Federal Jurisdiction - All Plaintiffs Required to Meet $10,000 Jurisdictional Amount in Order to Maintain a Rule 23(b)(3) Class Action Under 28 U.S.C. 1332(a)

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The Second Circuit Court of Appeals recently ruled that a diversity action will not be allowed to proceed as a class action under Federal Rules of Civil Procedure 23(b)(3) when the named plaintiffs meet the jurisdictional amount required by 28 U.S.C. § 1332(a) but the unnamed members of the class do not. The decision of Zahn v. International Paper Company1 requires each member of the class, named or unnamed, to sustain $10,000 damages before federal jurisdiction will attach. The action was brought by four named plaintiffs on behalf of themselves and all owners of lakefront property in Orwell, Bridport, and Shorham, Vermont. The plaintiffs sought compensatory and punitive damages for the impairment of their property rights resulting from the pollution of Lake Champlain by International Paper Company. Alleging that the owners and lessees of lakefront property in the three towns were properly members of the class sought to be represented, the plaintiffs contended that the case should proceed under Rule 23(b)(3).2

On September 30, 1971, Chief Judge Leddy of the United States District Court of Vermont ordered that all references to parties other

1. 469 F.2d 1033 (2d Cir. 1972), cert. granted, 93 S. Ct. 1370 (1973).
2. Fed. R. Civ. P. 23:
   a. Rule 23 (a) 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.
   b. Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * *
   (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
than the named plaintiffs be stricken from the complaint and that the action not be allowed to proceed as a class action. On October 8, 1971, the plaintiffs filed a Motion to Modify Order and to Certify Questions of Law to the Court of Appeals, which was granted. Following this amended opinion and order, plaintiffs filed a petition for certification pursuant to 28 U.S.C. § 1292(b). The Second Circuit Court of Appeals granted this motion.

On appeal, the Second Circuit affirmed the decision of the lower court reasoning that the rationale of Snyder v. Harris, prohibiting the aggregation of damage claims of the separate plaintiffs to satisfy the jurisdictional amount, was controlling. Plaintiffs petitioned the Circuit Court for a rehearing en banc, which was denied. They then filed a writ of certiorari to the United States Supreme Court which was granted.

SOME BACKGROUND CONSIDERATIONS REGARDING Snyder v. Harris

The Snyder decision embodies the Court's application of the traditional doctrine prohibiting the aggregation of claims to meet the jurisdictional amount and the newly amended Federal Rule 23. The original Rule 23 divided class actions into three categories which came to be known as "true," "spurious," and "hybrid," depending upon the nature of the claim asserted. The "true" category was defined to involve suits litigating "joint, common, or secondary" rights. The secondary rights were employed in cases in which the primary rights holder refused to enforce his right, thus entitling the secondary rights holder to enforce the right. "Hybrid" and "spurious" class actions each involved several rights, but were distinguished on the basis of the interest from which the several rights arose. If the several rights arose from specific property or interest, the class action was termed "hybrid," while if the several rights arose from common questions of law or fact which determined the relief sought by all class members, the action was termed "spurious."

Since the rights sought to be enforced in "true" class actions were, by definition, joint or common, the established doctrine was to allow the aggregation of all claims in those actions. "Spurious" and "hybrid" class actions, however, involved distinct individual rights, and therefore each

5. 469 F.2d at 1040.
separate claim was required to meet the jurisdictional amount.9 In additional to determining the applicability of the aggregation doctrine, the category of the interest asserted was used to determine the extent to which the judgment in class actions became binding upon members of the class.10 In "true" class actions, the judgment was binding upon all members of the class. In "hybrid" class actions, the judgment became binding upon class members only to the extent of their interest in the property. "Spurious" class actions were binding only upon members of the class who entered the litigation and were before the court.

Since the "spurious" class action resulted in binding judgment only upon those members of the class before the court, it was thought of as merely another device permitting permissive joinder of parties to facilitate judicial economy.11 This analogy to permissive joinder was called into question by the 1966 amendment to Rule 23. Section (c)(3) of the amended rule provided that the judgment in 23(b)(3) actions would bind all members of the class, unless they specifically requested to be excluded from the judgment.12 It was the plaintiff's contention in Snyder that the change in the binding effect of a judgment promulgated by the amendment to Rule 23 rendered the aggregation allowed formerly only in "true" class actions now applicable to all class actions under the new rule.

