 14-15, 53.

16. *See* U.S. CONST. art. III, § 1; 28 U.S.C. § 44 (2000) (stating "[c]ircuit judges shall hold office during good behavior").

17. *See, e.g.*, W. VA. CONST. art. VIII, § 5.

there was more than one district court.<sup>18</sup> The author researched the opinions of the judges who could sit on his case. He did this because, while the author could not choose exactly which judge would be assigned to the case, unless only one judge resided in that court, because the cases were assigned to the judges in rotation as they were filed, there was still an opportunity to file with one set of judges, or if only one judge sat in a district, a judge, who may have been more likely to produce a judge receptive to their argument. Due to the importance of the issue of piercing the corporate veil to the victim's case, it was imperative that the author find a judge who would be receptive to the concept.<sup>19</sup> As a procedural matter, if the victims would not have been allowed to pierce the corporate veil, they would not have been able to bring their case in federal court, for they would have to file suit against BCMC, thus, breaking diversity jurisdiction. The author ultimately filed suit in the United States District Court for the Southern District of West Virginia with a judge he felt comfortable would be receptive to his case.<sup>20</sup> I found this interesting because it gave another example of the strategy involved even after the decision has been made to get to federal court. Again, this provided another example of the importance and the many considerations involved in phrasing the question, more specifically phrasing the question in terms of who will hear your case, which, as the author demonstrated, is also extremely important.

Inherent in the question of how to get into federal court was the issue of the best way to get into federal court.<sup>21</sup> The author contemplated two options: (1) bring the case under the Navigable Streams Act<sup>22</sup> under federal question jurisdiction<sup>23</sup> or (2) rely on the diversity of citizenship between the victims, who were residents of West Virginia, and Pittston, whose home base was located in New York. The author decided to bring the case under diversity

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18. The author had the choice of filing in Huntington, West Virginia, which had only one federal judge, Judge Sidney L. Christie, and Charleston, West Virginia, which had two judges, Dennis R. Knapp and Judge K.K. Hall. STERN, *supra* note 1, at 54.

19. *Id.* at 55. The author acknowledged that piercing of the corporate veil is rarely allowed, making this search all the more important. *Id.*

20. *Id.* at 54. It is interesting to note that even after all of this strategy attempting to choose a judge, the judge they chose recused himself due to a conflict of interest, which the author was upset he had not found.

21. Federal courts have subject matter jurisdiction over cases involving: diversity, 28 U.S.C. § 1332 (2000); federal question, 28 U.S.C. § 1331 (2000); supplemental jurisdiction, 28 U.S.C. § 1367 (2000); and removal jurisdiction, 28 U.S.C. § 1441 (2000).

22. STERN, *supra* note 1, at 56 (arguing that Pittston had polluted a navigable stream in violation of federal law).

23. 28 U.S.C. § 1331 (2000). The casebook used the case *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), reprinted in BABCOCK & MASSARO, *supra* note 13, at 231, as an example of the cases stating that where federal law creates the cause of action, federal question jurisdiction exists.

jurisdiction<sup>24</sup> because he felt bringing the case under the Navigable Streams Act would make an already complicated case even more so and because Pittston was not merely liable for a technical violation of a federal statute.<sup>25</sup>

In the victim's lawsuit, to support a claim based on diversity, at that time, each and every one of the plaintiffs must have been able to show they incurred damages in excess of \$50,000.<sup>26</sup> Without this showing, it would not have been possible for the victims to stay in federal court. Thus, the decision to bring the victim's claim in federal court was also affected by the money value of the damages that these victims incurred. To determine what damages the victims may be entitled to receive in federal court, the author had to do research on punitive damages in similar cases.<sup>27</sup> Another monetary issue, and one of the most important elements of the damages in the author's opinion, was the issue of proving and valuing the mental suffering incurred by the victims.<sup>28</sup> The author's decision to pursue the claim under diversity was risky for two reasons: (1) if the judge failed to pierce the corporate veil, diversity would be broken and the victims would be relegated to state court and (2) the punitive damages and damages based on mental suffering, or psychic impairment, were considered somewhat tenuous and those victims who only lost property may not have satisfied the money requirement for diversity.<sup>29</sup> To get to this point there was the need for the judge to review the stories of the victims—stories that the author wanted so badly for people to hear.

