Opinion Feature

Class actions in Virginia state courts? Or is it just *Bull*?

by Devon J. Munro

Several years ago, while drafting a complaint for a single named plaintiff in a civil suit challenging the constitutionality of Virginia's controversial "abusive driver fees," I hungered for a class mechanism to provide a remedy for the other affected drivers statewide. As usual, there was no use in the clunky joinder statute euphemistically titled the "Multiple Claimant Litigation Act." But because we could state equity claims, I decided to test a theory I'd been researching about the common-law authority for bringing a representative lawsuit in Virginia state courts. Ultimately, the case became moot when Virginia repealed the fees. But the authority for representative actions in Virginia is sound, if a little old. Revitalized by a modern appeal, it could even become the foundation for a broader class action procedure. So let's survey the best authority for a representative lawsuit in the quixotic hope that one of my colleagues will resurrect it in the right case, the Commonwealth will be dragged – scratching and screaming – into the modern era of class-action justice.

While virtually every other jurisdiction in the country has a statutory scheme for class actions, usually based upon Federal Rule 23, it is widely accepted that Virginia is the anomalous, class-free zone. Virginia certainly follows the baseline rule that all necessary parties with an interest in the subject matter of the suit must be before the court, unless it is "practically impossible to join all parties in interest and the absent parties are represented by others having the same interest."[1] And while it is true that Virginia has never enacted a statutory class action procedure, Virginia has never actually outlawed class actions.

It will surprise many that the very same rules that spawned modern class actions statutes in Federal Rule 23 and other states are firmly established in Virginia Supreme Court decisions addressing equity claims. They are referred to as "representative suits" or "virtual representation," but they are in substance just simplified class actions arising in suits based on equity theories. The cases are old – the three most valuable precedents arise between 1855 and 1895 – but they remain valid authority for quasi-class actions under the right circumstances.

In English chancery, the doctrine applied in equity suits where, among other things, (1) it was impracticable to bring all persons before the court, because the proper parties are unknown to the named plaintiff; (2) the parties were so numerous that it would be impracticable to join them all; or (3) the parties' individual interests were very small.[2] The classic context was a contingent remainderman seeking to determine the identical, shared rights of the class of beneficiaries including both himself and others who could not be joined, such as his unborn siblings. "To obviate the difficulty in such cases the doctrine of virtual representation has been introduced, according to which certain parties before the court are regarded as representing those coming after them with contingent interests, who therefore it is not required should be made parties."[3] But American courts (including Virginia's) expanded this doctrine into equity claims more generally, and it became the "historical antecedent" of the current federal Rule 23, accounting for obvious similarities in rationale for group representation that still exist today.[4]

The seminal precedent is *Bull v. Read*, 13 Gratt. 78, 54 Va. 78 (1855). Sixteen individuals subject to a new tax in Accomack County sought to enjoin the tax and declare the underlying law unconstitutional. Chief among their challenges was the argument that the county commissioners violated their powers to levy a property tax by choosing to tax only slaves above the age of 12 years, and by fixing the value of all slaves at $300. The plaintiffs attempted to sue on behalf of themselves, as well as the other 200 county residents subject to the tax. The Court summarized the circumstances:

> The act in question is one necessarily affecting all the inhabitants of the district named who in respect of persons or property were liable to taxation under its provisions; and as they were many in number but had a common interest, it was allowable according to settled practice, for some to file a bill on behalf of themselves and the other inhabitants similarly situated seeking any relief to which they

> might all in common be justly entitled, although their individual interests might be several and distinct.[5]

Material to this case, the *Bull* Court justified – and expressed an unabashed preference for – the use of a representative suit in equity to efficiently resolve the claims for all similarly situated persons at once. Importantly, the Court reasoned that although the individuals could conceivably bring individual claims for legal damages, a representative action in equity was the only way to avoid a multiplicity of suits and to achieve uniform results for everyone. Of course, it is ironic that the *Bull* Court could be considered a progressive champion of equal justice by embracing a representative lawsuit procedure, while at the same time blithely discussing how the government should appraise the value of enslaved humans for property tax purposes.