The Snyder decision, per Mr. Justice Black, refused to hold that the aggregation doctrine was so altered by the amendment. The Court overruled the decision of the Tenth Circuit in Gas Service Co. v. Cribburn,13 which held that the change in Rule 23 made aggregation applicable to Rule 23(b)(3) actions. Mr. Justice Black found the logic of that case to be faulty because it worked an expansion of federal jurisdiction solely on the basis of a Supreme Court Rule change.

11. "Spurious class actions, on the other hand, were in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact." Snyder v. Harris, 394 U.S. 332, 335 (1969).
The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.
Tracing the inception of the aggregation doctrine to the joinder case of *Pinel v. Pinel*, Mr. Justice Black found the applicable rule adequately stated therein.

The stated rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount. But when several plaintiffs unite to enforce a single title or right in which they have a common undivided interest, it is enough if their interests collectively equal the jurisdictional amount.\(^{14}\)

Finding this rationale to have been consistently applied to class actions,\(^{15}\) he went on to explain that the *Pinel* doctrine predated and was in no way related to the “category of interest test” in the old Rule 23. The prohibition of aggregation springs not from the rule itself, but rather from the “amount in controversy” language in 28 U.S.C. § 1332(a). As a Congressional exercise of the legislature’s control of the lower federal courts,\(^{16}\) this provision is subject to judicial construction to the extent shared by all statutory provisions. In light of the long line of cases implementing the *Pinel* doctrine,\(^{17}\) Mr. Justice Black reasoned that such judicial construction was well-established in its application to class actions.

The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or any rule of procedure. That doctrine is based rather upon this Court’s interpretation of the statutory phrase as prohibiting aggregation substantially predates the 1938 Federal Rules of Civil Procedure.\(^{18}\)

This judicial construction establishes jurisdictional prerequisites which are not subject to alteration on the basis of a bare amendment of the Supreme Court Rule.

Any change in the Rule that did purport to effect a change in the definition of “matter in controversy” would clearly conflict with the command of Rule 82 that “these rules shall not be construed to extend or limit jurisdiction of the United States District Courts. . . .”\(^{19}\)

\(^{14}\). 240 U.S. 594, 596 (1916).


\(^{16}\). U.S. CONST. art. I, § 8, cl. 9; Id. art. I, § 9; Sibbach v. Wilson, Co., 312 U.S. 1, 9-10 (1941).

\(^{17}\). Supra notes 8 and 9. See listing. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1756 at 554-55 n. 97-98 (1972).

\(^{18}\). 394 U.S. at 336-37.

\(^{19}\). Id. at 337.
Recognizing the potential impact of a contrary holding upon Rules 18 and 20, Mr. Justice Black added the questionable argument that the Pinel doctrine had been given approval by Congress through their re-enactment of 28 U.S.C. § 1332(a). From the outset, the opinion evidences a reluctance to implement the expansive intent of the new Rule 23(b)(3), and should be instructive in prognosticating upon the fate of Zahn before the Supreme Court.

The Majority Opinion

The logic of Judge Smith writing for the majority in Zahn v. International Paper Co. is inescapably tied to the Snyder decision. Finding the Pinel doctrine to be the long-established rule, he based its applicability

20. Fed. R. Civ. P. 18, 20:

RULE 18. JOINER OF CLAIMS AND REMEDIES. (a) Joinder of claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

(b) Joinder of remedies; fraudulent conveyances. Whenever a claim is heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Rule 20. PERMISSIVE JOINER OF PARTIES. (a) Permissive joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

All persons ... may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

21. 394 U.S. at 339. This position is capably criticized by Mr. Justice Fortas who explains in his dissenting opinion that there is very little evidence to signify that Congress' re-enactment of 28 U.S.C. § 1332(a) in 1958 supports the position at all. 394 U.S. at 348-50. See also 83 Harv. L. Rev. 202, 204 (1970).

22. While the hope of many commentators that the aggregation restrictions would not be carried forward under the new Rule 23 was dashed by the Snyder decision, the abandonment of the old conceptual tests for the more functional provisions of the new Rule 23 could be furthered by a less encompassing interpretation of the Snyder holding. Requiring each member of the class to sustain $10,000 damages is not the inevitable conclusion required by the Snyder decision and only aggravates the damaging impact of that decision upon the attempt to modernize the law of class actions. See Wright, Class Actions, 47 F.R.D. 169, 184 (1969).

