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Ninth Circuit Review—The Jurisdictional Amount Requirement—Valuation from the Defendant's Perspective

Karen L. Williams

SELECTED DEVELOPMENTS IN CIVIL PROCEDURE IN THE NINTH CIRCUIT

THE JURISDICTIONAL AMOUNT REQUIREMENT—VALUATION FROM THE DEFENDANT'S PERSPECTIVE

I. INTRODUCTION

The jurisdictional amount requirement[1] is not mandated by the United States Constitution.[2] Instead, the Judiciary Act of 1789[3] provided that plaintiffs must pass a monetary jurisdictional barrier[4] in order to gain access to the federal courts. By creating this barrier, Congress intended to strengthen the concept that federal courts are courts of limited jurisdiction.[5] However, Congress still recognized that the requisite sum

1. The jurisdictional amount requirement is currently set forth in title 28 of the United States Code. Section 1331 provides in pertinent 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 interests and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C.A. § 1331(a) (West Supp. 1977).

Section 1332 provides in pertinent part: "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between—(1) citizens of different States." 28 U.S.C. § 1332(a)(1) (1970).

2. U.S. CONST. art. III, § 1 states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Section 2 of article III adds that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . [and] to Controversies . . . between Citizens of different States . . . ." *Id.* § 2.

3. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78.

4. Over the years, Congress steadily increased the requisite amount. The Judiciary Act of 1789 provided that all claims must exceed $500. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78. In 1887, Congress raised the sum to $2,000. Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552. In 1911, the amount was raised to $3,000. Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1091. Congress increased the amount to $10,000 in 1958. Act of July 25, 1958, Pub. L. No. 85-554, § 1, 72 Stat. 415 (codified at 28 U.S.C. § 1331 (1970)).

5. Lorraine Motors, Inc. v. Aetna Cas. & Sur. Co., 166 F. Supp. 319, 321 (E.D.N.Y. 1958) ("[T]he purpose of making the amount in controversy . . . determinative of jurisdiction has always been to prevent the dockets of the federal courts from being overcrowded with small cases . . . ."). *See also* Smith v. Sperling, 237 F.2d 317, 321 (9th Cir. 1956), *rev'd on other grounds*, 354 U.S. 91 (1957) ("The courts of the federal system are of . . . limited jurisdiction . . . .").

"should not be so high as to convert the Federal courts into courts of big business . . . ."[6] Therefore, it is obvious that competing tensions exist: the federal judiciary should not be cluttered with petty cases, but the system should also not be so restricted as to become inaccessible to plaintiffs with substantial claims.

The competing considerations are easily stated, but judicial attempts to reconcile them yield inconsistent results, especially in suits where injunctive relief is sought. It is easier to value claims for damages since the court has before it a specific amount included in the plaintiff's complaint. Unless it can be shown to a "legal certainty"[7] that the plaintiff cannot prove the damages he claims, the amount in controversy requirement is satisfied.[8] However, where injunctive relief is requested, the plaintiff often seeks to vindicate an intangible right which cannot be translated into monetary terms.[9] It is also possible that a suit of little pecuniary worth to the plaintiff may have substantial value to the defendant.[10]

In order to alleviate the harsh results[11] which follow from a strict

6. S. REP. NO. 1830, 85th Cong., 2d Sess. 4, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3101. On the other hand, Congress realized that the requisite amount should not be so small that the courts would "fritter away their time in the trial of petty controversies." *Id.*

7. It is interesting to note that courts are somewhat inconsistent in applying the burden of proof. The correct view is that once the plaintiff alleges the proper amount in controversy, the burden is upon the defendant to prove to a legal certainty that the plaintiff cannot prove damages in that amount. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938). But some courts have denied a federal forum to plaintiffs when plaintiffs could not demonstrate to a legal certainty that their claims met the jurisdictional amount requirement. *See, e.g.*, Zahn v. International Paper Co., 414 U.S. 291 (1973) (court maintained it must be convinced to legal certainty that the claims of unnamed class members met the requisite amount).

8. *See* 1 MOORE'S FEDERAL PRACTICE ¶ 0.91[1], at 839 (2d ed. 1977); Dobie, *Jurisdictional Amount in the United States District Court*, 38 HARV. L. REV. 733, 734 (1925). *See also* text accompanying note 17 *infra*.

9. *See, e.g.*, Spock v. David, 469 F.2d 1047 (3d Cir. 1972) (rights of freedom of speech and freedom of assembly necessarily satisfy jurisdictional amount requirement); Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965) (right to be free from surveillance by FBI held incapable of monetary valuation). *But cf.* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (damage claim for violation of fourth amendment rights justiciable under § 1331).

10. *See, e.g.*, State Chartered Banks v. Peoples Nat'l Bank, 291 F. Supp. 180 (W.D. Wash. 1966). *See* notes 36-40 *infra* and accompanying text.