The Supreme Court often repeated *Bull*'s ruling in the succeeding few decades, and it has never expressly limited it to taxpayer suits. But a circuit court hesitant to make legal waves might misinterpret that limitation as the supreme court's intent, since precedents about representation have usually arisen when citizens sue governments to enjoin them "from creating an unauthorized debt or illegally expending the money."[6] These courts have typically cited *Bull*'s rules in their natural sequence of first recognizing a taxpayer's equitable right to enjoin an unlawful tax, and second the right to bring such an equity claim on a representative basis.[7]

While this could support an inference that *Bull'*s endorsement of representative suits is tied specifically to tax-related injunction suits, Virginia has never limited the right of representation to a particular kind of equity claim or a government defendant, either explicitly by rule or through implication of reasoning. The Court's rulings following *Bull*, taken at their plain meanings, connect representative suits to equity claims generally. And the Court has definitely validated representative suits outside the tax-challenge context, confirming that the doctrine extends to all forms of equity claims, and against private defendants as well.

In 1883, the Court not only recognized representation outside the traditional taxpayer context in Virginia, but also strongly commanded its use under the right, class-oriented circumstances. In a fact that might cause a modern-day corporate lawyer to choke on his arugula, the Court even used the term "class" when describing these suits. *Blanton v. Southern Fertilizing Company* arose in Richmond by three fertilizer companies, "suing for themselves and all other manufacturers and sellers of fertilizers" across the state, seeking to enjoin Virginia's Commissioner of Agriculture from charging them five-cent "tags" for each bag of fertilizer they sold. 77 Va. 335 (1883). The alleged wrongdoing was not a challenged tax or related expenditure, but an illegal administrative order by a state official.

The Court – inserting its own italics – confirmed broadly "a joint suit *may* be brought by two or more parties of a class for the benefit of all, similarly affected," but stressed that "such a joint suit *must* be brought" on a representative basis when effective "to avoid a multiplicity of suits and irreparable damage."[8] This is an undeniable embrace by the Virginia Supreme Court of representative suits on equity claims involving a risk of multiplicity of suits, plus the threat of irreparable harm (or inconsistent results) absent unified representation.

The Court confirmed the general availability of representation to all equity claims in *Bosher v. Richmond & EI.L. Co.*, 89 Va. 455, 16 S.E. 360 (1892), where it endorsed the right to bring a representative suit for equitable claims of rescission and refund on the basis of fraud, and against respondents who were a private corporate defendant and its responsible officers. The *Bosher* Court authorized four shareholders to sue the company on behalf of approximately 200 shareholders to rescind their fraudulently induced share purchases and get their money back. While *Bosher* never mentioned the *Bull* case, the Court approved representation by drawing from the general, common-law grounds for a representative suit in equity. It also again mentioned the magic word "class" three times in reference to the group of represented victims.

The Court invoked the classic rationale for class actions:

> [I]n a case like the one made by this bill, where the parties allege in the bill that the fraudulent acts are exactly the same, and perpetrated by the same means, and the injury identical to all, except only in the amount of the injury . . . and the relief sought is the same, . . . there is a community of interest and right, and such persons may unite as co-plaintiffs against the common wrong-doer. If this were not so, it is difficult to see how relief could be had at all. In so many holdings many are necessarily small, and the whole interest destroyed inevitably in an effort to redress an admitted wrong.[9]

Importantly, the Court ruled that shareholders' contracts of subscription to a company "are to be treated like contracts between any two individuals" in so far as their right to sue to rescind them would be concerned.[10] So the Court based its ruling on the rights that any Virginia citizen would have in equity court, making it reasonable to infer that any injured citizen could sue any appropriate defendant as a class representative with similar standing on any type of equity claim. Consistent with this, the Court examined at length various treatises endorsing representative suits in equity generally and approved them as authority for its ruling. In summary, *Bosher* effectively extended *Bull* and *Blanton* to authorize representation suits on any equity claim against

any type of defendant, as long as the common-law requirements for class representation exist.[11]

After the important extensions of representation embedded in *Bosher*, one would have expected the bar to invoke the representation procedure in increasingly expansive and aggressive ways. But in more than a century since, it apparently hasn't. Perhaps this may be attributed to the fact that the apparent restriction to equity claims makes the mechanism less relevant because most attorneys would prefer to pursue legal damages in a class context. But the availability of certain types of equity claims that have the same effect of refunding money – particularly rescission – ought to inspire creative resurrections of the doctrine. At minimum, the modern bar should adjust its assumptions that the class mechanism is wholly unavailable in a Virginia state court.