23. Judge Smith incorporates the Pinel doctrine into the opinion through his treatment of an earlier equity case, Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911). This case is one upon which the Pinel case is based. See 240 U.S. at 596. The Snyder Court employed the Pinel case to utilize its language referring to the aggregation rule as the settled doctrine. The principle remains the same.
to class actions upon the decision of Clark v. Paul Gray, Inc.\textsuperscript{24} In that case, the Supreme Court dismissed all claims except that of Paul Gray, Inc.—the only plaintiff who met the jurisdictional amount. While there is some question as to the applicability of Clark to class actions,\textsuperscript{26} Judge Smith's reliance on the case is adequately supported by explicit language in Snyder\textsuperscript{26} and later application of the aggregation principles to class actions.\textsuperscript{27} As a result of the amendment to Rule 23 extending the binding effect of judgment to all members of the class, there was some question as to whether the analogy between class actions and permissive joinder was still valid. Nevertheless, the explicit language of the Supreme Court quoted by Judge Smith established that the analogy was still appropriate.

The fact that judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions is certainly no reason to treat them differently from joined actions for purposes of aggregation.\textsuperscript{28}

Judge Smith's reliance upon the analogy is further buttressed by the Snyder Court's enthusiastic endorsement of Alvarez v. Pan American Life Insurance Company.\textsuperscript{29} In Alvarez, the court relied exclusively on Clark to dismiss the claims of all parties failing to individually satisfy the jurisdictional amount, noting that one class member's ability to meet the requirement was of no help to the other plaintiffs.

Judge Smith expressed his sympathy for those maintaining the position that Rule 23 should be given a liberal interpretation,\textsuperscript{30} but was confronted with the fact that both Clark and Alvarez indicate that the presence of a qualified plaintiff does not alter the necessity of all members, named and unnamed, of former "spurious" class actions fulfilling the jurisdictional amount. Thus he reasoned that the ability of all named plaintiffs to meet the jurisdictional amount, as in Zahn, could not be distinguished from a situation in which only one plaintiff could do so, as in Clark and Alvarez. His conclusion was that the specific purport of these cases was to thwart the attempt of plaintiffs unable to meet the jurisdictional amount to "ride in on the coattails"\textsuperscript{31} of those who could.

\textsuperscript{24} 306 U.S. 583 (1939).
\textsuperscript{25} Judge Timbers contends, in his dissent, that the suit was actually a case of permissive joinder rather than a class action. 469 F.2d at 1039.
\textsuperscript{26} 394 U.S. at 336-37.
\textsuperscript{27} Thompson v. Gaskill, 315 U.S. 442 (1942); Buck v. Gallagher, 307 U.S. 95 (1939).
\textsuperscript{28} 394 U.S. at 333, 336.
\textsuperscript{29} 375 F.2d 992 (5th Cir.), cert. denied, 389 U.S. 827 (1967).
\textsuperscript{30} "We are entirely sympathetic to the proposition that the amended Rule 23 "should be given a liberal rather than a restrictive interpretation . . . . Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968). . . ." 469 F.2d at 1035.
\textsuperscript{31} 469 F.2d at 1035.
The language in *Snyder* endorsing this interpretation substantially supported his conclusion.82

Judge Smith recognized that the policy of the amended Rule 23 suggested a liberal interpretation of its requirements. Nevertheless, he felt compelled by the language of the Court in *Snyder*33 to limit his focus to the Congressional purpose underlying the jurisdictional amount of 28 U.S.C. § 1332(a)—to limit the rising number of cases which come before the federal courts.84

Judge Smith declined to examine at length the increase in the judicial caseload caused by litigating the several possibly different defenses of the appellee within the single class action. Rather, he rested his position on the fact that even if no such difficulties arose, a contrary holding would require the computation of damages for an additional 196 parties. He considered this difficulty alone sufficient to contravene the intent of the statute.85 Judge Smith also considered the Advisory Committee Note36 which specifically negated the intent of using the new Rule 23 in mass tort situations. His objection to this increase in the workload of the federal courts is augmented by the fact that there is no federal claim involved in the case at all. Because the controversy was a local one, he believed that a state court would be a more appropriate forum to determine the issues.87 After weighing the various policy considerations, Judge Smith felt compelled to send the several plaintiffs of the class to the state courts to seek redress. *Zahn*, therefore, squarely holds that the failure of the unnamed members of the class to meet the jurisdictional amount is fatal to the maintenance of the 23(b)(3) class action under 28 U.S.C. § 1332(a).

