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The Tower of Zahn Stands in Loose Sand: Zahn v. International Paper Co.

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THE TOWER OF ZAHN STANDS IN LOOSE SAND: *ZAHN v. INTERNATIONAL PAPER CO.*[1]

Class action suits[2] were created for a twofold purpose:

(1) [T]o reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the

1. 414 U.S. 291 (1973).

2. The class action device was initiated in the federal system by the passage of rule 23 of the Federal Rules of Civil Procedure. The original rule 23, enacted in 1938, read in part:

> (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> (1) joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
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> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
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> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

The causes of action included in this rule were classified into three categories, commonly labeled "true," "hybrid," and "spurious," depending on the nature of the right asserted. *Advisory Committee's Note, Proposed Rules of Civil Procedure*, 39 F.R.D. 98 (1965) [hereinafter cited as *Advisory Committee's Note*]. Professor Moore, who is credited with devising these categories, explains them as follows:

> The true class suit involved principles of compulsory joinder and rights of a joint . . . character; and a judgment, whether favorable or unfavorable, was res judicata as to the class. The hybrid class suit involved rights of a several character, where the object of the action was the adjudication of claims which do or may affect specific property involved in the action; and the judgment was conclusive as to those rights insofar as they affected the property. The spurious class suit dealt with rights of a several character where there was a common question of law or fact; and the judgment was binding only upon the original parties (and their privies) and those who intervened and became parties.

3B J. MOORE, FEDERAL PRACTICE § 23.02-1, at 23-121 to 23-122 (2d ed. 1948) [hereinafter cited as MOORE.] *See also* C. WRIGHT, FEDERAL COURTS 310-11 (2d ed. 1970) [hereinafter cited as WRIGHT]. The apparent simplicity of these labels is deceptive. Courts called upon to apply them exhibited considerable confusion. Z. CHAFEE, SOME PROBLEMS OF EQUITY 257 (1950).

The 1966 amendment to the rules substantially re-wrote the rule 23 class action. It provides in part:

> (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.
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> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

rights of groups of people who individually would be without effective strength to bring their opponents into court at all.[3]

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(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(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 litigations 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.

The primary reason for the re-drafting was to substitute a functional approach in place of the artificial categories, with the new rule defining the criteria for various class actions. *Advisory Committee's Note, supra* at 98-99. Professor Moore capsulized the new rule's categories as follows:

> Revised subdivision (b) provides for three types of class actions: (1) where separate actions would create a risk of varying adjudications (A) to the party opposing the class, or (B) to the members of the class; (2) where injunctive or declaratory relief on behalf of the class is appropriate; and (3) where common questions of law or fact warrant class action. These three categories are not necessarily mutually exclusive. Indeed, at times there is much overlap.

MOORE, *supra* § 23.02-1, at 23-124.

Equally important was the change in the effect of res judicata. The new rule 23(b)(3) binds all members of the described class who do not request to be excluded (opt-out) from class membership. *See generally* WRIGHT, *supra* at 310-11. Rule 23(b)(3) in that respect contrasts sharply with its 1938 counterpart, the spurious class action, where the judgment bound only those who requested to intervene. Thus, the old spurious action was more akin to the current permissive joinder procedure (FED. R. CIV. P. 20) than to a class action suit. A class action connotes the idea of plaintiff representatives instituting an action on behalf of absent members of an alleged class. This ingredient is missing in the spurious class and is a distinction which will be central to the discussion.

Note, however, that there is disagreement on whether the three 1966 rule categories are the counterparts to the 1938 true, hybrid, spurious trichotomy. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1752, at 514-15 (1972) [hereinafter cited as FEDERAL PRACTICE AND PROCEDURE] (analogizing the categories can be dangerously wrong). Professor Moore states: "The (b)(3) action is the old spurious class action become mod. Its predecessor was an invitation to joinder, while the (b)(3) action extends a privilege to a member to opt out." MOORE, *supra* § 23.02-1, at 23-124.

3. Kaplan, *The Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 497 (1969) [hereinafter cited as Kaplan]. Professor Kaplan was the reporter to the Advisory Committee on Civil Rules from its organization in 1960 to July 1, 1966 and since then has been a member of the committee. *See also* Ford, *Federal Rule 23: A*

In December, 1973, the United States Supreme Court rendered a decision in *Zahn v. International Paper Co.*[4] which both impeded judicial economy and destroyed the diversity class action as a means by which small claimants[5] could litigate their claims. In so holding, the Court

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Device for Aiding the Small Claimant, 10 B.C. IND. & COM. L. REV. 501 (1969). Equity rules and the 1938 class action rule required affirmative action to intervene in a spurious class action. Partly motivated by the desire to eliminate the costs to small claimants, the new rule 23(b)(3) allows class members to participate in class actions without requiring costly legal representation. *Id.* at 505-07.

4. 414 U.S. 291 (1973).

5. Small claimant is an epithet widely used to describe this litigant. Two interpretations of this characterization are tenable. First, it is employed to describe the jurisdictionally adequate ($10,000) David who must battle the corporate Goliath. In this sense, the class action device is a means whereby such plaintiffs may join strength and share costs in order to meet the financial burden. In Weeks v. Bareco Oil Co., 125 F.2d 84, 90 (7th Cir. 1941), the court stated:

> To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.

In the alternative, small claimant connotes a class member with a typically small claim (less than $10,000). The following offers support to this interpretation. The 1938 spurious class action (see note 2 *supra*) resembled a permissive joinder wherein the named plaintiff had to meet the jurisdictional requirements. Once before the court, however, intervenors were free to join the action regardless of jurisdictional minimum or diversity. Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 588 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962); FEDERAL PRACTICE AND PROCEDURE, *supra* note 2, § 1755, at 552; Kalven & Rosenfield, *The Contemporaneous Function of the Class Suit*, 8 U. CHI. L. REV. 684, 704 (1941) [hereinafter cited as Kalven]. The 23(a)(3) action was functionally divided into the original parties and the intervenors. The 1966 rule 23(b)(3) sought to eliminate the need for the intervenors to retain counsel in order to seek intervention. Rather, through its "Book of the Month" type of notice procedure, the class member is included in the action by inaction on his part. Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969). Functionally, the unnamed class member is the intervenor who now is not required to act affirmatively. If under the old rule the intervenor was not required to satisfy the jurisdictional requirements, then the new rule has added nothing which would require it now.

