

In the United States Claims Court

(FILED MAY 27, 1986)

RECEIVED

JUN 02 1986

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

JESSIE SHORT, ET AL.,)
)
 Plaintiffs,)
)
 v.)
)
 THE UNITED STATES,)
 Defendant,)
)
 and)
)
 THE HOOPA VALLEY TRIBE OF INDIANS,)
)
 Defendant-Intervenor.)

No. 102-63

O R D E R

The plaintiffs have moved the Court to clarify and to reconsider the order of April 10, 1985, which concerned deceased plaintiffs. After considering briefs submitted by all the parties, the Court grants in part the motion for clarification and denies the motion for reconsideration.

A. Motion for Clarification

The Court adds the following qualifications to the Order of April 10, 1985:

1. A Deceased Plaintiff Needs Only One Representative

If more than one legatee or heir could claim the decedent's cause of action, the Court will substitute only one of the legatees or heirs as the decedent's representative, as agreed upon by the legatees or heirs, or as determined by state law. If the other legatees or heirs should wish to contest the representative's conduct of the case or distribution of the recovery, they may bring an action in state court under state law.

2. State Law Determines Heirs

If the estate of a deceased party was never probated and Indian law does not apply, the Court will substitute as a plaintiff a person who qualifies as an heir under state law.

3. Hoopas May Represent Deceased Plaintiffs

The plaintiffs suggest that the Court substitute no Hoopas for deceased plaintiffs, because Hoopas, as defendant-intervenors, would face a conflict of interest. But if a Hoopa has inherited the right to join this action, it is the Hoopa's action to win or to lose. Hoopas who agree to represent deceased plaintiffs should consider, however, that state law might make them fiduciaries for other heirs of the decedent.

B. Motion for Reconsideration

On April 10, 1985 the Court held that potential plaintiffs who died before joining the action were not parties and therefore possessed no chose in action for successors to inherit. The plaintiffs had argued that potential plaintiffs were parties if they died after the filing date, because Short was filed as a class action. In their motion for reconsideration, the plaintiffs repeat this argument and add others. The Court finds no reason to change its decision.

This Court noted: "[P]laintiffs who died before being named were parties to the suit only if a judgment would have bound them." Order at 4. The plaintiffs accept this proposition, but contend that a judgment would have bound the unnamed plaintiffs because many of them had signed instruments authorizing three attorneys-in-fact to bring suit on their behalf.

Those attorneys neither moved for class action certification nor added the absent plaintiffs to the list of named parties. Had the named parties lost their action, that loss would not have estopped the absent potential plaintiffs. Neither could the absent potential plaintiffs have shared in the victory of the named parties simply by revealing private agreements after the victory was won. No judgment could have bound the absent plaintiffs. Therefore, they were not parties.

The plaintiffs also argue that the names of deceased persons appear among the 2,161 qualified plaintiffs listed on attachments to an order of the Court of Claims (Trial Div. March 31, 1982), aff'd, 719 F.2d 1133 (Fed. Cir. 1983), cert. denied, 104 S. Ct. 3545-46 (1984). According

to the plaintiffs, these "judgments" are the law of the case. But the Federal Circuit did not consider which deceased plaintiffs were parties. Any issue not expressly or implicitly determined on appeal is left open for the trial court's reconsideration on remand. E.g., Beltran v. Myers, 701 F.2d 91, 93 (9th Cir. 1983), cert. denied, 462 U.S. 1134 (1983).

Furthermore, those attachments list persons who died even before the action was filed. The Court of Claims would have dismissed those persons from the case had it considered the question. See Hanberry v. United States, 204 Ct. Cl. 811 (1974). The lists are not final judgments, and this Court may reconsider them.

While they lived, the decedents could either have joined the action as named plaintiffs or have moved for class certification. They did neither. This Court cannot correct their error. The motion for reconsideration is denied.

Lawrence S. Margolis

LAWRENCE S. MARGOLIS
Judge, U.S. Claims Court