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32. The Court of Appeals held, however, that a different result was compelled now that the amendment to Rule 23 abolished the distinctions between true and spurious class actions. The court held that because aggregation was permitted in some class actions, it must now be permitted in all class actions under the new Rule. We disagree and conclude . . . that the adoption of amended Rule 23 did not and could not have brought about this change in the scope of the congressionally enacted grant of jurisdiction to the district courts.

33. *Id.*

34. 469 F.2d at 1035; 395 U.S. at 339-40.

35. 469 F.2d at 1036.

36. A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

37. 469 F.2d at 1036.

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Advisory Committee Note, 39 F.R.D. 98, 103 (1966). The comment seems inapplicable to the point for which it is raised because it specifically embraces the situation in which the separate and distinct nature of the claims complicate the litigation beyond the computation of several different claims.
THE DISSENTING OPINION

Judge Timbers' initial observation was that the majority opinion reads the Snyder decision in its broadest possible application, rather than within the narrow context of its facts. It was his contention that the case could be resolved on the basis of ancillary jurisdiction. The Zahn majority addressed the potential applicability of this concept in, at best, a peripheral manner. None of the cases relied upon by the majority squarely addressed the issue. Judge Timbers explained that there are a number of situations in which the federal courts will take jurisdiction of an ancillary claim, once the initial subject matter jurisdiction has been established. The jurisdiction over the ancillary claim is not predicated on the ability of the ancillary claimant to establish jurisdiction independently. Rather, it is based on the premise that the court must be able to make proper determinations of non-federal actions inexorably bound to the litigation before the federal court. Judge Timbers traced the origin of this concept to Freeman v. Howe. In Freeman, the device was implemented for the purpose of litigating non-federal rights asserted in property held under the jurisdiction of the federal court. Since no state court could obtain jurisdiction over property so held, the Supreme Court decided to hear the state claims arising out of the cause. Freeman was limited to the situation in which the federal court's control of the property rendered the plaintiffs unable to seek redress in the state court. The Supreme Court employed the same rationale in Supreme Tribe of Ben-Hur v. Cauble, thus enabling a federal court to decide a state claim in order to effectuate its judgment in the federal cause. In Cauble, the Court held that where diversity of citizenship existed between the named complainants and the defendant in a class action, jurisdiction existed to bind all members of the class, including those members of the class who were co-citizens with the defendant. While these cases do not deal with the jurisdictional amount, their effect of loosening the threshold jurisdictional requirements should not be dismissed in the discussion of the jurisdictional amount.

Conceding that these early precedents were applicable only in relatively narrow situations, Judge Timbers traced the gradual expansion

38. Id.
40. 65 U.S. (24 How.) 450 (1861).
41. 255 U.S. 356 (1921).
42. 469 F.2d at 1036.
of the situations in which the doctrine has been applied. He pointed to Moore v. New York Cotton Exchange\textsuperscript{43} as the turning point in this expansion. In that case, the Court confronted the situation in which the original federal claim was dismissed and held that the subsequent dismissal of the original claim did not adversely affect the jurisdiction of the court over the ancillary claim.

Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, . . . does not matter.\textsuperscript{44}

The applicability of the Moore decision was significantly broadened in Hurn v. Oursler.\textsuperscript{45} There the Court expressed the belief that the compulsory nature of the counterclaim was irrelevant to the Court's consideration of ancillary jurisdiction. Relying on the established principle that the Federal Rules could not be the basis for expansion of jurisdiction, the Court reasoned that jurisdiction could not stand or fall upon a categorization made therein. Instead, the Hurn Court explained that the basis of ancillary jurisdiction is founded upon the claim itself. The test was whether the ancillary claim was sufficiently tied to the federal claim to constitute one of two grounds for a single cause of action.\textsuperscript{46}

Judge Timbers then explained that the enactment of the Federal Rules broadened the concept of a single triable case or controversy, enabling more diverse claims to meet the requirements of Hurn. He pointed to several district courts which utilized the new rules to circumvent problems involving lack of diversity of citizenship\textsuperscript{47} and jurisdictional amount\textsuperscript{48} and concluded that the Zahn decision "greatly retards" the evolutionary progress of ancillary jurisdiction.\textsuperscript{49}