Professor Kaplan (quoted in text accompanying note 3 *supra*) uses the phrase "small fellow" in a context which points to the "party with a small claim" category. Following the quote in the text, the professor stated "[t]he net effect of the decision [Snyder v. Harris, 394 U.S. 332 (1969)] is to disfavor the small fellow and thereby to defeat a main purpose of the Rule revision" (of which he was the reporter). Kaplan, *supra* note 3, at 498. The *Snyder* decision disallowed a class action in which no one class member had a $10,000 claim. It did not address itself to a case where the named plaintiff had a $10,000 claim. Thus, the small claimant which *Snyder* disfavored was a "less than $10,000" type, since a class with a $10,000 named plaintiff could have proceeded. Lesch v. Chicago & E.I.R.R., 279 F. Supp. 908, 912 (D. Ill. 1968).

Some convincing policy arguments have been made which point to the significant role played by class actions vis-a-vis the small (size of claim) claimant. Judge Weinstein views the availability of a national forum for small claimants as an "escape valve,

relied on dubious precedent, ignored viable alternatives, and subverted the intended purpose of the class action vehicle.

Zahn accomplished all of this by narrowly interpreting the requirement that diversity jurisdiction be limited to cases where the "matter in controversy" exceeds the sum of ten-thousand dollars.[6] While ambiguities have arisen from congressional failure to define the cryptic phrase "matter in controversy,"[7] the purpose of the amount in controversy requirement is clear. It is designed to reduce the federal caseload so that the federal judiciary might confine its attention to important matters.[8] In pursuit of the objective of caseload management, the courts have developed the "aggregation" doctrine, a concept whose roots are traceable to the decision of *Pinel v. Pinel*:[9]

> The settled rule is that when two or more plaintiffs having *separate and distinct* demands unite in a single suit, it is essential that the demand

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preventing explosive reactions during a period of boiling social change." Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 300 (1973). *See* Kalven, *supra* at 721 (effective quasi-public instrument in the contemporary administration of justice); Note, *Rule 23: Categories of Subsection (b)*, 10 B.C. IND. & COM. L. REV. 539, 546-47 (1969) (fair and efficient adjudication of the controversy, as a goal of the amended rule, should encompass small claimants).

In Dolgow v. Anderson, 43 F.R.D. 472, 495 (E.D.N.Y. 1968), the court stated:

> To assert that the minute interests of the parties before the court is a factor which militates against allowing a class action is to ignore the spirit of Rule 23. Since, as we have seen, if the plaintiff's claim is very large a class action is rendered unnecessary, the main purpose of the class action is to provide a means of vindicating small claims. It would be anomalous to hold that only major financial interests can make use of it.

The position advocated by the *Zahn* petitioners is that, once the named plaintiffs have met the jurisdictional requisite, thus compelling the court to hear their case, no purpose is served by leaving the small claimant out. Rather, it would contravene the previously mentioned policies. It was this claim which the *Zahn* Court erroneously rejected.

6. 28 U.S.C. § 1331(a) (1970) reads in part:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

7. The phrase originally appeared in section 11 of the Judiciary Act of 1789, which limited jurisdiction to controversies in which the amount involved exceeded $500. In 1887 the amount was increased to $2,000. 1911 saw the amount increased to $3,000. In 1958 the amount was increased to $10,000, as presently required under 28 U.S.C. §§ 1331-32 (1970). 414 U.S. at 293 n.1.

8. Snyder v. Harris, 394 U.S. 332, 340 (1969). *See also* 414 U.S. at 293 n.1 which stated:

> The legislative history discloses that the change was made [1958 increase in the jurisdictional amount to $10,000] "on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies . . . . The jurisdictional amount should not be so high as to convert the federal courts into courts of big business nor so low as to fritter away their time with petty controversies."

9. 240 U.S. 594 (1916).

> 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 and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.[10]

The *Zahn* majority utilized this "separate and distinct" aggregation test to serve the coup de grâce to recent trends in federal diversity class actions.

In *Zahn*, the Supreme Court was confronted with a novel situation. It was called upon to interpret the "matter in controversy" jurisdictional requirement in a class action which, unlike previous cases, was composed of *named* plaintiffs, all of whom met the jurisdictional minimum, and *unnamed* class members, many of whom did not meet the jurisdictional minimum.[11] It was not being asked to radically overturn the aggregation principles of *Pinel*, but, on the contrary, to apply *Pinel* to the named plaintiffs and to relax the interpretation of the jurisdictional statute vis-a-vis the unnamed members. The majority decided to apply the traditional construction of the aggregation doctrine to named and unnamed class members alike.[12]

The Court's decision was influenced by rule 82[13] and congressional re-enactment[14] arguments which it found to be insurmountable obstacles to the relaxation of the "matter in controversy"[15] requirement. A closer investigation, however, reveals that these obstacles were surmountable, that much of the majority opinion is based on precedent which is of dubious value, that the ancillary jurisdiction analysis

10. *Id.* at 596 (emphasis added).

11. In *Zahn*, four lakefront property owners instituted a class action suit under the Federal Rules of Civil Procedure on behalf of themselves and two hundred other similarly situated property owners. 414 U.S. at 291-92. The plaintiffs alleged property damage stemming from the defendant's New York paper-making plant's discharge into a river which emptied into Lake Champlain, Vermont, around which the plaintiffs' property was situated. Federal jurisdiction rested on the federal diversity statute, 28 U.S.C. § 1332 (1970), which provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 . . . and is between— (1) citizens of different states . . . .

