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IN THE SUPREME COURT OF FLORIDA

BRUCE A. JOHNSON, et al.,

Petitioners,

v. CASE NO. 82,237

PLANTATION GENERAL HOSPITAL, LIMITED PARTNERSHIP,

4TH DCA CASE NO. 93-0059
- CLASS REPRESENTATION -

Respondents,

_____/

PETITIONERS' REPLY BRIEF

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Date: March 11, 1994

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SUMMARY OF THE ARGUMENT

The threshold question of what constitutes the "amount in controvery" in a class action is uniquely one within the authority and province of this Court. Te federal diversity non-aggregation properly solves that sytem's practical and theoretical need to limit litigants' access as purely state issues. The same rule of access is inappropriate in the state court system of Florida becasue to do so would virtually eliminate circuit court as a forum for the salutary and judicially favored class action vehicle for the redress of multiple wrongs and litigation economy.

A class action, as it relates to the "amount in controversy," appropriately is measured by the value of the object of the litigation. In the instant action, the class claim exceeds $8 million (one measure of value) and the defendant is defending against a judgment of the same amount (another perspective of value).

The Fifth District's view that "the class action rule contemplates that the amount of claim of the entire class determines the dollar amount jurisdiction," should be acknowledged as the correct rule of law.

ARGUMENT

Reduced to its core, the determination as to which Court is jurisdictionally appropriate to hear the instant class action is a direct function of this Court's definition of the term "amount in controversy." All else flows from that seminal determination. If, as the Fourth District holds, that threshold term means that each class claimant must allege a legally cognizable loss in excess of the circuit court's minimum, then obviously county courts will be the forum for all consumer and shareholder class actions.

To the contrary, if the Fifth District's opinion states the correct definition and analysis -- that it is the claim of the class which governs -- then the result is similarly preordained.

There is no room for judicial interpretation of "amount in controversy when homeowner "A" sues trucking company "B" for knocking down a fence costing $2,000 to replace. The "amount in controversy" is clear. Whether a finder of fact will award "A" his replacement costs is what the controversy is all about, but the amount claimed is patently clear. Cases like that don't find their way to this Court over a term of art that may be clearly understood in such a case. In another context, the same term may become a veritable bramblebush. When such a term of art is clearly and unambiguously applicable, the need for this Court's intervention does not arise. When, however, the same term once clear, becomes subject to contradictory interpretations (as in the Fourth and Fifth Districts' opinions) finding the correct meaning and standard

for future legal authority and guidance to the Bar and public properly should come from this Court. The judicial interpretation of what constitutes the "amount in controversy" in a class action alleging damages in excess of $10 million dictates the logical reasoning expressed by the Fifth District in *Galen of Florida, Inc., etc. v. Arscott*, #93-79. Long before the reasoned analysis of Judges Griffin, Diamantis and Thompson, an appellate court in this state expressed the opinion (neither since overruled nor distinguished) that courts, in their role of interpreting statutes and defining public policy, have the duty to follow the obvious dictate of logical reasoning. See: *First National Insurance of America v. Devine*, 211 So. 2d 587, 589 (2d DCA, Fla. 1968).[1]

The Fourth District opinion here under review is clear in its expression of concern that the two judges concurring in that opinion had doubts and personal reservations concerning the public benefit of relegating class actions to the county court. Such doubts and concerns were subordinated to what Judge Farmer and Judge Hersey considered to be an unambiguous statuory provision as to the "amount in controversy." However, the issue for resolution by this court was made clearer by the Fifth District's contrary opinion establishing the pharse "amount in controvery" as

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[1] Whatever uncertainty may exist in the statute should be resolved with an interpretation that best accords with benefit to the public. *Rhoades v. Southwest Florida Regional Med. Center*, 554 So.2d 1188 (Fla. 2d DCA 1989).

inherently ambiguous because, upon the same argument, it reached the conclusion that the "amount in controvery" in a class action is the claimed dollar value of the loss or damage suffered by the class as the party litigant before the Court.

That this Court has as one of its duties the resolution of ambiguous statutory language is nothing new or revolutionary. In determining what "amount in controversy" means in the context of a class action, this Court is engaged in the quintessential judicial prerogative. In his opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall states,

> It is emphatically the providence and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.
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> * * * *
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> This is the very essence of judicial duty. [emphasis added].

The Supreme Court of the United States recently has addressed the issue of defining the term "amount in controversy" in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 975 S.Ct. 2439 (1977). In *Hunt* the Court was faced with a challenge to Plaintiff's diversity standing. The Plaintiff was suing in its capacity as representative of Washington state apple growers. The claim was premised upon the actual and threatened loss to growers arising from the enforcement of a North Carolina statute. The defendant argued that the growers were not a party to the litigation and that, even if the Commission properly could serve as

their representative, the federal courts were without jurisdiction because the required jurisdictional amount could not be established without aggregating the claims of the growers, each of whom presumably had less than the required jurisdictional claim. The defendant cited the cases so frequently cited by the adverse parties in these class cases, *Synder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053 (1969) and *Zahn v. International Paper, Co.*, 414 U.S. 291, 94 S.Ct. (1973).