Since the Zahn decision rests on the analogy to Rule 20 joinder cases, Judge Timbers noted that the recent joinder cases should be of particular importance here. He listed several such cases in which the aggregation doctrine was not used to prohibit the joinder of claims of less than the jurisdictional amount.\textsuperscript{50}

This change in position reflects the growing realization that the

\begin{itemize}
  \item 43. 270 U.S. 593 (1926).
  \item 44. Id. at 610.
  \item 45. 289 U.S. 238 (1933).
  \item 46. Id. at 245-46.
  \item 47. Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959); Formulabs, Inc. v. Hartley Pen Co., 318 F.2d 485 (9th Cir.); cert. denied, 375 U.S. 945 (1963).
  \item 48. Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3d Cir. 1968); Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971).
  \item 49. 469 F.2d at 1037.
\end{itemize}
disposition of jurisdictionally insufficient claims along with reason-
ably related claims having an independent jurisdictional basis is
expeditious and not unduly burdensome. There is, of course, a
limit on the number of claims that can be conveniently tried to-
gether, but that limit would not be exceeded by adjudicating all
the class members' claims here. 51

Johns-Manville Sales Corp. v. Chicago Title and Trust Co. 52 is repre-
sentative of the listed cases. There the court explained that the aggrega-
tion theory does not apply where one plaintiff satisfactorily pleads fed-
eral jurisdiction without reference to its co-plaintiff. The court reasoned
that where one party satisfies the amount, another party who is closely
tied to the litigation and otherwise could be joined, should not be re-
quired to meet this requirement. Forcing such a party to institute a sep-
rate suit in a state court would run contrary to the considerations of
judicial economy as well as convenience and fairness to the litigants
upon which ancillary jurisdiction is founded.

This rationale is given the more substantial support of Circuit Court
decisions cited in Judge Timbers’ dissent. 53 In Wilson v. American Chain
and Cable Co., 54 the Third Circuit found the same line of reasoning
persuasive and expressed serious doubts as to the validity of Clark v.
Paul Gray, Inc. 55 in the face of the expanding nature of ancillary jurisdic-
tion. 56 In addition to these cases cited in the opinion, Judge Timbers’
position has received more recent support in Nelson v. Keefer. 57

There the court was forced to dismiss the case for want of jurisdic-
tion because none of the plaintiffs could meet the jurisdictional amount.
The court, however, was quite clear in its support of the rationale of the
listed cases. 58 The case was a diversity action for personal injuries on the
part of three family members. The court required that only one of them
meet the jurisdictional amount.

It is appropriate to emphasize that “this court has taken the lead
in recognizing diversity jurisdiction over an entire lawsuit in tort
cases presenting closely related claims based, in principal part at

51. 469 F.2d at 1037.
53. Hartrige v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Stone v. Stone,
405 F.2d 94 (4th Cir. 1968); Wilson v. American Chain and Cable Co., 364 F.2d 558
(3d Cir. 1966); Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3d Cir. 1968).
54. 364 F.2d 558 (3d Cir. 1966).
55. 306 U.S. 583 (1939).
56. 364 F.2d at 564. “Nor do we consider persuasive those cases where the appli-
cation of pendent jurisdiction was not considered, . . . Clark v. Paul Gray, Inc.,
[citations omitted] to whatever extent it has survived United Mine Workers v. Gibbs,
[citations omitted] does not control the present case because there the individual plain-
tiffs were unrelated except in their effort to invalidate the statute assailed. . . .”
57. 451 F.2d 289 (3d Cir. 1971).
58. Supra notes 30 and 53.
least, on the same operative facts and normally litigated together, even though one of the claims, if litigated alone would not satisfy a requirement of diversity jurisdiction."

Thus, if any of the three plaintiffs meets the jurisdictional amount, we will extend hospitality to the other claims.59

While these cases can be distinguished from the Zahn situation on the basis of the number of plaintiffs involved and the close nature of the relationships among the parties (in many cases the plaintiffs were members of the same family), they do represent a growing area of exception to the rule that all plaintiffs must meet the jurisdictional amount.