11. The harshest possible result is to deny the plaintiff a federal forum. *See, e.g.*, Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973). Yet Congress realized that suits involving violations of constitutional rights are those most deserving of being heard in federal court. H.R. REP. NO. 1656, 94th Cong., 2d Sess. 15, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6121, 6135.

application of the traditional method[12] of valuing claims, some federal courts have shown an increasing willingness to value the controversy from the defendant's perspective. The Ninth Circuit, although it has addressed the issue in a variety of contexts, has not clearly indicated those situations where it will follow the defendant's perspective rule. Inherent in the court's efforts to formulate a clear policy is the recognition that the jurisdictional amount requirement in sections 1331[13] and 1332[14] is not always an accurate measure of the "substantiality" of a claim for injunctive relief.[15]

II. LAWSUITS INVOLVING A SOLE PLAINTIFF

A. *Plaintiff's Viewpoint vs. Defendant's Perspective*

The matter in controversy has traditionally been valued from the plaintiff's point of view.[16] This method of valuation, known as the "plaintiff viewpoint rule,"[17] is treated by some courts as an inflexible doctrine.[18] However, there is substantial authority[19] to support an opposing view—that the claim may be valued from the perspective of the defendant.[20] It is clear that at the present time there is no generally

12. *See* notes 16-17 *infra* and accompanying text.

13. 28 U.S.C.A. § 1331 (West Supp. 1977). *See* note 1 *supra*.

14. 28 U.S.C. § 1332 (1970). *See* note 1 *supra*.

15. It is important to note the change in Congress' definition of "substantial claims." In 1958, such claims were based almost entirely on their pecuniary worth. S. REP. NO. 1830, 85th Cong., 2d Sess. 4, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3101. In 1976, Congress admitted that "[t]he factors relevant to the question whether a Federal court should be available to a litigant seeking protection of a Federal right have little, if any, correlation with the minimum jurisdictional amount." H.R. REP. NO. 1656, 94th Cong., 2d Sess. 15, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6121, 6135. A recurrent theme in this note is that it is incorrect to automatically equate the "substantiality" of a suit with its monetary value.

16. *See, e.g.*, Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U.S. 121, 125 (1915) ("[T]he jurisdictional amount is to be tested by the value of the object to be gained by complainant.").

17. Dobie, *Jurisdictional Amount in the United States District Court*, 38 HARV. L. REV. 733, 736 (1925).

18. *See, e.g.*, Mas v. Perry, 489 F.2d 1396, 1400 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974) ("[T]he amount in controversy is determined by the amount claimed by the plaintiff in good faith."); Massachusetts State Pharmaceutical Ass'n v. Federal Prescription Serv., Inc., 431 F.2d 130, 132 n.1 (8th Cir. 1970) ("[W]e are of the view that the 'plaintiff's viewpoint rule' is the only valid rule.").

19. *E.g.*, Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970); Government Employees Ins. Co. v. Lally, 327 F.2d 568 (4th Cir. 1964); Ridder Bros. v. Blethen, 142 F.2d 395 (9th Cir. 1944).

20. Often a court will refer to the "value of the thing to be accomplished," or the "value of the object," rather than "defendant's perspective." The effect of all such

accepted means of valuing a claim.[21] There is disagreement not only between circuits,[22] but within circuits as well. For example, courts in the Ninth Circuit have used both methods.[23]

There is normally little difficulty in applying the plaintiff viewpoint method where plaintiff's claim equals the potential loss to the defendant.[24] However, this method becomes considerably more difficult to apply in suits seeking injunctive relief, when the value of the claim to the respective parties differs,[25] or when the right plaintiff seeks to protect is incapable of monetary valuation.[26] Still, many courts continue to follow the plaintiff viewpoint rule, even though the action is barred from federal court as a result.[27]

"Plaintiff viewpoint" valuation requires the complainant, as the party exercising the court's jurisdiction,[28] to plead the requisite amount in

language, however, is to value the claim from the viewpoint of the defendant. *See, e.g.*, Mississippi & Mo. R.R. v. Ward, 67 U.S. 485, 492 (1862); Ridder Bros. v. Blethen, 142 F.2d 395, 399 (9th Cir. 1944).

21. *Compare* Mas v. Perry, 489 F.2d 1396, 1400 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974) ("It is well settled that the amount in controversy is determined by the amount claimed by the plaintiff . . . .") *with* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 60 (D.D.C. 1973) ("[I]t is well settled that in determining the amount-in-controversy, reference to either party's situation is appropriate.").

22. *Compare* note 27 *infra* and accompanying text *with* note 34 *infra*. *See also* note 28 *infra*.

23. *Compare* Riggins v. Riggins, 415 F.2d 1259 (9th Cir. 1969) *and* Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977) (appeal pending) *with* Ridder Bros. v. Blethen, 142 F.2d 395 (9th Cir. 1944) *and* Petterson v. Resor, 331 F. Supp. 1302 (D. Ore. 1971).

24. For instance, if the plaintiff suffers injuries in an automobile accident and in good faith sues defendant for $50,000, defendant stands to lose exactly what plaintiff stands to gain—$50,000.

25. *See* Government Employees Ins. Co. v. Lally, 327 F.2d 568 (4th Cir. 1964). In *Lally*, plaintiff insurance company sued for a declaratory judgment, seeking to limit its liability under the defendant's policy to $10,000. Potential liability under the policy was $30,000. The plaintiff's claim was technically worth an even $10,000 and thus did not meet the jurisdictional amount requirement (the statute provides that the claim must *exceed* $10,000). Use of the defendant's perspective rule led to a different result, since defendant contended that plaintiff was liable for the full value of the policy, $30,000.

26. *See, e.g.*, Tatum v. Laird, 444 F.2d 947 (D.C. Cir. 1971), *rev'd on other grounds*, 408 U.S. 1 (1972) (plaintiffs challenged surveillance of lawful civilian political activity by United States Army).