The United States District Court for the District of Vermont ordered the action not to proceed as a class action because the $10,000 jurisdictional requirement was not satisfied by some members of the class, *i.e.*, many of the *unnamed* plaintiffs. Zahn v. International Paper Co., 53 F.R.D. 430, 432-34 (D. Vt. 1971). The United States Court of Appeals for the Second Circuit upheld the decision. Zahn v. International Paper Co., 469 F.2d 1033, 1034 (2d Cir. 1972). Ultimately, the United States Supreme Court sustained the lower court decisions. 414 U.S. at 292-93.

12. 414 U.S. at 301.

13. See text accompanying notes 16-17 *infra*.

14. See text accompanying note 18 *infra*.

15. 414 U.S. at 300-01.

made by the dissenters has more merit than the majority recognized, that *Zahn* will not contribute to the management of the federal caseload, and that the aftershocks of *Zahn* may be devastating to class actions.

RULE 82 AND RE-ENACTMENT

Rule 82 provides in part that the Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States District Courts." Since the "matter in controversy" requirement is jurisdictional, any interpretation of rule 23 (the federal rule governing class actions) that purports to relax the definition of "matter in controversy" would clearly exceed the limits of rule 82.[16] This was the conclusion drawn in *Snyder v. Harris*,[17] a decision which significantly influenced Justice White's majority opinion in *Zahn*. In conjunction with this conclusion, the *Snyder* Court reasoned that the "separate and distinct" aggregation doctrine launched by *Pinel* had been legislatively adopted in the form of congressional re-enactments of the "matter in controversy" requirement, all in apparent recognition of the judicial gloss placed upon it. Since judicial gloss had been silently transformed into *statutory* authority, the aggregation doctrine could only be amended by congressional action.[18]

Despite the complete absence of any statutory language adopting the *Pinel* doctrine and despite the absolute failure of anyone in the entire course of the legislative history to even mention that approach, the *Snyder* court divined that, "The settled judicial interpretation of 'amount in controversy' was *implicitly* taken into account by the relevant congressional committee . . . ."[19] This startling conclusion was fortified by the speculative observation that, "It is quite possible, if not probable, that Congress chose the increase to $10,000 rather than the proposed increases to $7,500 or $15,000 on the basis of workload estimates which clearly relied on the settled doctrine that separate and distinct claims could not be aggregated."[20]

16. Snyder v. Harris, 394 U.S. 332, 337 (1969).

17. 394 U.S. 332 (1969). The 23(b)(3) class action was brought by one named plaintiff on behalf of herself and all others similarly situated. The named plaintiff's claim fell short of the jurisdictional $10,000 minimum. The Court refused to aggregate the claims of the class to reach the jurisdictional requisite.

18. 414 U.S. at 300.

19. 394 U.S. at 339 (emphasis added).

20. *Id.* In essence, Justice Black's reasoning was that Congress had the *Pinel* doctrine's application to rule 23 actions in mind when it arrived at the $10,000 figure. But for *Pinel's* applicability to class actions, Congress would have established a

Surely there is force in the dissenting remarks of Justice Fortas:

> " 'It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.' It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law . . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases."[21]

Even if the re-enactment reasoning were unassailable, it is by no means clear that the *Pinel* doctrine should have controlled the result in *Zahn*. The thrust of the majority was that the Court should not modify past judicial constructions which have crystallized into legislative adoptions.[22] But there is precedent which stands for the opposite proposition. For example, 28 U.S.C. § 1332 requires both a "matter in controversy" exceeding ten-thousand dollars *and* citizens of different states. The diversity of citizenship requirement is as much

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higher jurisdictional amount—say $15,000. Justice Black would then conclude that removal of *Pinel* from the 23(b)(3) class actions would increase the federal workload beyond the level envisioned by Congress.

A decision of such dimensions requires much greater documentation than the casual speculation about congressional motives that *Snyder* offered. The *Pinel* factor was not demonstrably considered by Congress. Actually, the increase of the jurisdictional amount from $3,000 to $10,000 reflected an intent to reduce that portion of the federal judicial workload which resulted from economic inflation. *See* U.S. CODE CONG. & AD. NEWS, 85th Cong., 2d Sess. 3101 (1958).

> The present requirement of $3,000 has been on the statute books since 1911 and obviously the value of the dollar in terms of its purchasing power has undergone marked depreciation since that date. The Consumers Price Index for moderate income families in large cities indicates a rise of about 152 percent since 1913, shortly after the present $3,000 minimum was established. It is apparent that since $3,000 was the smallest amount that was considered substantial in 1911 for problems of Federal jurisdiction, there is today no substantiality in such an amount for jurisdictional problems. Accordingly the committee believes that the standard for fixing jurisdictional amounts should be increased to $10,000.

Id.

Even if Justice Black's perception of congressional intent were accurate, the *Zahn* situation can be shown to fall outside the Black rationale. The congressional analysis of the federal workload was limited to the study of the increase in *number* of cases. *Id.* at 3105-35. In the *Snyder* situation, if aggregation were allowed the case would have met jurisdictional requirements. If aggregation were not permitted, the case would not have received federal judicial attention. *Pinel's* applicability in such a case would be directly responsible for a decline in the federal workload. However, in the *Zahn* situation, whether *Pinel* applied or not, the named plaintiffs who qualify for federal jurisdiction are properly before the court, whether as part of a class action or individual actions. The net result is that the workload—the number of cases—is not affected by the *Pinel* doctrine. Paradoxically, *Zahn* may likely result in an unnecessary increase of the federal workload. See notes 71-77 *infra* and accompanying text.

21. 394 U.S. at 348, *quoting* Giravard v. United States, 328 U.S. 61, 69-70 (1946), and *citing* Helvering v. Reynolds, 313 U.S. 428, 432 (1941). *Cf.* Massachusetts Trustees v. United States, 377 U.S. 235, 241 (1964) (requiring a showing that Congress "advertently addressed itself" to the issue).