Judge Timbers then turned to the analogous situations in which the federal courts have exercised pendent jurisdiction to obtain jurisdiction over an ancillary claim which could not meet federal jurisdictional requirements. Pendent jurisdiction is a specialized form of ancillary jurisdiction which is applicable when a claim arising out of the Constitution, laws or treaties of the United States is sufficiently related to a state claim to justify the conclusion that the entire matter before the court constitutes one constitutional case.60 The Supreme Court in United Mine Workers v. Gibbs stated the broadest and most complete formulation of the pendent jurisdiction doctrine to date. The test of Gibbs requires that:

The state and federal claims must derive from a common nucleus of operative fact, but if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then assuming substantiality of the federal issues, there is power in federal courts to hear the whole.61

In addition, the Gibbs decision strongly approved of a broad scope of joinder under the Federal Rules and characterized the Hurnd definition of cause of action as "unnecessarily grudging."62

This significantly expanded the doctrine beyond its initial formulation in Hurnd, illustrating another line of expansion of ancillary jurisdiction. The analogy to Gibbs is especially appealing in the Zahn fact situation because the Gibbs case dealt with jurisdiction limited by constitutional considerations whereas Zahn deals with the statutory limitation of 28 U.S.C. § 1332.

Judge Timbers reasoned that the claims of the named plaintiffs were properly before the court under section 1332(a) and that although the

59. 451 F.2d at 291.
61. 383 U.S. at 725.
62. Id.
claims of the unnamed plaintiffs failed to meet subject matter jurisdictional requirements, they could be adjudicated on the basis of pendent jurisdiction. By applying the test of Gibbs, Judge Timbers found that: The claims of the named and unnamed plaintiffs “comprise but one constitutional case;” are of a nature that they would “ordinarily be expected to be tried all in one judicial proceeding;” and arise out of the same “common nucleus of operative facts.”

Judge Timbers’ application of the pendent jurisdiction principle is supported by two recent cases: Almenares v. Wyman and Serritella v. Engleman. Both cases approve of class action treatment of pendent claims. The cases do not speak to the jurisdictional sufficiency of a diversity claim to support the initial jurisdiction upon which the pendent claim relies, since that threshold requirement in these cases was met under 28 U.S.C. § 1343(3). They do, however, reveal a liberal interpretation of Rule 23 with regard to pendent class actions. In the event that diversity jurisdiction is determined to be of a sufficiently substantial federal nature to support the pendent claims of less than $10,000, the reasoning of these cases lends support to permitting pendent claims to proceed as class actions.

The proposition that diversity jurisdiction is of a sufficiently federal nature to support pendent claims is subject to substantial criticism. It is, however, arguable that the grant of diversity jurisdiction arises out of the laws of the United States and on that basis meets the requirement of Gibbs. However, the majority of courts have refused to implement pendent jurisdiction in this context. The rationale is that since diversity cases arise out of a state cause of action, in which under Erie v. Tompkins the federal courts must apply state law, the federal courts have neither special expertise nor overriding interest in the questions of law presented. Reading Gibbs’ requirement of “assuming the substantiality of the federal issues” to relate to the nature of the cause of action, these courts have refused to exercise jurisdiction of claims pendent to diversity cases.

There is, however, a substantial minority of circuits in which such

63. 469 F.2d at 1038.
64. 453 F.2d 1075 (2d Cir.), cert. denied, 405 U.S. 944 (1971).
67. Id.
68. 304 U.S. 64 (1937).
69. 383 U.S. at 725.
claims have been allowed to be pursued in federal courts. The weight of these cases is too great for their significance to go unnoticed in the fact situation. Illustrative of the cases cited by Judge Timbers is the recent case of Lynch v. Porter in which the court distinguished between the Snyder and Zahn fact situations, holding that the doctrine prohibiting aggregation was applicable only when all plaintiffs failed to meet the jurisdictional amount and sought to aggregate their claims initially. Pendent jurisdiction was appropriate, however, if one of the plaintiffs could meet the jurisdictional amount and the other claims were sufficiently close to satisfy the test of Gibbs.

Pendent jurisdiction in a diversity action attaches to a claim when that claim, lacking in independent jurisdictional requirements, cannot be aggregated with other claims in the suit. However, the trial court may find that the ancillary claim is so closely related to the subject matter being adjudicated that considerations of judicial economy and fairness to the litigants require assumption of jurisdiction.

The case preserves the distinction between Snyder and Zahn which Judge Smith's opinion failed to acknowledge, yet which Judge Timbers found compelling.