An interesting part of the book, from a strategy point of view, was the author questioning the defense's tactic to continue requesting a more definite statement with respect to the damages.<sup>30</sup> The author stated the realities of trial work are that it is possible a judge would not have read all the statements by the victims if he were not forced to as a result of the defense's claim that the statements were insufficient.<sup>31</sup> The author felt this was a strategic error on the part of the defense because of the fact the statements of these victims were so moving it would be better for the defense if they were not focused on, especially so early on in the litigation.<sup>32</sup> The defense counsel's tactic,

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24. 28 U.S.C. § 1332 (2000).

25. STERN, *supra* note 1, at 56.

26. 28 U.S.C. § 1332 (2000). This amount is currently \$75,000. *Id.*

27. STERN, *supra* note 1, at 57. Since the awarding of punitive damages was anything but certain, many of the plaintiffs who were in need of money left the lawsuit.

28. *Id.* at 90. The mental suffering, or psychic impairment, was a hotly contested issue because it was uncertain how the judge would view the topic. *Id.*

29. Those victims who lost family members would have been able to claim \$10,000 for wrongful death in West Virginia, unless the family could have proven greater financial dependence on the deceased, in which case the maximum allowed was another \$100,000. *Id.* at 21.

30. *Id.* at 116.

31. *Id.* at 117.

32. STERN, *supra* note 1, at 116-17.

therefore, backfired in the author's mind, because it placed the focus of the judge directly on those statements and the importance of the mental suffering component of the compensatory damages.<sup>33</sup>

C. *What suit to file?*

In class during the lecture on class action lawsuits, our professor asked: "Why didn't Stern file this case as a class action?" I, as many of my classmates, went through each of the elements that must be met to qualify for a class action.<sup>34</sup> After going through the elements,<sup>35</sup> I, along with many of my classmates, was stumped. Finally, some brave soul answered one reason the author may not have filed the suit as a class action was because the author wanted to get these victims in front of a jury to tell their individual stories.<sup>36</sup> Since my classmates and I had spent the night before reading the prerequisites for a class action lawsuit, we were not considering the practical reasons one might choose *not* to file a class action. We were only focusing on whether or not the criterion for a class action was met. This question taught me one of the most valuable lessons I learned in law school and am reminded of constantly; it is very easy to get caught up in what you *can* do rather than focusing on the effects of this decision on later aspects of your case from a strategic standpoint. Too often in law school, I, as many of my peers do, get lost in the rules and whether or not I *can* use them, rather than also focusing on whether or not I *want* to use those rules from a strategy standpoint. This point demonstrated the importance in terms of phrasing the question on what type of suit the judge or jury is asked to decide.

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33. *Id.*

34. FED. R. CIV. P. 23(a). The textbook used *Angelastro v. Prudential-Bache Securities, Inc.*, 113 F.R.D. 579 (D. N.J. 1986), reprinted in BABCOCK & MASSARO, *supra* note 13, at 568, as a representative case for Rule 23(a).

35. FED. R. CIV. P. 23(a) states:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representative parties will fairly and adequately protect the interests of the class.

*Id.*

36. While in the end the judge asked the author to produce representational victims from each class, i.e., those that lost a relative, those that watched as others were killed, and those that lost only personal property, the stories of the victims were still heard. STERN, *supra* note 1, at 122.



### III. CONCLUSION

The use of *The Buffalo Creek Disaster* in teaching Civil Procedure provided me with a better understanding of the role of strategy in bringing a lawsuit. Inherent in the strategy of bringing the lawsuit is the process of “phrasing the question” to the court and how important it is to make sure each decision you make combines to create a question to pose to the judge or jury which is in the best possible terms for your case. The book provided a great example to laypersons, and first-year law students, that, while the constant bickering among lawyers as to where the suit is brought may, at first blush, appear trivial, in the end it can make the difference between winning and losing the case. The author in *The Buffalo Creek Disaster* spent much of his time and energy in the litigation pondering how he would phrase the question to the court. He tried to phrase the question by getting the most beneficial of his options at each critical juncture of the case, be it the court he filed in (federal or state), the judge who would hear his case, the state in which he filed, the type of suit he filed and who he brought the suit against. By looking at his options at each juncture and phrasing the question in the best terms available at the time, he gave his clients the best opportunity to win their case.

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\* J.D. Candidate, Saint Louis University School of Law, 2003; B.S., Truman State University. I would like to thank my family for their support and encouragement, especially my parents, Larry and Sandy Schmieg, my sister, Kelly Schmieg, and my grandmothers, Helen Petersen and Jeanne Schmieg.