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Federal Practice and Procedure

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FEDERAL PRACTICE AND PROCEDURE

OVERVIEW

I. STATUTES OF LIMITATIONS IN CIVIL RIGHTS CASES

A. *Zuniga v. AMFAC Foods, Inc.*[1]

In an action invoked under the jurisdiction of 42 U.S.C. § 1981,[2] plaintiff Zuniga alleged he was discriminately refused "bumping rights" by the defendant; these rights would have enabled plaintiff to continue working and retain his seniority. Plaintiff further averred that subsequent to termination of employment, he was wrongfully refused reinstatement.[3] The action was dismissed by the district court on limitations grounds.[4]

The issue for the purposes of appeal was which statute of limitations should be applicable to federal employment discrimination actions brought under 42 U.S.C. § 1981 in Colorado's federal district courts.[5] The three statutes mentioned in the district court's statement, and later discussed in the court of appeals' opinion, were the two-year "federal action" statute,[6] the three-year "residuary" statute,[7] and the six-year statute governing spe-

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[1] 580 F.2d 380 (10th Cir. 1978).

[2] Equal rights under the law. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1976).

[3] 580 F.2d at 381-82.

[4] *Id.* at 381. The district court found the action barred by the statutes of limitation under COLO. REV. STAT. §§ 13-80-106 and 13-80-108(1)(b) (1973). For text of the statutes, see notes 6&7 *infra*.

[5] 580 F.2d at 381.

[6] COLO. REV. STAT. § 13-80-106 (1973).

Actions under federal statutes. All actions upon a liability created by a federal statute, other than for a forfeiture or penalty for which actions no period of limitations is provided in such statute, shall be commenced within two years or the period specified for comparable actions arising under Colorado law, whichever is longer, after the cause of action accrues.

[7] The relevant portion of COLO. REV. STAT. § 13-80-108 (1973) states: "Actions barred in three years. (1) The following actions shall be commenced within three years next after the act complained of and not afterwards: . . .

(b) All other actions of every kind for which no other period of limitation is provided for by law."

cifically mentioned contract and tort actions.[8]

The court of appeals determined that a two-step approach would be in keeping with prior decisions,[9] stating that "the answer to our limitations question requires analysis of the essential nature of the federal claim and comparison to similar state actions."[10]

Although both the "federal action" statute and the "residuary" or "catch-all" statute are available to the plaintiff of a federal civil rights claim, the Tenth Circuit concluded that under Colorado's statutory scheme another longer statute must be utilized if also applicable.[11] The reasoning in *Jackson v. Continental Oil Co.*[12] persuaded the court of appeals that " '[i]n an employment discrimination case such as this, the facts will most closely resemble either a contract or a tort suit.' "[13] Therefore, the longer six-year limitation would govern.[14]

First, to sustain their holding that the case at bar related to a contract action, the Tenth Circuit relied on the Supreme Court's broad construction of 42 U.S.C. § 1981 in *Johnson v. Railway Express Agency, Inc.*[15] In *Johnson,* the Court resurrected 42 U.S.C. § 1981 to provide an alternate legal remedy to Title VII

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[8] COLO. REV. STAT. § 13-80-110 (1973) states:

> Actions barred in six years. (1) Except as otherwise provided in section 4-2-725, C.R.S. 1973, the following actions shall be commenced within six years after the cause of action accrues, and not afterwards:
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> . . . .
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> (d) All actions of assumpsit, or on the case founded on any contract or liability, express or implied;
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> . . . .
>
> (g) All other actions on the case, except actions for slander and for libel.

[9] The court of appeals relied on Runyon v. McCrary, 427 U.S. 160, 180 (1976); Auto Workers v. Hoosier Corp., 383 U.S. 696, 704-05 (1966); and O'Sullivan v. Felix, 233 U.S. 318, 324 (1914). In *Runyon,* the silence of Congress as to statutes of limitations under 42 U.S.C. § 1981 was interpreted to mean that federal policy would approve adoption of the local limitation laws. *Auto Workers* previously had stated this concept as it applied to the Labor Management Relations Act. *O'Sullivan* characterized civil rights actions by an individual as remedial in nature and not penal. Therefore, the federal limitation governing actions for civil fines, penalties, or forfeitures was inapplicable.