22. See text accompanying note 18 *supra.*

statutory in nature as the "matter in controversy" requirement. Yet, the Supreme Court, in *Supreme Tribe of Ben Hur v. Cauble*,[23] interpreted the jurisdictional requirements with flexibility to allow federal diversity jurisdiction in a class action despite intervention by non-diverse plaintiffs.[24] *Zahn*, read together with *Supreme Tribe of Ben Hur*, reveals a curious anomaly: unnamed plaintiffs must meet the required jurisdictional *amount* because of the statutory language (albeit with a generous reading of the legislative history), but unnamed plaintiffs need not meet the jurisdictional *diversity* requirements despite the statutory language. Thus, even if the re-enactment analysis of the court were acceptable, the *Zahn* decision is difficult to square with *Supreme Tribe of Ben Hur*, nor can it be persuasively argued that the *Zahn* result is required by other decisions of the Court.

DUBIOUS PRECEDENT RELIED UPON

Beginning with *Snyder*, much of the precedent relied upon by the *Zahn* majority is of questionable value. In *Snyder*, the named plaintiff had stated claims which fell short of the "matter in controversy" requirement.[25] She asked the court to aggregate the claims of all the members in the diversity rule 23(b)(3) class suit.[26] The majority, relying on traditional aggregation doctrines,[27] the re-enactment doctrine,[28] and rule 82,[29] denied the class action suit.[30]

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23. 255 U.S. 356 (1921).

24. *Id.* at 363-66.

25. 394 U.S. at 333-34.

26. *Id.* at 333.

27. See text accompanying notes 9-10 *supra*.

28. See text accompanying note 18 *supra*.

29. See text accompanying notes 16-17 *supra*.

30. 394 U.S. at 336-41. Another obstacle to the relaxation of the "matter in controversy" requirement in rule 23 class actions which was recognized in *Snyder* was that such an extension would necessarily extend to rule 20 permissive joinders and rule 18 joinder of claims. *Id.* at 340. Those provisions provide in part:

> 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.

FED. R. CIV. P. 20(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.

FED. R. CIV. P. 18(a).

In light of the post-1966 res judicata changes, which involve all 23(b)(3) members who do not "opt-out" from being bound by the judgment, an extension to Rules 18 and

The difficulty with the employment of *Snyder* as precedent in *Zahn* is that the named plaintiff in *Snyder* did not meet the requisite jurisdictional amount. By contrast, in *Zahn* each of the named plaintiffs was in compliance. The *Snyder* plaintiff was seeking to change the aggregation doctrine of *Pinel* in order to achieve the jurisdictional minimum. In *Zahn,* the court already had jurisdiction over the claims of the four named plaintiffs. The *Zahn* petitioners sought not the total avoidance of the aggregation rule, but only a reexamination of the doctrine as it applied to unnamed class members and, alternatively, application of ancillary jurisdiction principles to the case. Distinguishable on these facts, the statements of law from *Snyder* seem inapplicable to *Zahn,* where the named plaintiffs did not need to aggregate to reach the jurisdictional minimum.[31]

An indication of the inapplicability of *Snyder* to unnamed plaintiffs is the majority's inability to isolate *any* language in *Snyder* applying the holding to unnamed plaintiffs.[32] The major thrust of *Zahn* is that *Snyder* is applicable to unnamed as well as to named plaintiffs; yet, incredibly, the only language making this attenuated connection is relegated to a footnote:

> The dissent recognizes that *Clark* requires the dismissal of any named plaintiff in an action whose case does not satisfy the jurisdictional amount. But apparently unnamed members of the class would enjoy advantages not shared by the named plaintiffs since their separate and distinct cases would be exempted from the jurisdictional amount requirement. Why this should be the case and how this squares with *Clark* or with *Snyder v. Harris* are left unexplained. We simply apply

20 may seem logical if other procedural devices in which all the parties before the court were also bound by the judgment are to be accorded equal treatment.

Such an extension becomes less compelling, however, if the joinder concept is contrasted with the rationale of class actions, *i.e.,* making a forum available for small claimants, *and* the inherent guarantees of efficiency built into the class action criteria which are not built into the joinder concept.

31. Prior to *Snyder,* the interpretation of the jurisdictional requirement in rule 23 actions was that only the *named* plaintiffs were compelled to attain the jurisdictional amount without aggregation, unless the right asserted was common. *See generally* FEDERAL PROCEDURE AND PRACTICE, *supra* note 2, at 565. If *Snyder* had intended to radically alter this procedure, it would undoubtedly have been explicit in its language. Yet, many commentators disagreed on the impact of *Snyder,* which is a further indication of the lack of intent to drastically modify the status quo ante. *See, e.g.,* Kaplan, *supra* note 3, at 498 (holding applied to *representatives* of the class only).

32. In *Snyder,* the application of the aggregation principles to unnamed class members was not even an issue. The case involved one named plaintiff with a claim below the jurisdictional minimum. 394 U.S. at 333. In accord with established precedent, that factor was dispositive of the case without necessitating analysis of the unnamed members' claims.

> the rule governing named plaintiffs joining in an action to the unnamed members of a class, *as Snyder v. Harris surely contemplated.*[33]

This inability to point to specific language from *Snyder* forces the majority to superimpose the *Snyder* conclusions over the different *Zahn* facts. The Court cites in abundance other authorities which highlight the phrase "each plaintiff must" (or equivalent language).[34] The extraction of this phrase from several cases cited in *Zahn* illustrates why their value as precedent is problematical. In cases which predate the 1938 Federal Rules of Civil Procedure, the "plaintiff" reference is made to a named party, since no class actions yet existed.[35] Sometimes the language arises in the context of a class action, but in a pre-1966 context where again there were no unnamed parties.[36] Finally, language was extracted from *Clark v. Paul Gray, Inc.*,[37] a case which arguably is not even a class action; however, the Court cites it as central to its holding, making it the link between joinder principles and class actions.[38]

The reliance of the *Zahn* and *Snyder* majorities on *Clark* is crucial because it is alleged that this was the case which first applied the "separate and distinct" aggregation doctrine to class actions.[39] In *Clark*, several individuals, co-partnerships, and corporations joined to challenge a California statute.[40] The Court found that only one plaintiff satisfied the "matter in controversy" minimum and, therefore, dismissed the others from the action.[41]

Clark would be ideally suited to the needs of the *Zahn* and *Snyder* analysis as a bridge between the older joinder cases and the newer class action device.[42] Without this link, there are but two shores. On one lies an abundant source of precedent on "separate and distinct" aggregation. On the other shore, there are class action procedures with named and unnamed plaintiffs. If *Clark* is not a class action case, it becomes but another pebble on the joinder shore. Chief Judge

33. 414 U.S. at 300-01 n.9 (emphasis added).