The Supreme Court first found that the plaintiff's representative capacity was appropriate and then offered a definition of the term of art "amount in controversy" that should be useful and provide judicial guidance for this Court:

> [7] In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation. *E.g., McNutt v. General Motors Acceptance Corp*, 298 U.S. 178, 181 56 S.Ct. 780, 781, 80 L.Ed. 1135 (1936); *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 126, 36 S.Ct. 30, 32 60 L.Ed. 174 (1915); *Hunt v. New York Cotton Exchange,* 205 U.S. 322 336, 27 S.Ct 529, 533, 51 L.Ed. 821 (1907); 1 J. Moore, Federal Practice ¶¶0.95, 0.96 (2d ed. 1975); C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3708 (1976).
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> The value of that right is measured by the losses that will follow from the statute's enforcement. *McNutt, supra,* at 181, 56 S.Ct., at 781; *Buck v. Gallagher,* 307 U.S. 95, 100, 50 S.Ct. 740, 742, 83 O.Ed. 1128 (1939); *Kroger Grocery & Baking Co. v. Lutz*, 299 U.S. 300, 301, 57 S.Ct. 215, 81 L.Ed. 251 (1936); *Packard v. Banton*, 264 U.S. 140, 142, 44 S.Ct.

257, 258, 68 L.Ed. 596 (1924) at 97 S.Ct. 2443.[2]

It is not gainsaid that "the object" of the instant litigation is redress to the class in the nature of refunds and credits in an approximate amount of $8-9 million. Consistent with *Hunt*, the value of that claimed loss follows from the uniform, consistent and institutionalized imposition of egregious overcharges on the class of private paying patients.

The result of the reasoning of the Fourth District if it were to become the procedural standard in Florida would be the certainty that the circuit courts of this state would never again see a class action in a contract, shareholder, or common-law context. Except for statutes granting a private right of action or expressly vesting exclusive jurisdiction in the circuit court, the logic and reality of life and experience indicates that consumers and shareholders who are imposed upon by commercial institutions will not have damages in excess of the $15,000 circuit court minimum.[3] (See Petitioners' Brief on Merits footnotes pages 14 and 34).

The Fifth District's opinion directly conflicting with that of the Fourth District is more faithful to the long established doctrine of a statutory interpretation that when the meaning of a statute (i.e. amount in controversy) is at all doubtful, the law

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[2] Count I of the Class' Complaint seeks declaratory relief.

[3] The same would be true of all concievable class actions in the absence of an authorizing statute.

favors a rational, sensible construction. *See e.g.*: *State v. Webb*, 399 So.2d 820 (Fla. 1981), *Agrico Chemical v. State Dept. of Environmental Regulation*, 365 So.2d 759 (Fla. 1st DCA 1978), *cert. denied* 376 So.2d 72 (1979); 42 Fla. Jur. 2d Statutes § 185. Absent the ability of class claimants to aggregate their claims arising from the conduct of a potential defendant in those types of important class cases, our circuit courts will not again be the forum hearing them. It should be difficult to envision a shareholder or consumer class member with a claim in excess of $15,000.[4] It is well-neigh impossible to expect the existence of enough of such sizeable claimants to constitute a legally cognizable class.[5] For the typical private pay hospital patient

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[4] Chapter 718.110 (10) authorizes actions involving Declarations of Condominium to be brought in circuit court as a class action; F.S. 26.012(2)(e) vests the circuit court with exclusive jurisdiction in actions concerning any tax assessment or toll. Chapter 542.22, The Florida Antitrust Act, provides that any person injured in his person or property by a violation may bring an action in circuit court without regard to an amount in controversy. Thus, we may see the anomalous situation of a state antitrust class action for nominal amounts in circuit court and, under the Fourth District's rationale, a state claim based on contract and common law for $30 million relegated to county court. Surely the order of society intended to be established by our law would not be well served by so bizarre an interpretation.

[5] For example, the New Florida Deceptive and Unfair Trade Practices Act, Chapter 501.201, et seq., (Session law 93-38), 1993, provides for extensive remedies and rights of action for private parties aggrieved by a defendant's conduct and for state officials to bring an action" ... on behalf of one or more consumers for actual damages ..." [501.207(c)] It cannot reasonably

to gather overcharges of the type claimed in the instant action (supplies, pharmeuticals and laboratory tests), he or she would require an underlying gross hospital bill of approximately $200,000 in order to assert a $15,000 claim sufficient for circuit court jurisdiciton. The 1989 figures from the Florida Healthcare Cost Containment Board indicate that the average hospital bill in Florida is less than $10,000.

Aside from the continued slavish citation to the non-aggregation doctrine of the federal courts in *diversity* cases, the Respondent spends a great deal of time and brief space to declare that the class members' claims arise over time and out of separate transactions. Such an argument in a brief at this stage of the case should be non-availing because it:

(1) argues evidence not before any court since there has been no class certification hearing; and

(2) it misstates the claim of the class.