27. *See, e.g.*, Jackson v. American Bar Ass'n, 538 F.2d 829 (9th Cir. 1976); Kheel v. Port Auth., 457 F.2d 46 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972).

28. There is a third method of valuing claims used by a small minority of courts, which permits valuation of the claim with reference to which party (plaintiff or defendant) seeks to exercise federal jurisdiction. For example, where the defendant seeks to remove a case from state to federal court, the value of the claim will be assessed from the defendant's perspective. One court decided that

when what a plaintiff stands to gain and what a defendant stands to lose are unequal,

controversy.[29] Courts adhering to this procedure reason that

> [s]ince the question of original jurisdiction is contingent on the complaint of the plaintiff, setting out his cause of action, it would seem to follow that the jurisdictional fact of the value of that cause of action or the amount in controversy would be determined from the plaintiff's viewpoint. Certainly such a standard normally leads to a greater certainty and simplicity than would ensue should the defendant's viewpoint be injected into the determination.[30]

Courts subscribing to this view overlook the fact that, although certainty and simplicity are desirable goals, they should not be pursued at the risk of barring substantial claims[31] from federal court.

The plaintiff viewpoint rule is less easily applied when the complainant's claim is difficult to value, or when defendant seeks to exercise the jurisdiction of the court through the process of removal.[32] A plaintiff seeking an injunction may find it difficult to value his claim in terms of dollars and cents.[33] To circumvent this problem, some courts[34] have

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and where federal jurisdiction is invoked by the party standing to gain or lose more than his adversary the greater gain or the greater loss should be applied as the criteria of jurisdictional amount.

Inman v. Milwhite Co., 261 F. Supp. 703, 708 (E.D. Ark. 1966), *aff'd*, 402 F.2d 122 (8th Cir. 1968). *See also* Family Motor Inn, Inc. v. L-K Enterprises Div. Consol. Foods Corp., 369 F. Supp. 766 (E.D. Ky. 1973).

29. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938). Once the plaintiff pleads the proper amount, the burden falls on the defendant to attack the court's jurisdiction. *See* note 7 *supra*.

30. 1 MOORE'S FEDERAL PRACTICE ¶ 0.91[1], at 845 (2d ed. 1977).

31. *See* note 15 *supra*.

32. 28 U.S.C. § 1441(a) (1970) provides:

> [A]ny 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.

33. *See, e.g.*, Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) (plaintiff, soldier in Europe, sought to have Army's drug rehabilitation program declared unconstitutional); Petterson v. Resor, 331 F. Supp. 1302 (D. Ore. 1971) (plaintiffs sought to enjoin Army Corps of Engineers from expanding local airport, fearing damage to property in form of noise and congestion).

34. In State Chartered Banks v. Peoples Nat'l Bank, 291 F. Supp. 180 (W.D. Wash. 1966), the court acknowledged that although the defendant's perspective rule was only accepted by a minority of courts, "this holding [allowing consideration of defendant's interests] may be gaining acceptance in other jurisdictions as well as our own circuit." *Id.* at 186. At least four circuits currently accept this method. *See* Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970); Government Employees Ins. Co. v. Lally, 327 F.2d 568 (4th Cir. 1964); Ronzio v. Denver & R.G.W.R.R., 116 F.2d 604, (10th Cir. 1940). The Ninth Circuit appears to accept the defendant's perspective rule under some circumstances. *See* Ridder Bros. v. Blethen, 142 F.2d 395 (9th Cir. 1944). The *Ridder Bros.* holding was limited by the Ninth Circuit's decisions in Snow v. Ford Motor Co., 561 F.2d 787 (9th Cir. 1977) and Jackson v. American Bar Ass'n, 538 F.2d 829 (9th Cir. 1976).

taken the attitude that "[i]n determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiff's complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce."[35]

In *State Chartered Banks v. Peoples National Bank*,[36] plaintiffs sought an injunction and a declaration that construction of a branch bank by the defendant was unlawful. The defendant claimed that the new facility would simply be an extension of the extant bank, and thus not subject to the authority of the state comptroller and state statutes. Since plaintiffs realized in evaluating the impact of a branch bank on their businesses that their damages "must be prospective and not easy of evaluation,"[37] they made no attempt to use the plaintiff viewpoint rule. Instead, they requested that the court value the action from the perspective of the defendant. The value of the lawsuit from the defendant's perspective satisfied the statutory requirement, since defendant would sustain over $50,000 actual damages in contract cancellations. The court held that it was proper to value the claim from the defendant's viewpoint.

The court noted in *State Chartered Banks* that the defendants could have brought an action to declare construction of the branch *lawful*. In that event, the court would have been able to conclude that the claim exceeded the jurisdictional amount requirement under a traditional analysis. The court saw no reason to dismiss the plaintiffs' suit simply because they had gone forward and filed the action. The right to operate a branch bank was in dispute, regardless of who brought the suit.[38]

The controversy in *State Chartered Banks* was not a "trivial" one.[39] Yet, had the court applied the plaintiff viewpoint rule, plaintiffs probably could not have filed the lawsuit in a federal forum.[40] Those courts following the defendant's perspective rule recognize that suits for injunctive relief are not "petty" just because the relief sought is difficult to value in monetary terms. Therefore, instead of rigidly applying the jurisdictional amount requirement, they look to the *rights involved* to evaluate the substantiality of the claim. Considering that the purpose of the amount in controversy requirement is to prevent federal courts from

35. Ronzio v. Denver & R.G.W.R.R., 116 F.2d 604, 606 (10th Cir. 1940).
36. 291 F. Supp. 180 (W.D. Wash. 1966).
37. *Id.* at 186.
38. *Id.* at 187.
39. This is clearly the case since defendant stood to lose $50,000 in contract cancellations and the right to operate its facility.
40. 291 F. Supp. at 186.