[10] 580 F.2d at 384.

[11] *Id.* at 384-85, 387.

[12] No. 74-F-1209 (D.Colo. Nov. 9, 1976).

[13] 580 F.2d at 385 (quoting Jackson v. Continental Oil Co., No. 74-F-1209 (D.Colo. Nov. 9, 1976)).

[14] 580 F.2d at 385.

[15] 421 U.S. 454 (1975).

of the Civil Rights Act of 1964,[16] stating that 42 U.S.C. § 1981 "on its face relates primarily to racial discrimination in the making and enforcement of contracts."[17] The Tenth Circuit noted that the plaintiff in *Zuniga* had averred breach of the collective bargaining contract and denial of "bumping rights." Discriminatory acts dealing with enforcement of contract rights had therefore been alleged and the six-year limitations statute was applicable.[18]

Secondly, the Tenth Circuit stated that the cause of action also sounded in tort since employer discrimination interferes with the personal right to contract; thus, the action would be "for the tort growing out of the contract."[19] The plaintiff in *Zuniga* had alleged injury because of his national origin and the court of appeals held this to be "in effect and by nature, an action in tort for trespass on the case."[20] Again, the six-year limitations period would control.[21]

Because the plaintiff's complaint asserted "tortious discriminatory acts infringing contractual rights, and denial of contractual rights as well,"[22] the action was timely under the broad provisions of the six-year statute of limitations. The motion to dismiss was reversed and the case remanded for further proceedings.[23]

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[16] 42 U.S.C. § 2000e-5 (1976). For criticism of § 1981 as an alternative remedy, see Note, *Filing of an Employment Discrimination Charge Under Title VII as Tolling The Statute of Limitations Applicable To A 1981 Action: The Unanswered Questions of Johnson v. REA*, 26 CASE W. RES. L. REV. 889, 940-43 (1976), where the author argues that the rebirth of 42 U.S.C. § 1981 has not remedied the existing problems of Title VII, has instead overburdened the judicial system, and that the individual's remedies should be returned to pre-*Johnson* status. However, in Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56, 102 (1972), the author concludes that 42 U.S.C. § 1981 should be used as a remedy in conjunction with Title VII and that the problems relating "primarily to statutes of limitations, exhaustion of remedies, the applicable substantive law, and scope of available remedies" can be resolved by the courts.

[17] 421 U.S. at 459.

[18] 580 F.2d at 386.

[19] Ahart v. Sutton, 79 Colo. 145, 148, 244 P. 306, 307 (1926). In *Ahart*, the six-year limitation was utilized in an action for fraud in real estate contracts.

[20] 580 F.2d at 386-87 (quoting from Wolf Sales Co. v. Randolf Wurlitzer Co., 105 F. Supp. 506, 508 (D.Colo. 1952)). In *Wolf*, a two-year statute of limitations for a federal antitrust claim was held to be discriminatory and therefore the six-year statute of limitations governed actions on the case. *See* 580 F.2d at 387 n.8, for a discussion of trespass on the case (damage suffered for a wrong committed without force).

[21] 580 F.2d at 387.

[22] *Id.*

[23] *Id.*

B. *Which Analogies Should Be Utilized in the Application of Statutes of Limitations to Civil Rights Acts?*

In the course of the decision to apply a six-year statute of limitations to *Zuniga*, the Tenth Circuit considered various Colorado statutory periods which would bar a federal civil rights action,[24] *i.e.*, the "federal action" statute, the "residuary" statute, and the contract/tort statute. The major problem is, however, that the Tenth Circuit has inconsistently applied the conflicting limitation statutes.[25] Therefore, neither party can foresee which analogy will be utilized by the court. The plaintiff cannot accurately predict whether his cause of action will be barred at the outset solely on procedural grounds; and the defendant is exposed to a claim until the running of the longest limitations statute which could conceivably apply to a federal civil rights claim.

The problem is not unique to the Tenth Circuit.[26] Other statutes in addition to those discussed by the Tenth Circuit have been considered; a court is limited only by the types of provisions on the states' books. At least three types of statutes not argued in *Zuniga* have been determinative in other federal civil rights

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[24] The Tenth Circuit also rejected AMFAC's argument that the six-month statute of limitations under the Colorado Anti-Discrimination Act of 1957 (COLO. REV. STAT. § 24-34-307 (1973)) should apply. 580 F.2d at 384 n.5.