34. See notes 35-37 *infra.*

35. *See* 414 U.S. at 293-94, *citing* Troy v. Whitehead, 222 U.S. 39, 40-41 (1911).

36 *See* 414 U.S. at 296, *citing* Steele v. Guaranty Trust Co., 164 F.2d 387, 388 (2d Cir. 1947).

37. 306 U.S. 583 (1939).

38. *See* 414 U.S. at 295-96. See also text accompanying notes 42-44 *infra.*

39. 394 U.S. at 336-37; 414 U.S. at 295.

40. 306 U.S. at 586-87.

41. *Id.* at 589-90.

42. "Both *Troy Bank* and *Pinel* were joinder cases, but *Snyder* stated that *Clark* applied this joinder doctrine to class actions . . . ." 53 F.R.D. at 431 (emphasis in original).

Leddy, who wrote the majority opinion in *Zahn* at the district court level, remarked: "[w]e confess that we can find nothing in the official report of *Clark* clearly indicating that it was, in fact, a class action."[43]

Several details corroborate the position that *Clark* was not a class action suit. First, if a class action is dismissed, leaving only individual claims, the omission of language "dismissing the class action" is peculiar. In the *Zahn* district court opinion there is such language;[44] in the *Clark* opinion there is not. Another detail which supports the position that *Clark* was not a class suit is the date of the decision. The case was decided by the United States Supreme Court in April, 1939. The original action was probably filed in 1938 or earlier. This substantially reduces the probability that the action was filed pursuant to the Federal Rules of Civil Procedure, enacted only in July of 1938. Furthermore, rule 23, then a new creation of the Supreme Court, would naturally have invited comment. Again, not one isolated reference to rule 23 or to class actions is to be found in the decision—a significant omission, surely significant enough to give one pause before citing *Clark* as an insurmountable obstacle to the petitioners' demands in *Zahn*.

The *Zahn* majority also cites *Steele v. Guaranty Trust Co.*[45] and *Hacker v. Guaranty Trust Co. of New York*[46] for the proposition that a spurious class action is, in effect, " 'but a congeries of separate suits so that each claimant must, as to his own claim, meet jurisdictional requirements.' "[47] This again is misleading. Taken in a light most favorable to the *Zahn* majority, it means that each plaintiff must satisfy jurisdictional requirements. Under the pre-1966 rule 23(b)(3) action, the only category of plaintiffs which existed was that of *named* plaintiffs.[48] As a condition precedent to membership in the class, the potential member had to petition the court to intervene. Each potential class member's credentials were reviewed by the court prior to admission into the class. Under the amended rule 23 (1966), the named plaintiff representatives bind the entire class without prior intervention. In fact, the new rule binds all members of the described class

43. *Id.*

44. "Accordingly, it is hereby ordered that reference to all persons other than the four named plaintiffs be stricken from the complaint and that this action not be permitted to proceed as a class action." *Id.* at 434.

45. 164 F.2d 387 (2d Cir. 1947).

46. 117 F.2d 95 (2d Cir. 1941).

47. 414 U.S. at 296, *quoting* Steele v. Guaranty Trust Co., 164 F.2d 387, 388 (2d Cir. 1947).

48. *See* note 2 *supra.*

who do not specifically request to be excluded from class membership. Thus, the conclusion that pre-1966 courts were applying the *Pinel* doctrine to post-1966 forms of plaintiffs is untenable. The amendment to rule 23 created a new procedural context and a type of plaintiff neither countenanced nor controlled by pre-1966 precedents.

ANCILLARY JURISDICTION

The dissenting opinions of Justice Brennan and Judge Timbers adamantly point out that the respective courts neglected a viable alternate theory for finding jurisdiction—ancillary jurisdiction.[49] It is disturbing that neither the Court of Appeals nor the Supreme Court addressed a response to the extensive discussion of this concept by both dissenting opinions. The ancillary jurisdiction analysis of the dissenters is unassailable and need only be capsulized and complemented with some cases which clarify the position and further buttress it.

Judge Timbers relied heavily on *United Mine Workers v. Gibbs*.[50] In *Gibbs*, the plaintiff stated claims, arising out of the same facts, alleging violation of both federal and state law.[51] Jurisdiction over the state claim was based on pendent jurisdiction, a close relative to ancillary jurisdiction.[52] The Supreme Court concluded:

> Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties . . . . Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made" . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case". . . . The state and federal claims must derive from a common nucleus of operative facts. 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.[53]

The *Gibbs* rationale may be attacked on the basis that it is addressed to a distinguishable issue: whether a federal court may extend its jurisdiction to claims presented by the plaintiff cognizable under

49. 414 U.S. at 305-09 and 469 F.2d at 1036-40 respectively.
50. 383 U.S. 715 (1966).
51. *Id.* at 717-18.
52. *Id.* at 725-29. *See* WRIGHT, *supra* note 2, at 19-21, for the subtle distinction between the ancillary jurisdiction concept and its variant application, pendent jurisdiction.
53. 383 U.S. at 724-25.

state but not federal law. *Zahn* treats the problem of "additional parties" as opposed to additional claims by a party properly before the court. This objection may be overcome.