"fritter[ing] away their time in the trial of petty controversies,"[41] these courts refuse to accept the "price tag" of a suit as determinative of its worth. When the test of substantiality is met by valuing the action from defendant's perspective, it makes little sense to keep the suit out of court.

It is unclear which of the aforementioned methods has been adopted by the Ninth Circuit. Some courts have held that the plaintiff viewpoint rule is the proper method of valuing the amount in controversy.[42] Generally, however, courts in the Ninth Circuit are willing to look to the defendant's interests.[43]

The Ninth Circuit first accepted the defendant's perspective method in 1944;[44] since then several district courts have used it.[45] Professor Wright indicates that no proponent of the plaintiff viewpoint rule has "pointed to any Supreme Court decision rejecting jurisdiction where the jurisdictional amount was satisfied from the defendant's viewpoint, but not from the plaintiff's. Only such a case can conclusively establish the 'plaintiff viewpoint rule.' "[46] Until the Ninth Circuit adopts one rule or the other,[47] district courts apparently may use their discretion in deciding which rule to follow.

41. S. REP. NO. 1830, 85th Cong., 2d Sess. 4, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3101.

42. *See, e.g.*, Riggins v. Riggins, 415 F.2d 1259 (9th Cir. 1969); Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977) (appeal pending). In neither of these cases, however, was it necessary to resort to the defendant's perspective rule to establish jurisdiction. Jurisdiction was established under the traditional "plaintiff viewpoint" method.

43. *See, e.g.*, Ridder Bros. v. Blethen, 142 F.2d 395 (9th Cir. 1944); Petterson v. Resor, 331 F. Supp. 1302 (D. Ore. 1971); State Chartered Banks v. Peoples Nat'l Bank, 291 F. Supp. 180 (W.D. Wash. 1966).

44. Ridder Bros. v. Blethen, 142 F.2d 395 (9th Cir. 1944).

45. *See, e.g.*, State Chartered Banks v. Peoples Nat'l Bank, 291 F. Supp. 180 (W.D. Wash. 1966). *See* note 43 *supra* and accompanying text.

46. C. WRIGHT, LAW OF FEDERAL COURTS 134-35 (3d ed. 1976).

47. In Snow v. Ford Motor Co., 561 F.2d 787, 790 n.5 (9th Cir. 1977), the court said that "to the extent that *Ridder Bros., Inc. v. Blethen* . . . is inconsistent with *Snyder*, it must be considered to have been superseded." Snyder v. Harris, 394 U.S. 332 (1969) held that plaintiffs in a class action suit may not aggregate their claims to meet the jurisdictional amount requirement. Instead, *each* plaintiff must have a claim exceeding $10,000. *See* notes 76-103 *infra* and accompanying text. In *Snow*, plaintiffs attempted to apply the defendant's perspective rule to circumvent *Snyder's* non-aggregation doctrine. The court held that in this situation, use of the defendant's perspective rule was simply a means of avoiding *Snyder* and was therefore impermissible. It should be noted that the Ninth Circuit relied principally on Massachusetts State Pharmaceutical Ass'n v. Federal Prescription Serv., Inc., 431 F.2d 130, 132 n.1 (8th Cir. 1970) which went further in its analysis: "In light of Snyder v. Harris . . . we are of the view that the 'plaintiff's viewpoint' rule is the only valid rule." It is possible the Ninth Circuit will continue to follow the lead of the Eighth Circuit and eventually disregard the defendant's perspective rule altogether. However, since the court could have done so in *Snow* had it been so inclined, it seems more likely that the Ninth Circuit will not go as far as the Eighth Circuit has gone.

B. *Valuing Constitutional Claims*

1. Valuation from the Defendant's Perspective

Constitutional rights and intangible interests are often incapable of being valued in monetary terms. It is virtually impossible[48] to assess the value of one's right to walk through city streets unharassed by the police,[49] or the right to be free from surveillance by the FBI.[50] Since rigid application of the plaintiff viewpoint rule would result in denying a federal forum to plaintiffs in these cases, it is important to consider whether the defendant's perspective rule may be invoked to confer jurisdiction.

For the most part, federal courts still hold that the jurisdictional amount requirement must be met when a case seeks injunctive relief to rectify the infringement of a constitutional right.[51] It is recognized that "[h]owever unsavory the 'price tag' requirement of § 1331 . . . it is still the task of the district courts to consider the rights sought to be protected and determine whether, in the circumstances of the case, the value of their vindication exceeds $10,000."[52] Whereas some courts require a strict interpretation of the jurisdiction amount requirement,[53] others apply the requirement loosely, either by accepting a bare allegation of more

48. Although it may be "impossible," a finding that the amount in controversy exceeds $10,000 is necessary no matter how difficult the valuation may be. King v. Morton, 520 F.2d 1140, 1145 (D.C. Cir. 1975).