[25] Circuit Judge Holloway, in *Zuniga*, cited examples of Tenth Circuit federal civil rights litigation which had been decided on the basis of each of the three statutes:

1. COLO. REV. STAT. § 13-80-106 (1973). McKinney v. ARMCO Recreational Products Co., 419 F. Supp. 464 (D. Colo. 1976) (Statute applicable to claims under 42 U.S.C. §§ 1981 and 1985); Salazar v. Dowd, 256 F. Supp. 220 (D.Colo. 1966) (Statute applicable to litigation under 42 U.S.C. §§ 1983 and 1985. Longer limitations periods were not considered); Ray v. Safeway Stores, Inc., No. 75-W-459 (D.Colo. May 19, 1978), *app. pending*, (suit under §§ 42 U.S.C. 1981 and 1983 was barred by this statute); Castro v. Patterson, No. 74-M-1189 (D.Colo. Oct. 1, 1975).

2. COLO. REV. STAT. § 13-80-108(1)(b)(1973). Solano v. Sears Roebuck and Co., No. 75-A-931 (D.Colo. Aug. 24, 1976) (42 U.S.C. § 1981 action barred); Evans v. Dow Chemical Co., No. 74-A-1210 (D.Colo. May 11, 1976) (42 U.S.C. § 1981 claim not brought within limitation of statute).

3. COLO. REV. STAT. § 13-80-110(1)(d) and (g) (1973). Jackson v. Continental Oil Co., No. 74-F-1209 (D. Colo. Nov. 9, 1976) (statute applied to claim under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5).

[26] *See Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 97. The Seventh Circuit has more consistently applied one limitations period, the residuary statute, to its federal civil rights claims. *See* Rinehart v. Locke, 454 F.2d 313 (7th Cir. 1971)(42 U.S.C. § 1983); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir. 1970) (42 U.S.C. § 1981); Baker v. F&F Investment, 420 F.2d 1191 (7th Cir.) (42 U.S.C. § 1982), *cert. denied*, 400 U.S. 821 (1970). *But see* Duncan v. Nelson, 466 F.2d 939 (7th Cir. 1972).

claims in several circuits; and these also have been applied inconsistently.[27]

Various remedies have been suggested to alleviate the confusion, including: enactment by Congress of a federal limitations statute, development of principles by the Supreme Court which lower courts could follow, consistent application of the existing statutes, and utilization of statutes based on concepts other than contract or tort analogies (since these are based on common law, rather than statutory foundations).[28]

The Tenth Circuit has not followed any of the available suggestions. Instead, as evidenced by the *Zuniga* ruling, it has continued the confusion and unpredictability already present in the area of limitations periods as applied to federal civil rights claims.

II. JURISDICTION

A. *Pendent and Ancillary Jurisdiction*

The discretionary power of the federal district courts to exercise pendent jurisdiction of state claims (over whom there is no basis for independent jurisdiction) was affirmed by the Tenth Circuit in *Transok Pipeline Co. v. Darko.*[29] Even though the federal defendants settled before trial, the federal claim was substantial, and jurisdiction was reserved over the state claim.[30]

The court of appeals found that ancillary federal jurisdiction can be accorded to general water adjudication claims even though many of the claimants have no rights under any federal statute.

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[27] State limitations provisions not mentioned in *Zuniga* are:

1. Statutes governing actions for injuries to the person or rights of the person. *E.g.*, Almond v. Kent, 459 F.2d 200 (4th Cir. 1972); Jones v. Bombeck, 375 F.2d 737 (3d Cir. 1967); Wilson v. Hinman, 172 F.2d 914 (10th Cir.), *cert. denied*, 336 U.S. 970 (1949).

2. Those governing actions upon a liability created by statute. *E.g.*, Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973); Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962).

3. Special statutes for refiled actions after a dismissal other than on the merits, if the case were deemed a refiled action. *E.g.*, Crosswhite v. Brown, 424 F.2d 495 (10th Cir. 1970).