The former is self-evident, the latter requires a short reiteration of the common nature of the wrong done to the entire class and the common methodology used by the defendant hospital to inflict the injury. Every member of the instant patient class claims under a common right [imposition -- *Southern States Power v. Ivey*, 118 Fla. 756, 160 So. 46 (1935)]. Every member of the class

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be anticipated that the Attorney General or State Attorney, who have the right to bring a class action, must be limited to a county court, with appellate review to the circuit court, in asserting the public and consumers' rights under the Act.

has been subjected to the imposition and obligation to pay amounts of money in excess of that which would have otherwise been reasonable for the three distinct category of items alleged in the complaint; medical supplies, pharmaceuticals, and laboratory tests. As argued in detail at page 17 of Petitioners' merits brief, the class asserts its claim under a common right, based on the same legal theory and upon the same facts that each class member would be required to prove in individual suits.

The well defined distinction between the federal court rule of non-aggregation in diversity cases and the jurisdictional standard in the instant action was fully argued in the Petitioners' Merits Brief (pp. 9-26). Suffice here to briefly add that diversity jurisdiction is a vehicle by which federal courts alleviate a party's problem of having to litigate in a hostile forum of a foreign state. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 307 (1816); see Note: "Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers," 18 U.C.L.A. Law Review 1002, 1006 Note 32 (1971).

Being a purely state law issue and not having the same restrictive reason for existence, the class action aggregation doctrine of the federal courts is not appropriate for application to the instant action. The opinion of the Fifth District in *Galen of Florida, Inc., etc. v. Arscott* should be compelling.

It is inappropriate for a party to extract a single sentence from a case (decided on wholly different grounds) and recite that

passage as the rule of decision. Specifically, the citation by *Plantation* at page 16 of its brief to *More v. Intelcom Support Services, Inc.*, 960 F.2d 466 (5th Cir. 1992) at 472, is such an example. *Intelcom* raised as its material issue whether Philippine citizen employees of a contractor working on a U.S. Air Force base on Wake Island had standing to raise a claim for relief for non-payment of a Christmas bonus. The contract workers were subject to a treaty between the United States and the government of the Republic of the Philippines and a written agreement. The case was not brought as a class action.

The critical issue decided in *Intelcom* was whether the treaty material to the action allowed a private right of action (i.e. a federal question) for Philippino workers (pp. 470-471). When confronted with a question from the bench at oral argument as to what would be the plaintiffs' counsel's view of federal court jurisdiction if standing under the treaty were rejected (as it was), counsel for the workers said that the federal courts would have diversity jurisdiction. To place the colloquy in perspective, the following is cited to the Court:

> [4] Plaintiffs' complaint that Intelcom terminated them improperly sounds in state law. There is a question, not addressed to us by the parties, as to whether we have subject matter jurisdiction over this claim. At oral argument, we asked counsel for Plaintiffs what the basis for jurisdiction would be for this claim if we decided that they had no claim under the Treaty. Counsel replied that we would have diversity jurisdiction. *Id.* at 472

As asserted by the class in its merits brief, it is solely in those cases brought under the doctrine of diversity jurisdiction that the federal courts invoke the non-aggregation standard argued by the instant Respondent as a universal truth.[6]

CONCLUSION

> Nothing is more destructive to a sense of justice than the widespread belief that it is much more risky for an ordinary citizen to take $5 from one person at the point of a gun than it is for a corporation to take $5 each from a million customers at the point of a pen.
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> Address by Vice President Walter Mondale, Second Judicial Circuit Conference, September 10, 1977.

The issue that determines all others will be how this Court judicially interprets the term "amount in controversy" in class actions where the classes are comprised of more than 300,000 persons having claims in excess of $30 million.[7]

The correct statement of law and public policy to be ascertained through thoughtful analysis of the critical term was

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[6] All of the cases cited in Respondent's Brief at pages 16-17 relate to diversity jurisdiction considerations and hence are not appropriate for consideration as authority.

[7] While the class in *Johnson* numbers approximately 50,000 patients with claims in the neighborhood of $8-$9 million, the total number of class members involved in parallel litigation in eight other actions make up the balance of the number and dollars stated above.

announced by the Fifth District in its December 3, 1993 Opinion of *Galen of Florida, Inc., etc. v. Arscott, supra.*

> The class action rule contemplates a single judgment, not hundreds or thousands of judgments for each individual claim.
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> [given] the purpose of the class action procedure and the size and complexity of the usual class action, *we conclude that the class action rule contemplates that the amount of the claim of the entire class determines the dollar amount jurisdiction.* Our circuit courts are designed to hear such complex cases; our county courts are not. If the aggregated individual claims do not exceed the $15,000 jurisdictional amount, the class action belongs in county court. If it exceeds the circuit court threshold, it belongs in circuit court. (emphasis added)

The instant Petitioners and Class urge this Court to adopt and announce the same as the rule of law in Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioners' Reply Brief has been furnished by U.S. Mail to Debora A. Sampieri, Attorney at Law, Kenny, Nachwalter, Seymour, Arnold & Critchlow, P.A., 400 Miami Center, 201 South Biscayne Boulevard, Miami, Florida 33131-2305, this 11th day of March, 1994.

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