This is not to say that it will be an easy "sell" to a circuit judge; the Virginia Supreme Court has not applied the doctrine in a modern precedent. But it has never retreated from or questioned the ongoing validity or scope of its older rulings, which are unequivocal about embracing representation. This is enough for commentators more scholarly than myself to conclude that the representative lawsuit remains viable in equity suits.[12] In the last three decades, at least one Virginia Circuit Court and the Western District of Virginia have agreed. While their holdings did not grant representation or produce a shiny new Virginia Supreme Court precedent, they at least recognized the doctrine's general application in equity claims in Virginia state courts.

In 1987, Judge Chamblin declared that "[t]he doctrine of representation of parties, (or 'virtual representation') is recognized in Virginia in equity suits." *Miller v. Nat'l Wildlife Federation, supra*, 1987 WL 488717 (Loudoun County 1987, Ch. No. 10884).[13] Judge Chamblin proclaimed: "In an equity suit, as the instant case is, one person may be permitted to prosecute the suit on behalf of himself and others" if:

(1) It is extremely difficult or inconvenient to conform to the general equitable principle that all parties interested in the subject matter or object of the suit must be made parties;
(2) The other persons are interested in identically the same right; and
(3) A multiplicity of suits will be avoided.[14]

Inconveniently for the purpose of testing the doctrine in a modern appeal, *Miller* then correctly held that the plaintiff had failed to satisfy the elements for representation as a factual matter. Miller sued a non-governmental conservation group apparently seeking specific performance of a contractual provision relating to wildlife conservation efforts on his land or elsewhere. Judge Chamblin recognized that while Miller claimed to represent all citizens of Virginia because of the indirect benefits they would receive from the conservation, only his single contract was at issue and no one else would have a similar claim. That plaintiff's claim was inappropriate for the representation mechanism, but the decision validates the doctrine.

In 2004, Judge Jones of the Western District of Virginia dismissed a suit from federal court in part because of the availability of state court remedies. In *dicta*, he recognized the doctrine of representation both existed in Virginia and extended to equitable claims. Specifically, he saw "no reason why a suit in equity for an injunction requiring a refund" of monies paid under an illegal ordinance "could not be filed on a representative basis in state court." *Indian Creek Monument Sales v. Adkins*, 301 F.Supp.2d 555, 563 (W.D.Va. 2004).

No published case addresses the doctrine since, and it has never been overturned. In fact, the only case that the Commonwealth mustered as a defense to our argument for representation in our abusive driver fees injunction suit was *W.S. Carnes, Inc. v. Board of Sup'rs of Chesterfield County*, 252 Va. 377, 383, 478 S.E.2d 295, 300 (1996), where the Court stated that "[a]n individual or entity does not acquire standing to sue in a representative capacity by asserting the rights of another, unless authorized by statute to do so." But the Court was pointing out that the plaintiff in that case – a home builders' association with no justiciable interest in the suit – could not acquire an individual standing to sue by simply claiming to represent others who did have an individual right of action. It was not addressing the availability of the representation doctrine, and was only consistent with the typical class action requirement that a representative plaintiff have its own individual standing to sue before he can represent another. The *Bull*, *Blanton*, and *Bosher* cases remain valid, binding, and unrestricted authorities for representative (class) actions on equitable claims, given the right circumstances of a large group sharing similar rights of action.

Conclusion

It now falls to creative and bold members of the plaintiff's bar to dust off of the doctrine of representation in an appropriate suit, and potentially to become a folk hero in whose name majestic statues – or more importantly, statutes – are thereafter erected. The ideal suit would involve justiciable, equitable claims with the characteristics to pass the stricter, F.R.C.P. 23 class certification on behalf of a multitude of Virginia citizens possessing identical rights. It would be a significant victory simply to revalidate the representation right in the strict context of equitable claims of any sort, and particularly against a private entity defendant.