[28] *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 97; Note, *Filing of an Employment Discrimination Charge Under Title VII as Tolling the Statute of Limitations Applicable to a 1981 Action: The Unanswered Questions of Johnson v. REA*, 26 CASE W. RES. L. REV. 889 (1976).

[29] 565 F.2d 1150 (10th Cir. 1977), *cert. denied*, 98 S. Ct. 1876 (1978).

[30] Another consideration besides the substantiality of the federal claim was that considerable time and energy had been expended in the case. 565 F.2d at 1155.

In *Reynolds v. Molybdenum Corp. of America*,[31] the United States had, at first, been a named defendant. The federal government subsequently filed a complaint "in intervention," requesting jurisdiction "under 28 U.S.C. § 1345 which grants federal jurisdiction over actions commenced by the United States."[32] The court of appeals looked to the principal purpose of the suit, determined that a general water adjudication was similar to an interpleader, realigned the United States as a plaintiff, and granted federal jurisdiction under 28 U.S.C. § 1345.

B. Subject Matter and Personal Jurisdiction

In *Pedi Bares, Inc. v. P & C Food Markets, Inc.*,[33] the Tenth Circuit ruled the "minimum contacts" test[34] for *in personam* jurisdiction was satisfied even though the contract action did not arise "out of an act done or transaction consummated in the forum state,"[35] and even though the initial solicitation was made by the plaintiff.[36] The controlling fact was that the defendant had acted affirmatively on the plaintiff's telephone contract orders; therefore, the transaction of business provision of the Kansas long-arm statute applied.[37]

The Colorado statutory provision pertaining to the service of process on a foreign corporation,[38] not the long-arm statute, was pertinent to the decision in *Budde v. Kenton Hawaii, Ltd.*[39] The court recognized the general rule that the activities which are the basis of the action need not arise in the state as long as the in-state service of the corporation's agent is proper.[40]

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[31] 570 F.2d 1364 (10th Cir. 1978).

[32] *Id.* at 1365.

[33] 567 F.2d 933 (10th Cir. 1977).

[34] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[35] Hanson v. Denckla, 357 U.S. 235, 251 (1958).

[36] 567 F.2d at 937.

[37] KAN. STAT. § 60-308(b)(1) (Supp. 1975).

[38] COLO. REV. STAT. § 13-1-124 (1973).

[39] 565 F.2d 1145 (10th Cir. 1977). As discussed in *Budde*, two actions by the plaintiff, who had been injured in a jeep accident in Viet Nam, had already been dismissed on limitations grounds. Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033 (10th Cir. 1975); Budde v. Insurance Co. of N.A., 502 F.2d 783 (5th Cir. 1974).

[40] 565 F.2d at 1149. Other cases decided by the Tenth Circuit in keeping with general jurisdictional rules were United States v. Blackwood, Nos. 78-1358, 78-1359, and 78-1360 (10th Cir. Aug. 28, 1978) (issue not raised at district court cannot be raised upon appeal); Stewarts Sec. Corp. v. Guaranty Trust Co., No. 76-2067 (10th Cir. 1978) (dismissal based on lack of jurisdiction is not an adjudication of the merits even though dismissal order

C. *The Law Applied Under Diversity Jurisdiction*

Oklahoma state law prohibits declaratory judgments which would determine the liability of insurers,[41] but the Tenth Circuit, in *Farmers Alliance Mutual Insurance Co. v. Jones*,[42] ruled that this does not bar a similar suit in the federal courts. One of the federal policies underlying the Federal Declaratory Judgments Act[43] is that insurers should be provided a forum in which their liability can be declared. The Declaratory Judgments Act is thereby viewed as procedural.[44] Based on the doctrine of *Erie v. Tompkins*,[45] and federal policies,[46] the Tenth Circuit allowed the federal interpleader action.

III. FEDERAL RULES OF CIVIL PROCEDURE

A. *Discovery*

Three major cases discussed the power of the district courts to order a party to produce documents and persons for deposition under rule 34[47] and impose sanctions under rule 37.[48]

Judge McWilliams' opinion in *In re Westinghouse Electric Corp. Uranium Contracts Litigation*[49] stated that district courts

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did not state whether it was to be with or without prejudice); Monks v. Hetherington, 573 F.2d 1164 (10th Cir. 1978) (possibility of federal defense to a state claim does not confer federal jurisdiction); Korgich v. Regents of N.M. School of Mines, No. 77-1932 (10th Cir. Aug. 16, 1978) (dismissal of action based on eleventh amendment is final disposition of the case and appealable).