In a case dating back to 1866, the Supreme Court stated that the presence of "parties" over whom jurisdiction could not have been obtained independently does not forbid the court from proceeding.[54] "For such proceeding should be treated as incidental to the jurisdiction thus acquired, and auxiliary to it. . . ."[55]

More recently the Fourth Circuit confronted the same issue in *Stone v. Stone*.[56] In that case, the plaintiff stated claims against three defendants which individually fell short of the jurisdictional $10,000 minimum. The majority reversed the trial court and held that two claims against the one defendant could be aggregated to meet the jurisdictional minimum.[57] Next, an analogy to the *Gibbs* case was recognized which resulted in the court's exercise of ancillary jurisdiction over the remaining defendants.[58] After discussing the *Gibbs* concept of "nucleus of operative facts," the court concluded:

> We find significance in the Court's emphasis on whether the "entire action" may be viewed as "but one constitutional 'case'," and are persuaded . . . that the same question should be asked in multi-claim diversity cases. If the entire lawsuit before us may be viewed as a single constitutional "case," the District Court could have taken jurisdiction . . . .
>
> Justice Brennan [in *Gibbs*] explicitly stated the factors that are critical in determining whether a single "case" is involved. The court thought that considerations of judicial economy, convenience, and fairness should govern . . . .[59]

Even more recently, the Supreme Court had occasion to comment on the *Gibbs* ancillary-pendent jurisdiction doctrine. In *Moor v. County of Alameda*,[60] the plaintiffs sought to invoke ancillary jurisdiction over a defendant who had not met the jurisdictional requirement.[61] The dis-

54. Phelps v. Oaks, 117 U.S. 236 (1886).
55. *Id.* at 241.
56. 405 F.2d 94 (4th Cir. 1968).
57. *Id.* at 96.
58. *Id.* at 97-98.
59. *Id.* at 98.
60. 411 U.S. 693 (1973).
61. The defendant, Alameda County, avoided plaintiffs' jurisdictional claims by contending that it was not a suable person for the purpose of the Civil Rights Act, under which it was being sued. *Id.* at 707. This failure to establish jurisdiction independently over the county made it necessary for the plaintiff to put forth an ancillary jurisdiction theory based on the jurisdiction that had been properly established over another defendant. *Id.* at 711.

trict court declined to exercise jurisdiction.[62] The Supreme Court, recognizing the dual nature of ancillary jurisdiction, power and discretion, upheld the district court's decision as a proper exercise of its discretion.[63] But in dictum, the court stated:

> As to the question of judicial power, the District Court and Court of Appeals considered themselves bound by the Ninth Circuit's previous decision in *Hymer v. Chai* wherein the court refused to permit the joinder of a pendent plaintiff . . . . It is true that numerous decisions throughout the courts of appeals since *Gibbs* have recognized the existence of judicial power to hear pendent claims involving pendent *parties* where the "entire action before the court comprises but one constitutional 'case'" as defined in *Gibbs*. *Hymer* stands virtually alone against this post-*Gibbs* trend in the courts of appeals, and . . . was largely based on . . . a decision which predated *Gibbs* . . . . Moreover, the exercise of federal jurisdiction over claims against parties as to whom there exists no independent basis for federal jurisdiction finds substantial analogues in the joinder of new parties under the well-established doctrine of ancillary jurisdiction in the context of compulsory counter claims . . . and in the context of third-party claims . . . .[64]

If the *Zahn* court had allowed jurisdiction over the claims of the unnamed class members, the purpose of the ancillary jurisdiction doctrine[65] would have been well-served. The proceeding would have promoted judicial economy and fairness by litigating all of the related claims in one court; instead, piecemeal litigation was fostered. As for the fear that the federal courts will be overtaxed, that possibility is remote since the court is vested with several checking mechanisms. Ancillary jurisdiction is discretionary;[66] therefore, the court can decline to exercise it when it fears abuse. Furthermore, the "nucleus of operative facts" test established by *Gibbs*[67] further limits the application of an-

62. *Id.* at 697.

63. *Id.* at 712-15.

64. *Id.* at 713-15 (citation omitted and emphasis in original). The court is quick to indicate the unsettled state of the law in this area, however:

> [T]he County counsels that the Court should not be quick to sweep state law claims against an entirely new party within the jurisdiction of the lower federal courts which are courts of limited jurisdiction—a jurisdiction subject, within the limits of the Constitution, to the will of Congress, not the courts. Whether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far-reaching implications. But we do not consider it appropriate to resolve this difficult issue in the present case.

Id. at 715.

65. It promotes judicial economy and convenience. 383 U.S. at 727.

66. *Id.* at 726. Here the Court applied pendent jurisdiction and recognized its discretionary nature. Note that pendent jurisdiction is a cousin to ancillary jurisdiction. *See* note 52 *supra*. *See also* 28 U.S.C. § 1441(c) (1970) which expressly delineates the ancillary jurisdictional feature of the removal statute as discretionary.

67. See text accompanying note 53 *supra*.

cillary jurisdiction. Finally, when the doctrine is applied in class actions, rule 23 itself provides a multitude of internal checks against abuse.[68] One court summed it up well in *Almenares v. Wyman*[69] when it said:

> This is sufficient to vest the court with subject-matter jurisdiction not merely over their primary claim but also over their pendent claims . . . whether against the defendant to the primary claim or another. We see no valid distinction in the *power* of the court to join additional plaintiffs. Neither do we perceive any inherent limitation that makes Rule 23 *per se* inapplicable to a pendent claim so long as the claim meets the *Gibbs* test of a "common nucleus of operative facts" with the primary claim as well as those of Rule 23 itself.[70]

AFTERMATH OF ZAHN

A. Judicial Workload

The looming presence of *Supreme Tribe of Ben Hur* perhaps explains the unwillingness of the Court to relax construction of the matter in controversy requirement. In *Snyder*, Justice Black expressed concern that one of the two floodgates of diversity jurisdiction had already been relaxed in *Supreme Tribe of Ben Hur*.[71] If the limiting effect of the aggregation doctrine were also lifted, then the federal caseload would expand beyond reasonable bounds.[72] These are the practical overtones in both *Snyder* and *Zahn*, but reduction of the federal workload will not likely be accomplished by this decision.[73] A probe into the probable consequences of *Zahn* discloses that the burden in some cases may have been increased, not reduced. Consider the following hypothetical: Twelve named plaintiffs have claims over $10,000 each, based on state law. They institute a rule 23(b) (3) class suit in federal court based on diversity jurisdiction. The unnamed

68. See note 2 *supra*.

69. 453 F.2d 1075 (2d Cir. 1971).