In Snyder no member of the class had a claim that could satisfy the amount in controversy requirement; so the Court never reached the ancillary jurisdiction issue. It was for this reason that Judge Timbers found the majority's reliance upon Snyder and Clark unsupportable. Conceding the existence of a settled line of cases holding aggregation inapplicable where separate and distinct claims were involved, he asserted that no such settled line of cases supports the requirement that each member of the class satisfy the jurisdictional amount. In addition, he regarded Clark as not controlling. He reasoned that because the case predated the amendment to Rule 23 and was thus not binding on unnamed plaintiffs, it was merely a case of permissive joinder. More importantly, he felt that the precedential value of Clark had been substantially reduced by recent decisions and by the expansion of the doctrine of ancillary jurisdiction.

In the light of this distinct trend, and the Supreme Court's enthusiastic endorsement in Gibbs of the ancillary jurisdiction concept, old cases such as Clark should be wielded with discrimination. He contended that the potential burden of the additional plaintiffs

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70. Supra note 53.
71. 446 F.2d 225 (8th Cir. 1971), cert. denied, 404 U.S. 1047 (1972).
72. Id. at 226.
73. 469 F.2d at 1038.
74. Id. at 1039.
upon the federal courts should not be justification for such a restrictive
decision, noting that Gibbs gives the court wide discretion to determine
when the burden is sufficient to require that the claims be separated.
If judicial economy and fairness will not result from joining the claims,
the court can refuse to do so. Judge Timbers found the potential burden
upon the federal courts to be more than outweighed by the duplication
of state litigation and the restriction of the Rule 23(b)(3) action founded
on diversity to the extraordinary situation in which all members could
meet the $10,000 jurisdictional amount.

The decision is not compelled by Snyder and Clark, as the
[majority] opinion states. The result reached disregards the
development of a sound doctrine for more efficient and economical
judicial administration and severely impairs the efforts of those
who would modernize the federal law of class actions.76

ANALYSIS

The Snyder decision substantially crippled the applicability of the
23(b)(3) action in diversity cases. Zahn afforded an opportunity to
escape the adverse effects of the Snyder decision in the limited number
of cases in which the claims of some or all named plaintiffs exceeded the
jurisdictional amount by exercising ancillary jurisdiction over the claims
of less than the jurisdictional amount. The court of appeals refused to
do so, thereby reducing the possibility of a broad application of
23(b)(3) actions to the narrow situation in which all class members
meet the $10,000 requirement.

Many authorities had foreseen the decision of Zahn causing the argu-
ments supporting or rejecting the rationale to be well documented.78
The split of the authorities is based upon interpretation of policy con-
siderations. The arguments opposed to Zahn and Snyder have substan-
tial support in the amendment of Rule 23. The rule itself envisions
class actions to be applicable in situations where a class action would
achieve economics of time, effort and expense, and promote uniformity
of decisions.77

These notions of judicial economy are well-served by the Zahn holding
only if one focuses exclusively on the federal system. It is obvious that

75. Id. at 1040.
76. See 83 HARV. L. REV. 202 (1970); Kaplan, A Prefatory Note, 10 B. COLL. I. &
C. L. REV. 497 (1970); Bangs, Revised Rule 23: Aggregation of Claims for Achieve-
ment of Jurisdictional Amount, 10 B. COLL. I. & C. L. REV. 601 (1970); 7 C. WRIGHT &
A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1755 at 551 (1970). See also 58 KY.
L.J. 403 (1970); 79 YALE L.J. 1577 (1970). But see Mariast and Sharp, After
77. See Fed. R. Civ. P. 23 (b).
joinder under diversity jurisdiction of claims which would ordinarily be tried in state courts does not serve the purpose of judicial economy. Indeed it adds claims that are not particularly suited to federal adjudication. If, however, the judicial economy argument is expanded to encompass both state and federal courts, the duplicative litigation in a state court required by the Zahn holding must be considered. The claims against International Paper Company will be heard in both state and federal forums and the same issues will be litigated twice.