[41] OKLA. STAT. tit. 11 § 1651, (Supp. 1975).

[42] 570 F.2d 1384 (10th Cir. 1978).

[43] 28 U.S.C. § 2201 (1976).

[44] 6A MOORE'S FEDERAL PRACTICE § 57-23, at 57-237 (1974).

[45] 304 U.S. 64 (1938). Under this doctrine, the federal court must apply the same substantive law that a state court would apply but must apply federal procedural law.

[46] The *Erie* rule concerning substance versus procedure is not correctly applied in the instant case. The better rule was stated in Castro v. Arkansas-Louisiana Gas Co., 562 F.2d 622 (10th Cir. 1977). "Since *Erie*, the federal courts have undertaken to determine whether a matter is subject to state or federal law and a state pronouncement as to whether a question is substantive or procedural is not binding." *Id.* at 624.

[47] FED. R. CIV. P. 34 allows a party to serve a request on any other party to inspect and copy any designated documents.

[48] FED. R. CIV. P. 37 allows a party to apply for an order compelling discovery.

[49] 563 F.2d 992 (10th Cir. 1977). As part of its discovery for the cause of action by the same name in the United States District Court for the Eastern District of Virginia, defendant Westinghouse caused a subpoena to issue in Utah on Rio Algom Corp., which operates a uranium mine in Utah. The major issue in the Virginia trial is whether the increase in the price of uranium, which allegedly caused Westinghouse to breach its contracts for the delivery of uranium, was caused by the price fixing of a uranium cartel.

do have the power to require production of foreign documents and production of foreign persons for depositions. But whether or not the district court may impose sanctions when the production may also impose criminal sanctions in the foreign country calls for a "balancing" approach on a case-by-case basis.[50] The Tenth Circuit relied heavily on *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*[51] and section 39 of the Restatement (Second) of Foreign Relations Law of the United States. Upon consideration of the facts of *Westinghouse*, the court of appeals found that it was not unreasonable for Canada to refuse to enforce letters rogatory when compliance would have violated Canadian public policies as expressed in uranium information securities regulations. Further, there was no evidence to suggest that the Canadian government or the Canadian court had not acted in good faith. Instead, it was determined that Canada had a legitimate interest in the nondisclosure of information which was based in Canada.[52] The Tenth Circuit vacated the district court's order holding the defendant in contempt and imposing sanctions.[53]

A similar set of facts regarding documents in a foreign country was encountered in *Ohio v. Arthur Andersen & Co.*[54] Citing *In re Westinghouse*, the Tenth Circuit ruled that Andersen had not acted in good faith and the balancing test was on Ohio's side.[55]

In a companion case to the above uranium litigation,

Rio Algom had complied with most of the subpeona, but it refused to produce certain documents in Canada and to produce the company president for further depositions.

[50] 563 F.2d at 997.

[51] 357 U.S. 197 (1958). In *Societe*, the Supreme Court found that the failure of the petitioner to produce documents was not because of circumstances they could control nor because of their conduct.

[52] 563 F.2d at 998-99.

[53] Judge Doyle dissented (563 F.2d at 1000). He felt there were enough reasons to infer that the Canadian regulations were promulgated solely to protect Canada's uranium industries from insufficient prices. Given the importance of discovery, Judge Doyle would only accept certain privileges as an excuse for noncompliance.

[54] 570 F.2d 1370 (10th Cir. 1978). In *Ohio*, Arthur Andersen & Co., after being served with a request for production of documents, raised the "foreign law" issue regarding documents in Switzerland. Six months after the district court ordered Andersen to specify the applicable foreign secrecy laws with "great particularity and specificity," Andersen said it had been taken by surprise and was sending a lawyer to consult with Swiss counsel.

[55] *Id.* at 1373.