70. *Id.* at 1084 (footnote omitted).

71. In expressing this concern Justice Black stated:

> Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. To allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into federal courts numerous local controversies involving exclusively questions of state law.

394 U.S. at 340.

72. *Id.*

73. The *Zahn* majority relies on *Snyder* to a great extent; and *Snyder*, in part, rests on the practical need to prevent the federal caseload from being overburdened. *Id.* at 339-41.

members of the class consist of one-hundred plaintiffs with $1,000 claims each. Guided by the *Zahn* holding, the district court would dismiss the class action suit for failure to satisfy jurisdictional requirements. Result: the federal judiciary would be required to hear as many as one to twelve actions[74] filed in different courts if the geographical distribution of the diverse plaintiffs places them in different districts and if they do not themselves seek to join in one action. Even if the cases are ultimately forced to consolidate, the effort expended in hearing motions for consolidations and for forum changes will have further taxed the federal workload. Could it then be truly said that the burden on the federal court, not to mention the burden on the judicial system as a whole,[75] has been significantly reduced?

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74. In *Zahn*, the court still had to hear the claims of the four remaining plaintiffs who chose to join in one action. 469 F.2d at 1039.

75. A tangential issue which may affect the judicial system as a whole is the effect *Zahn* will have on the statute of limitations. In Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968), the court addressed itself to the statute of limitations aspect of a 23(b)(3) class action suit. When the class action is not allowed, should a member of the alleged class be precluded from instituting an individual action if the statute of limitations period has lapsed? The answer, according to that court, is that it depends on the reason for which the class is denied. If the class action is denied because of failure to meet the criteria established in rule 23 or some 23(b)(3) technicality, then the statute of limitations is not tolled. *Id.* at 461.

> If there never really was a class to be represented, members of the purported class can scarcely be heard to claim that they started suit, vicariously, before the limitations period expired. But if the reason for the negative determination stems from a weighing of various considerations of judicial housekeeping, . . . an opportunity should be presented for proof of reliance upon the pendency of the purported class action sufficient to toll the statute of limitations.

Id. The issue becomes whether a finding that some members of the purported class do not meet federal jurisdictional requirements will be treated as if there was not a class from the inception. Such a finding is plausible since, after the *Zahn* decision, a class will be understood as a collection of plaintiffs where each meets the jurisdictional sum individually. If such is the finding, then the statute of limitations would not be tolled and the subsequent individual actions would be barred. As a foreseeable consequence, class members will in the future routinely file parallel individual state actions.

Philadelphia Electric has been cited favorably in the recent United States Supreme Court case of American Pipe & Construction Co. v. Utah, 414 U.S. 538, 550 n.20 (1974). The *American Pipe* Court's narrow holding stated that, where a class is established but is found to be not numerous enough, the statute of limitations will be tolled. *Philadelphia Electric* turns on whether there is a class in the first instance. Consequently, a finding by *Zahn* standards that no class exists would result in the continued running of the limitation period. *See* Buford v. American Finance Co., 333 F. Supp. 1243 (N.D. Ga. 1971), which said of this problem:

> It would be inconsistent with the purpose of Rule 23 to insist that in every lawsuit in which a plaintiff seeks to maintain a class action, the proposed members of the class file precautionary individual actions.

Id. at 1252. As stated, the fear of likely failures of rule 23 actions in the future will result in class members increasingly resorting to this safety valve.

Moreover, the mechanics required by the *Zahn* procedure will contribute to the federal workload. Under pre-*Zahn* procedure, the court was required to define the composition of the class by some objective criteria. Post-*Zahn* courts will be called upon to define the class as possessing some common denominator and, additionally, as having a $10,000 per individual claim. This prerequisite for the existence of a class will create additional litigation for the federal courts. But more importantly, how and when will this evaluation be made? The *Zahn* district court opinion reflected upon this imponderable:

> Indeed, we think this problem is insuperable in the case at bar, for we can find no appropriate class over which we have jurisdiction. A class defined as all lakefront landowners and lessees in the towns of Orwell, Shoreham, and Bridport having $10,000 in controversy would not be feasible. The class would have to be further defined either before or after trial on the liability issue. A determination before trial of the landowners actually encompassed within this class would require the unnamed class members to appear and at least plead, and perhaps prove facts substantiating, an amount in controversy. This would eliminate any advantage of a class action over joinder; a class action would therefore not be properly maintainable because class treatment would not be "superior to other available methods for the fair and efficient adjudication of the controversy," as required by Rule 23(b)(3). Nor could further definition of the class be postponed until after trial on the liability issue. . . . [I]f liability were found not to exist in the case at bar, the res judicata effect of the judgment would depend on an evaluation at some future date of whether a given class member had $10,000 in controversy at the time of this action. This is clearly an impossible task. And if liability were found to exist, the question of jurisdiction would be hopelessly intertwined with the determination of damages, despite the fact that the "inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction."[76]

A related problem is the invitation to abuse created by this new procedure. *Zahn* permits members to maintain a low profile until the outcome of the case. If the verdict is favorable, then these plaintiffs appear before the court, allege a $10,000 injury, and claim membership in the class for the purpose of sharing in the judgment. If, however, the decision is adverse, these same plaintiffs will appear in state court with a $9,000 claim, in which case res judicata will not operate to their detriment. Such optional membership is difficult to reconcile with

76. 53 F.R.D. at 433-34, *quoting* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

the class action concept.[77]

B. *Federal Question Statute*

Aside from the increased burdens placed on the federal judiciary, *Zahn* has left its imprints on other areas of the law. One such area is the companion to the diversity jurisdiction statute, the federal question statute.

Since *Zahn* was a diversity case, most attention was drawn to 28 U.S.C. § 1332;[78] however, the holding claimed to govern the meaning of the "matter in controversy" requirement, which also appears in the federal question jurisdiction statute—28 U.S.C. § 1331.[79] In substance, the choice of the "matter in controversy" requirement as the vehicle to redress the alleged abuse of federal diversity jurisdiction[80] will also restrict the availability of federal courts in class action cases arising under the Constitution or federal laws.