It should also be noted that the class action was developed to insure justice. Its expanding application results from the inability of small plaintiffs to overcome the burdens of instituting legal action. The class action enables such plaintiffs to aggregate the costs of attorneys' fees, court costs, and research into one sum to be divided among all members of the class. In so doing, the class action opens the judicial system to a great many plaintiffs who traditionally have been denied access to the courts. This purpose of the class action is exemplified in recent legislation in the consumer area. While the small plaintiff protection policy of the Consumer Credit Protection Act is certainly not sufficient in itself to justify a departure from judicial precedent, Mr. Justice Fortas' dissent in Snyder is a strong indication that the holding there could have allowed the Court to reinterpret the "amount in controversy." One commentator suggested that a broader reading of the statute could be easily accomplished by adopting the 23(b)(3) tests for whether the action should be heard as a class action as the basis of determining whether the claims arise out of the same cause. Such a test would be no more disruptive than were the tests promulgated in Hurn v. Oursler or United Mine Workers v. Gibbs and would not necessarily result in a flood of litigation. The Rule calls for rigorous scrutiny of the case in terms which would insure that it arises out of the same cause. Any potential flood upon the federal courts could easily be siphoned off by judicious use of the discretionary provisions within the rule itself. The court is left to decide whether the class action "is superior to other available methods for the fair and efficient adjudications of the controversy." It must be remembered that diversity jurisdiction is not solely for the convenience of the federal court.

78. J. Story, Commentaries on Equity Pleading 127-42 (5th Ed. 1852).
81. 394 U.S. at 347-50.
82. Supra note 79.
84. Id.
Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law. . . .

There are, however, factors weighing against a liberal interpretation of Rule 23(b)(3) class actions which deserve consideration. When jurisdiction is based solely on diversity of citizenship of the parties, it is arguable that the state should be allowed to decide by what method its substantive law should be enforced. In addition, the situations in which diversity jurisdiction could be manufactured are effectively limitless. Such easy access to the federal courts does conjure up visions of state courts being abandoned in the rush to the federal courthouse. This vision fades, however, in the face of the considerable discretion vested in the court by Rule 23 to refuse to adjudicate a class action when it is found to be inferior to other available means of litigating the claims. Furthermore, the states would be encouraged to implement "more suitable" remedies in the face of an available federal forum.

In addition, the Zahn court's concern with limiting the number of cases reaching the federal courts seems overly scrupulous. It has long been the established rule in class actions that only the citizenship of the named representatives is to be considered for purposes of diversity. The entire class action concept would become unworkable if the citizenship of all members of the class, many of whom are unknown, had to be considered. Were the policy of limiting the federal caseload as compelling as the majority in Zahn interprets it to be, surely that policy would call for all members of the class to meet the diversity of citizenship requirement as well. The weight of this consideration should not be lost in the discussion of jurisdictional amount.

Finally, the "floodgates" argument is considerably weakened when one examines the requirements for removal under 28 U.S.C. § 1441(c).

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

If discretion of the court is a reliable means of regulating the flow of

85. Meredith v. Winter Haven, 320 U.S. 228, 236 (1943).
88. 28 U.S.C. § 1441(c) (1948).
claims which enter the federal system by means of removal from state
courts, surely such discretion can be implemented to control the number
of claims which enter the federal system by means of class actions.

CONCLUSION

As the Zahn case approaches resolution in the Supreme Court, it
should be noted that there is compelling reasoning underlying both the
majority and the dissenting opinions. The majority position is supported
by the weight of judicial precedent. It is further strengthened by Snyder
v. Harris which contains Supreme Court dicta on the issue. The dissent,
in contrast, affords a viable alternative based upon several recent cases
revealing a trend towards a more liberal view of federal jurisdiction.

The complexities attendant upon expanding the use of 23(b)(3) class
actions are worthy of consideration. Certainly the federal courts will
be required to exercise sound discretion in determining which cases will
be allowed to proceed under the rule. However, the substantial doctrines
of fairness and judicial economy upon which the rule is based should be
found sufficient to override difficulties in its implementation.

What is called for is a decision which will finally determine whether
the class action is to be freed from the myriad restrictions that have been
placed upon its use. It is the opinion of this writer that the difficult task
of amending Rule 23 attempted to do this. If that attempt is to fail, it
cannot be justified on the basis that there is insufficient judicial precedent
to support a contrary holding. Zahn v. International Paper Company
should be reversed. Having taken jurisdiction of the entire case, the court
would then be able to examine the accompanying problems. If the facts
establish that a class action is not the best available method for the fair
and efficient adjudication of the controversy, the court could then exer-
cise its discretion and decline to hear the suit.

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