Westinghouse Electric Corp. v. Adams,[56] the Tenth Circuit ruled that a party could be relieved from an improvident stipulation regarding discovery. Citing the strong policy factor for discovery, the court held that it would be inequitable to enforce the stipulation against further questioning of Mr. Adams by Westinghouse once potentially critical events came to light.[57]

B. Intervention—Rule 24

In *National Farm Lines v. ICC,*[58] an association representing regulated common carriers sought to intervene under Rule 24(a).[59] The plaintiff National Farm Lines was an unregulated agricultural cooperative testing the constitutionality of certain ICC rulings. The rulings had been promulgated to protect the regulated carriers from unregulated competition.[60] Reversing the district court's decision, the Tenth Circuit allowed the association to intervene based on two arguments. First, the court held that it is difficult for a government agency to adequately protect the interest of the public as well as the right of the private petitioner in intervention. Secondly, the petitioner in intervention possessed experience and access to facts about a complex area of business which the government may not have had.[61]

In the certified class action of *Shump v. Balka,*[62] plaintiffs were seeking relief against the Topeka Housing Authority under 42 U.S.C. §§ 1402 and 1437, whereby rentals and payments of public housing tenants are controlled. The plaintiffs in a related action against the officers of the Topeka Housing Authority requested intervention in *Shump.* This was denied by the trial

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[56] 570 F.2d 899 (10th Cir. 1978).

[57] *Id.* at 902

[58] 564 F.2d 381 (10th Cir. 1977).

[59] FED. R. CIV. P. 24(a) allows anyone to intervene where there is an interest which will be impaired or impeded by the disposition of the case *unless* the interest is adequately represented by existing parties. (emphasis added).

[60] 564 F.2d at 382.

[61] *Id.* at 383-84. *National Farm Lines* was cited as determinative in the subsequent case of Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345-46 (10th Cir. 1978) (Kerr-McGee and the American Mining Congress were allowed to intervene in a cause of action determining the necessity for a New Mexico agency to issue environmental impact statements before issuing licenses for uranium mines).

[62] 574 F.2d 1341 (10th Cir. 1978).

[63] *Id.* at 1342.

court and affirmed by the Tenth Circuit.[64] The reasoning was that the two actions differed because plaintiffs in the related action were seeking additional relief, and further, failed to produce evidence of collusion in the settlement of the *Shump* action.[65]

C. *Class Action—Rule 23*

In *Bowe v. First of Denver Mortgage Investors,*[66] the court of appeals reiterated[67] that denial of class action is interlocutory and not appealable unless plaintiffs make a showing that the case will not proceed in the absence of class certification. The plaintiff in *Bowe* had declared she would proceed individually with her claim. The certification denial was therefore not appealable until final judgment.[68]

In *Garcia v. Board of Education, School District No. 1, Denver, Colorado,*[69] the Tenth Circuit restated that collateral attacks on class action judgments should be discouraged because the policy behind a class action suit is to finally determine numerous claims.[70] The suit was related to *Keyes v. School District No. 1,*[71] and since the problem of whether Hispanic schools should be included in that desegregation case was adjudicated, and the plaintiffs of the instant case had adequate representation in *Keyes,* it was determined that the issue should not be reopened.[72]

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[64] The Tenth Circuit let stand a district court ruling that the two claims should not be consolidated. *Id.* at 1344.

[65] *Id.* at 1345.

[66] 562 F.2d 640 (10th Cir. 1977).

[67] *See* Seiffer v. Topsy's Int'l, Inc., 520 F.2d 795 (10th Cir. 1975), *cert. denied,* 423 U.S. 1051 (1976); Monarch v. Wilshire, 511 F.2d 1073 (10th Cir. 1975).

[68] 562 F.2d at 644-45.

[69] 573 F.2d 676 (10th Cir. 1978).

[70] *Id.* at 679. *Cf. In Re* Four Seasons Sec. Laws Litigation, 502 F.2d 834 (10th Cir.), *cert. denied,* 419 U.S. 1034 (1974).

[71] 313 F. Supp. 61 (D. Colo. 1970), *rev'd in part,* 445 F.2d 990 (10th Cir. 1971), *modified and remanded,* 413 U.S. 189 (1973), *on remand,* 368 F. Supp. 207 (D. Colo. 1973) and 380 F. Supp. 673 (D. Colo. 1974), *rev'd in part,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

[72] 573 F.2d at 679-80.