49. Gomez v. Wilson, 477 F.2d 411 (D.C. Cir. 1973).

50. Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965).

51. *See* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 59 (D.D.C. 1973) ("The satisfaction of a minimum amount-in-controversy is not a technicality; *it is a requirement imposed by Congress which the courts may not dispense with at their pleasure.*").

Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972), is an exception to the general rule. The court was adamant in its refusal to dismiss the claim for failure to meet the jurisdictional amount requirement:

> A monetary price can hardly be placed on the rights guaranteed by the First Amendment. To say that these priceless rights so many have fought and died to protect are worth nothing is to insult the basic principles upon which this nation was founded and which still give it its unique vitality. Free speech is almost by definition, worth more than $10,000 . . . .

Id. at 810.

52. CCCO-Western Region v. Fellows, 359 F. Supp. 644, 647 (N.D. Cal. 1972).

53. In Shimabuku v. Britton, 357 F. Supp. 825 (D. Kan. 1973), *aff'd*, 503 F.2d 38 (10th Cir. 1974), the court stated: "Jurisdiction under § 1331 cannot be founded on a right secured by the Constitution unless that right 'has a known and certain value, which can be proved or calculated, in the ordinary mode of a business transaction.' " *Id.* at 826 (quoting Barry v. Mercein, 46 U.S. 103, 120 (1847)).

than $10,000 by the plaintiff,[54] or by valuing the claim from the defendant's perspective.[55]

The confusion among courts regarding the valuation of constitutional claims is illustrated by two cases, *Goldsmith v. Sutherland*[56] and *CCCO-Western Region v. Fellows*.[57] Both cases were decided in the early 1970s and involved protesters entering military bases to distribute anti-war leaflets. In both cases plaintiffs were removed from the bases; subsequently, they received "bar letters" informing them that if they returned to the bases, they would be prosecuted under 18 U.S.C. section 1382.[58] In *Fellows*, plaintiffs sought a declaration that "bar letters" and section 1382 were unconstitutional. In *Goldsmith*, plaintiff sued to enjoin the defendant from enforcing the exclusion order.

The court in *Fellows* found that the valuation process, no matter how distasteful to the court, was still a necessary element of subject matter jurisdiction. However, the court proceeded to find that the amount in controversy requirement had been met because the rights involved had "traditionally been regarded as fundamental."[59] Therefore, the court found "that 'the allegation of jurisdiction based upon § 1331 ought not to be subject to denial.' "[60] In effect, the court did not attempt to value the claim in monetary terms at all. It was simply acknowledged that such rights are so important that they necessarily must exceed any jurisdictional amount requirement imposed by Congress.

The court in *Goldsmith* took the opposite view. Acknowledging the difficulty of valuing a constitutional right where injunctive relief is sought, the court held that "[t]he rule pertaining to the specified dollar sum requirement is that 'the matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained.' "[61] The effect of this attitude is to allow into federal court only those suits which have a monetary basis. Any claim not capable of being

54. *See, e.g.*, Gomez v. Wilson, 477 F.2d 411 (D.C. Cir. 1973); Spock v. David, 469 F.2d 1047 (3d Cir. 1972).

55. *See, e.g.*, Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); Tatum v. Laird, 444 F.2d 947 (D.C. Cir. 1971), *rev'd on other grounds*, 408 U.S. 1 (1972).

56. 426 F.2d 1395 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970).

57. 359 F. Supp. 644 (N.D. Cal. 1972).

58. 18 U.S.C. § 1382 (1970) provides in pertinent part:

> Whoever reenters or is found within any . . . reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or in person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

59. 359 F. Supp. at 648.

60. *Id.* (quoting Cortright v. Resor, 325 F. Supp. 797, 810 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972)).

61. 426 F.2d at 1397 (quoting Barry v. Mercein, 46 U.S. 103, 120 (1847)).

valued in terms of dollars and cents is equated with a "petty controversy"[62] and is denied a federal forum.

Fellows and *Goldsmith* exemplify differing viewpoints exhibited by federal courts.[63] District courts in the Ninth Circuit apply both views, without resolution by the appellate court.[64] The Ninth Circuit did, however, recently consider a case requiring the valuation of rights which were "intangible, speculative, and [which lacked] the capability of being translated into monetary values."[65] The court found that unless such rights could be measured in pecuniary terms, the jurisdictional amount requirement was not met. However, the court believed that the rights involved therein were not *legitimate* constitutional rights. The distinction is important, in light of the split of authority just discussed. The cases represented by *Fellows* clearly treat bonafide constitutional rights as a special subcategory of injunctive suits; these cases are treated more liberally than non-constitutional cases.[66] Until the Ninth Circuit decides a case involving the valuation of fundamental rights in an action for injunctive relief, the validity of treating this "subcategory" differently may be questioned.

2. The Effect of the 1976 Amendment to Section 1331

The issue of valuing constitutional rights, although still qualitatively

62. *See* note 6 *supra* and accompanying text.

63. Cases supporting the *Fellows* rationale include: Gomez v. Wilson, 477 F.2d 411 (D.C. Cir. 1973); Spock v. David, 469 F.2d 1047 (3d Cir. 1972); Tatum v. Laird, 444 F.2d 947 (D.C. Cir. 1971), *rev'd on other grounds*, 408 U.S. 1 (1972); Fifth Ave. Peace Parade Comm. v. Hoover, 327 F. Supp. 238 (S.D.N.Y. 1971); Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972). The following cases support *Goldsmith*: Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965); Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977) (appeal pending); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973); Shimabuku v. Britton, 357 F. Supp. 825 (D. Kan. 1973); Yahr v. Resor, 339 F. Supp. 964 (E.D.N.C. 1972).