C. *Removal Statute*

In addition to the impact on the federal question jurisdictional stat-

77. Under the 1938 rule 23, it was possible in some cases to await the outcome of the case and then, if favorable, the party would intervene and benefit from that judgment. If the disposition was unfavorable, intervention would not be sought, but rather, the bystander would file a separate action. In the latter case, res judicata would not preclude the suit. This "one way" intervention was remedied in the new rule 23(b)(3) class action mechanism by way of the rule 23(c)(3) negative notice feature—the party is bound unless he requested to be excluded before the suit's outcome. *Advisory Committee's Note, supra* note 2, at 105-06. *See also* WRIGHT, *supra* note 2, at 314.

78. See note 11 *supra.*

79. 414 U.S. at 302 n.11. For the text of section 1331, see note 6 *supra.* Justice Brennan, in his dissent in *Zahn*, questions the efficacy of this argument. He stated:

> The Court also observes, quite correctly, that the same rule on aggregation has been applied to the federal question jurisdiction, 28 U.S.C. § 1331. But the assertion, in the Court's final footnote, that the same jurisdictional rules it announces for § 1332 will apply to § 1331, is even more questionable than its application of those rules in this case. The continued need for exercise of the diversity jurisdiction, at least where a showing of prejudice is not made, has been challenged by respected authorities. But a sharply different view has been taken of the federal question jurisdiction, and the Court has reflected that view in its decisions upholding the exercise of jurisdiction over pendent claims under state law. Similarly significant disincentives to assertion of federal rights in federal forums are likely if claimants are barred from combining to reduce the time and cost of litigation.

414 U.S. at 304 n.5 (citations omitted).

80. The *Snyder* court stated concern for the ease of access to and use of federal courts where state courts were equally available and could have been utilized. 394 U.S. at 339-41. If curtailing this practice was the end sought in *Zahn*, then the means selected, *i.e.*, "matter in controversy," was too broad because it restricted federal question class actions as well as those arising out of diversity.

ute, the *Zahn* holding yields results which will be inconsistent with the operation of the removal statute.[81] It would be incongruous if four named plaintiffs were unable to bring a class action, as in *Zahn*, yet, if the action were removed under 28 U.S.C. § 1441, the court could exercise ancillary power over all those claims which do not meet the jurisdictional requirements.

Biechele v. Norfolk & Western Railway Co.[82] is a good example. In that case, the plaintiffs brought a class action against the defendant based on nuisance.[83] The defendant had the action removed to the federal district court pursuant to 28 U.S.C. § 1441(c).[84] The district court held that there were two class actions: the first, under rule 23(b)(1) and (2), for injunctive relief and the second, under rule 23(b) (3), for past damages.[85] The right to live in a clean environment was valued at over $10,000 for purposes of injunctive relief.[86] Then, the claim for damages was also removed under 28 U.S.C. § 1441(c), even though the monetary damages were less than $10,000.[87]

The same result might also be reached by using the *Stone v. Stone* analogy[88] and applying ancillary-pendent jurisdiction principles to encompass additional "parties" within the court's jurisdiction. But this would not even be necessary in the present case. In *Zahn*, the class could seek both past damages and injunctive relief. The injunctive relief would satisfy the jurisdictional requirement[89] and the ancillary jurisdictional power in the statute would permit removal of the damages claim too.

The removal procedure can only be initiated by the defendant,[90]

81. 28 U.S.C. § 1441 (1970), reads in part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending . . . .

. . . .

(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.

82. 309 F. Supp. 354 (N.D. Ohio 1969).

83. *Id.* at 355-58.

84. *Id.* at 355.

85. *Id.*

86. *Id.*

87. See note 81 *supra.*

88. See text accompanying notes 56-59 *supra.*

89. *See* WRIGHT, *supra* note 2, at 117-19.

90. 28 U.S.C. § 1441(c) (1970) (see note 81 *supra*).

but removals will occur,[91] and when they do, courts will be faced with this new problem.

Possibly Congress will respond to *Zahn* with an amendment to the diversity jurisdiction statute[92] which would permit rule 23 class actions to be maintained if the jurisdictional requirements are met by the named plaintiffs. By requiring the named plaintiffs to satisfy the jurisdictional minimum, the federal court limits its jurisdiction to such cases which, but for the class action, would have reached its docket anyway.

CONCLUSION

It is unfortunate that the Court concluded as it did in view of the many alternate theories and approaches available to it. If the *Zahn* Court had allowed class action suits to proceed as long as the named plaintiffs satisfied the jurisdictional minimum, the holding would have been more in tune with the Federal Rules of Civil Procedure[93] and with accepted concepts of ancillary jurisdiction.[94] The decision would have remained faithful to the purpose of the "matter in controversy"[95] requirement and to rule 23,[96] while assuring greater judicial economy[97] with safeguards against abuse provided by the criteria of rule 23[98] and the discretion vested in the court by ancillary jurisdiction.[99]

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91. Denial of class action treatment in some cases may result in the filing of separate individual and class actions in the various states where the class members reside. If the statute of limitations is long and the geographical dispersal of class members is great, the defendant, faced with the prospect of piecemeal litigation may seek removal to federal court in order to obtain a single disposition of this case and avoid the costly multiplicity of suits. The discretionary ancillary power may prove attractive to such defendants.

92. WRIGHT, *supra* note 2, at 316. Professor Wright states:

> It would be highly desirable if Congress were to amend 28 U.S.C. § 1332 to provide that in any case permitted to be maintained as action under the Federal Rules of Civil Procedure, the aggregate claims for or against all members of the class shall be regarded as the matter in controversy.

Id.

93. See notes 2-5 *supra.*

94. See notes 49-70 *supra* and accompanying text.

95. See notes 8 & 20 *supra* and accompanying text.

96. See note 5 *supra* and text accompanying note 3 *supra.*

97. See notes 71-77 *supra* and accompanying text.

98. See note 2 *supra.*

99. See notes 65-70 *supra* and accompanying text.