Under *Bull*, *Blanton*, and *Bosher*, the Virginia Supreme Court not only authorizes this kind of suit to be brought on a representative basis, but arguably mandates it. If the modern Virginia Supreme Court is faced with such a case, shutting the door altogether on the mechanism is going to be difficult to

justify without trampling *stare decisis*. There is, of course, a risk that the Court will find a way around the representation rules in its prior cases by reading new limits into them, or finding that the right of representation was an equity court "procedure" that has somehow vanished after the 2006 merger of those courts with the new Rule 3:1. Yet other than delay, there is little risk for an individual litigant willing to try a representative suit, because the rejection of representation does not prejudice the plaintiff's individual claim in any event. But the upside is tremendous. A new representative suit could spark progressive evolution towards a useful class action procedure in Virginia state courts, finally availing mass victims in the Commonwealth one of the greatest tools for achieving civil justice.

Endnotes

1. *Jett v. DeGaetani*, 259 Va. 616, 620, 528 S.E.2d 116, 118 (2000).
2. *See* 11 Fletcher, *A Treatise on Equity Pleading and Practice* §21, at 37-8 (1902); *see also* Story's Equity Pleadings §77, *et. seq*. (1865).
3. *See Copland's Ex'rs v. Copland*, 146 Va. 33, 40-41, 135 S.E. 707 (1926); *accord NationsBank of Virginia, N.A. v. Estate of Grandy*, 248 Va. 557, 560, 450 S.E.2d 140, 142-143 (1994) ("the interest of a contingent beneficiary can be represented by another contingent beneficiary under the doctrine of 'virtual representation'. . .").
4. *E.g., Klugh v. U.S.*, 818 F.2d 294, 300 (4th Cir. 1987).
5. *Bull v. Read, supra*, 54 Va. at 86 (extensive citations omitted).
6. *Brown v. Baldwin*, 112 Va. 536, 72 S.E. 143, 144 (1911); *see also Johnson v. Black*, 103 Va. 477, 49 S.E. 633, 635 (1905); and cases cited *infra*.
7. *See*, for example, *Buffalo v. Town of Pocahontas*, 85 Va. 222, 7 S.E. 238, 240 (1888) (*citing Bull, supra*); *accord Roper v. McWhorter*, 77 Va. 214, 217 (1883); *Campbell v. Bryant*, 104 Va. 509, 52 S.E. 638, 639 (1905), *Lynchburg & R. St. Ry. Co. v. Dameron*, 95 Va. 545, 28 S.E. 951, 951 (1898), *Redd v. Henry County Sup'rs*, 72 Va. 695, 695 (1879).
8. *See Blanton, supra*, 77 Va. at 337 (emphasis in original) (citing *McClung v. Livesay*, 7th West Va. 329-333; *Wood v. Draper*, 24 Barb. 187; S. C. 4 Abb. Pr. Rep. 322; *Kerr on Injunctions*, 199-200).
9. *Bosher v. Richmond & H.L. Co.*, 89 Va. 455, 16 S.E. 360, 363 (1892).
10. *Bosher, supra*, 16 S.E. at 362.
11. As many will recognize, the rescission suit in *Bosher* is essentially the right of action now codified in the blue-sky laws known as the Virginia Securities Act, Code §13.1-502. But the authority still stands for representation including all appropriate equity claims. And a litigant who cannot sue under the federal Securities Act of 1933, but wishes to bring a class action for securities fraud in Virginia state court, might argue that *Bosher* validates a representative action in that setting even though it is now a statutory action at law, since the causes and the rationale for representation are otherwise identical.
12. *See generally* Anne P. Wheeler, *et al., Survey of State Class Action Law – 2006*, American Bar Association, Section of Litigation, at 485-486; Boyd, Graves & L. Middleditch, *Virginia Civil Procedure*, 5 4.18(D) (1982).
13. As authority, Judge Chamblin cited Lile's Equity Pleading and Practice, Section 77; and Hogg's Equity Procedure, Section 43.
14. *Miller v. Nat'l Wildlife Federation, supra*, 1987 WL 488717, at 1.

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