64. In Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977) (appeal pending), the court discussed the split of authority and held: "In the absence of any decision on the point from our Circuit we decline to follow the cases . . . which find the amount in controversy invariably present because constitutional rights are not capable of valuation in monetary terms." *Id.* at 166-67 n.18.

65. Jackson v. American Bar Ass'n, 538 F.2d 829, 831 (9th Cir. 1976). For a full discussion of this case, see notes 122-26 *infra* and accompanying text.

66. *See* Committee for GI Rights v. Callaway, 518 F.2d 466, 473 n.19 (D.C. Cir. 1975) ("[C]ases of this nature which raise substantial constitutional questions lend support to the position that the jurisdictional amount requirement should not be applied to defeat federal jurisdiction when fundamental constitutional rights of intangible value are involved."); Spock v. David, 469 F.2d 1047, 1052 (3d Cir. 1972) ("There is no reason to lay down a rule of law that the rights of free speech and free assembly present nonjusticiable problems of valuation.").

important, has become less urgent in light of the 1976 amendment to section 1331.[67] By removing the jurisdictional amount requirement in suits against federal officers, Congress effectively closed "an unfortunate gap in the statutory jurisdiction of the federal courts."[68] Over the years, Congress had passed so many exceptions to section 1331[69] that the House Judiciary Committee was led to state: "This category [of suits against federal officers] provides the only significant instance in which the jurisdictional amount requirement of 28 U.S.C. section 1331 is an effective limitation."[70]

Certainly the application of the monetary amount requirement was a major barrier to jurisdiction in these suits. It was difficult to rationalize the vesting of federal jurisdiction in actions against a *state* officer[71] accused of violating a plaintiff's constitutional rights, while denying jurisdiction in the identical suit against a *federal* officer because the claim could not meet the requisite dollar value. However, the fact that this gap has been closed by Congress does not entirely eliminate the need to value constitutional rights. *Chavez-Salido v. Cabell*[72] illustrates that the problem still exists. In *Cabell*, three resident aliens challenged the constitutionality of a state law which required employees of state, county and local governments to be United States citizens. Defendant Los Angeles County contended that the plaintiffs were unable to establish the requisite jurisdictional amount. The court found that under recent Ninth Circuit authority,[73] "political subdivisions of states may be sued for both damages and equitable relief for constitutional violations, *with juris-*

67. 28 U.S.C. § 1331 as amended in 1976 by Pub. L. No. 94-574, § 2, 90 Stat. 2721. Prior to 1976, § 1331 read as follows: "The district courts shall have original jurisdiction of all civil actions wherein the matter in the controversy exceeds the sum or value of $10,000, exclusive of interests or costs, and arises under the Constitution, laws, or treaties of the United States."

The 1976 amendment added this phrase: "except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." 28 U.S.C.A. § 1331(a) (West Supp. 1977).

68. Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 826 (2d Cir. 1967).

69. For a list of these exceptions, see H.R. REP. NO. 1656, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6121, 6134. The most important exception is embodied in 28 U.S.C. § 1343 (1970 & Supp. V 1975). Section 1343 grants federal courts jurisdiction over civil rights cases filed against state officers and private persons, without regard to jurisdictional amount.

70. H.R. REP. NO. 1656, 94th Cong., 2d Sess. 15-16, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6121, 6136.

71. Jurisdiction without regard to amount in controversy is granted by 28 U.S.C. § 1343 (1970 & Supp. V 1975). *See* note 69 *supra*.

72. 427 F. Supp. 158 (D.C. Cal. 1977) (appeal pending).

73. Gray v. Union County Intermediate Educ. Dep't, 520 F.2d 803 (9th Cir. 1975).

diction being provided by 1331(a)."[74] It is apparent that although the majority of cases involving constitutional violations have been removed from the scope of section 1331, some of these cases will still arise in federal courts.

III. CLASS ACTIONS

A. Doctrine of Aggregation

Special problems arise in valuing the matter in controversy when the plaintiff has filed a class action.[75] Traditionally, courts have held that plaintiffs in a class action may not aggregate their claims in order to meet the jurisdictional amount requirement.[76] Instead, the value of each plaintiff's claim must exceed $10,000. The only exception to this rule is a suit where "several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest."[77]

Although the aggregation doctrine has stood without alteration for over a century, many commentators[78] hoped that the 1966 amendments to the Federal Rules of Civil Procedure would effect some change. There was a

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74. 427 F. Supp. at 166 (emphasis added). "Political subdivisions" include municipalities, school boards and counties. However, the court said in dictum that jurisdiction might have been established under § 1343(4) of title 28 as well, since the court found valid claims under both the 14th amendment and 28 U.S.C. § 1981 (1970):

> 1343(4) is not broad enough to cover a charge of direct violation of the 14th Amendment since the section is limited to civil actions arising "under any Act of Congress." But since we hold that the County is amenable to suit in a § 1981 action, § 1343 would give us jurisdiction and without respect to amount in controversy.

427 U.S. at 167 n.19. Conversely, had the court found only a constitutional violation, plaintiffs would have had no choice but to satisfy the jurisdictional amount requirement of § 1331.

75. Since nearly all of the significant cases in the area of aggregation concern class actions, this section will refer only to class suits. However, the discussion applies with equal force to any lawsuit involving multiple claimants. The language of Zahn v. International Paper Co., 414 U.S. 291 (1973) makes this clear: "[M]ultiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount requirement for suit in the federal courts." *Id.* at 294. A class action is only one type of suit involving multiple claimants.

76. The doctrine of aggregation was first considered in Oliver v. Alexander, 31 U.S. 143 (1832). The Supreme Court has not altered its rejection of the doctrine since that time. For a discussion of the history of this rule, see Coiner, *Class Actions: Aggregation of Claims for Federal Jurisdiction*, 4 MEM. ST. U.L. REV. 427 (1974).

77. Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40-41 (1911).

78. *See* Coiner, *Class Actions: Aggregation of Claims for Federal Jurisdiction*, 4 MEM. ST. U.L. REV. 427, 429 (1974); Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 405 (1976); Note, *Civil Procedure—Class Actions—Closing the Doors to the Federal Courts*, 39 MO. L. REV. 447, 448-49 (1974).

widespread belief that with liberalized guidelines for class actions,[79] the Court would allow aggregation in class action litigation. Instead, in *Snyder v. Harris*,[80] the Court held that the old test still applies: unless plaintiffs sue to protect a "common and undivided interest"[81] they may not aggregate their claims to meet the jurisdictional amount requirement.

In *Snyder* plaintiffs were a group of 4,000 shareholders. They sued to have the proceeds of a sale of stock by the company's directors distributed among the shareholders. Snyder's individual claim was for $8,700, but the plaintiffs' aggregated claims exceeded $1,200,000. The Court refused to allow aggregation for three reasons. First, the Court maintained that the doctrine of aggregation did not develop from the categorical definitions of former rule 23, but from an historical interpretation of "matter in controversy."[82] Therefore, any change in the rule should have no effect on the limits of aggregation. Second, the Court held that to allow aggregation under the amended rule 23 would violate the prohibition of rule 82, that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts."[83] Third, the Court concluded that Congress had implicitly considered the judicial doctrine of aggregation when it raised the jurisdictional amount requirement in 1958.[84] Had Congress wanted to change this doctrine (or its application), it would have done so explicitly.[85] The Court concluded:

> There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add

79. Prior to 1966, rule 23 categorized class actions as "true," "hybrid," or "spurious." Aggregation of claims was allowed only in "true" class actions, since by definition such suits involved "common and undivided rights." These categories proved to be too rigid and confusing for consistent application by the courts, and they were therefore replaced by the more "functional approach" of new rule 23. For a discussion of the history of the amendment to rule 23 and its effect on aggregation, see Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 98 (1966). *See also* Snyder v. Harris, 394 U.S. 332, 335-40 (1969); Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 400-02 (1976).

80. 394 U.S. 332, 341 (1969).

81. *Id.* at 335. Professor Wright has severely criticized the continued use of this test:

> Except in property law contexts, such terms as "common" and "several" are poor words for a test of jurisdiction—or anything else—since they "have little or no clear and ascertainable meaning. . . . [T]he Court said [in *Snyder*] that "lower courts have developed largely workable standards for determining when claims are joint and common, and therefore entitled to be aggregated, and when they are separate and distinct and therefore not aggregable." It would have been helpful if the Court had indicated what these standards are or where they are to be found.

C. WRIGHT, LAW OF FEDERAL COURTS 139-40 (3d ed. 1976) (quoting Snyder v. Harris, 394 U.S. at 341).

82. 394 U.S. at 336.

83. *Id.* at 337.

84. *See* note 4 *supra*.

85. 394 U.S. at 339.

> to the burdens of an already overloaded federal court system . . . . If there is a present need to expand the jurisdiction of [the district] courts, we cannot overlook the fact that the Constitution specifically vests that power in Congress, not in the courts.[86]

For these reasons the ban on aggregation in federal courts was continued without alteration.

The Court provided additional limitations on aggregation in *Zahn v. International Paper Co.*[87] In *Zahn*, the class action was brought by owners of lakefront property, seeking damages from defendant for polluting the lake. The named plaintiffs' claims were valued in excess of $10,000. However, there was no showing that the claim of *each* unnamed class member exceeded that amount. The Court held that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not may be dismissed from the case—'one plaintiff may not ride in on another's coattails.' "[88]

The Court has, therefore, clearly indicated that aggregation in a rule 23(b)(3)[89] class action is impermissible.[90] The effect of *Snyder* and *Zahn* is to preclude plaintiffs from bringing a class action in federal court unless it falls into one of three exceptions: (1) where it can be shown to a "legal certainty"[91] that each member of the class has incurred damages in excess of $10,000; (2) where plaintiffs can invoke jurisdiction under a statute which does not contain a jurisdictional amount requirement;[92] or (3) where plaintiffs sue to protect a "common and undivided interest."[93]

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86. *Id.* at 341-42.

87. 414 U.S. 291 (1973).

88. *Id.* at 301.

89. FED. R. CIV. P. 23(b)(3) provides that a class action may be maintained if the court finds that "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." *Id.*

90. This is especially true in light of the Court's failure to discuss ancillary jurisdiction in *Zahn*. Since the named plaintiffs had claims in excess of $10,000, the Court arguably could have taken ancillary jurisdiction over the unnamed plaintiffs and their claims. The majority opinion refrained from mentioning this possibility, even though the dissent discussed it in depth. 414 U.S. at 305-08 (Brennan, J., dissenting). For a full discussion of ancillary jurisdiction, see Note, *Ancillary Jurisdiction and the Jurisdictional Amount Requirement*, 50 NOTRE DAME LAW. 346 (1974).

91. *See* note 7 *supra*.

92. *See* note 69 *supra*.

93. Snyder v. Harris, 394 U.S. 332, 335 (1969).

Environmental and consumer class actions apparently do not fit into one of these exceptions. Since it is rare for plaintiffs in either type of case to have a claim in excess of $10,000, it is doubtful that these suits will be heard in federal court. *See* Note, *Federal Procedure: The Class Action—A Social Weapon Disarmed?*, 26 U. FLA. L. REV. 642, 647 (1974). This is unfortunate, since the class action suit has been considered the most

The decisions in *Snyder* and *Zahn* apparently run counter to the rationale of the amendment to rule 23. The new rule was enacted "to eliminate nonfunctional and analytically worthless distinctions embodied in the old rules and . . . to facilitate class actions under a wider variety of circumstances."[94] But those distinctions have indeed been maintained by continued use of the old tests for aggregation,[95] and the unaltered ban on aggregation has prevented any expanded use of class actions.[96] The Court has instead considered the purpose of the jurisdictional amount requirement to be paramount. In refusing to allow aggregation, the Court believes it is obeying the more important mandates of Congress:

> To overrule the aggregation doctrine at this late date would run counter to the congressional purpose in steadily increasing through the years the jurisdictional amount requirement. That purpose was to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship requirement.[97]

However, as discussed earlier,[98] the purpose of the jurisdictional amount requirement is to prevent federal dockets from being cluttered with petty controversies. It is not always correct to equate the substantiality of a suit with its monetary value.[99] Although each plaintiff's claim might be of little monetary value, the total amount of money involved and the rights violated may be substantial.[100] In addition, some commentators feel that aggregation would not add significantly to the caseload of federal courts.[101] Therefore, the ban on aggregation does nothing to

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effective method of protecting the average citizen attempting to fight a corporate defendant. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968).

94. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 397, 405 (1976).

95. *Id. See also* note 81 *supra*.

96. *See* note 93 *supra*.

97. Snyder v. Harris, 394 U.S. 332, 339-40 (1969).

98. *See* notes 5-15 *supra* and accompanying text.

99. Otherwise, for example, nearly all consumer class actions would be considered trivial. *See* note 15 *supra* and accompanying text.

100. A good example is Gas Serv. Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968), *rev'd sub nom.* Snyder v. Harris, 394 U.S. 332 (1969) (*Coburn* is actually a companion case to *Snyder v. Harris*). In *Coburn*, plaintiffs alleged that the defendant had illegally billed and collected a city tax from a class of 18,000 plaintiffs. Coburn's own claim was for $7.81, but the total amount collected by defendant far exceeded $10,000. Considering the number of plaintiffs and the nature of the violation, this was obviously a substantial suit. In fact one commentator suggested that "[i]f any suit deserves a federal forum, it is a suit like *Snyder* or *Coburn*." Moore & Wicker, *Federal Jurisdiction: A Proposal to Simplify the System to Meet the Needs of a Complex Society*, 1 FLA. ST. U.L. REV. 1, 13 (1973). But apparently this is the sort of case which is too trivial for federal courts to consider.

101. Moore & Wicker, *Federal Jurisdiction: A Proposal to Simplify the System to Meet the Needs of a Complex Society*, 1 FLA. ST. U.L. REV. 1, 12 (1973); Note, *Ancillary*

promote the congressional goals discussed in *Snyder*.[102] In light of these factors the Court's stance on aggregation seems unnecessary, and it may serve to frustrate the purpose behind the amendment to rule 23.[103]

B. Effect of Aggregation on Defendant's Perspective Rule

In *Snyder* and *Zahn*, the Court dealt with class actions seeking damages. However, these cases also have a significant impact on class actions seeking injunctive relief. A potential means of avoiding the limits of the aggregation doctrine is to value the matter in controversy from the defendant's perspective. Yet all of the lower courts which have confronted this argument have rejected it.[104] Their rationale is that " '[t]otal detriment' [to the defendant] is basically the same as aggregation."[105]

The Ninth Circuit, in *Snow v. Ford Motor Co.*,[106] rejected an argument that the defendant's perspective rule applies in 23(b)(3) class actions seeking, in large part, injunctive relief. Alvah Snow had purchased a "trailering special package" from Ford, only to find that the kit was incomplete,[107] contrary to explicit statements made in Ford's advertisements. Snow then brought a class action in a California court, seeking actual damages of $11.00 (the price of the kit), punitive damages of $5,000,000, and an injunction to prevent Ford from selling the kit without the necessary components. Ford then removed the case to federal court. Snow sought to have the suit remanded to state court for lack of subject matter jurisdiction. The district court denied Snow's motion by valuing the amount in controversy from the defendant's perspective. The court did not examine the amount of money Ford would have to expend in order to comply with the injunction, but instead valued Ford's "business right"[108] to market its products.

The Ninth Circuit rejected the district court's analysis and held that the right involved was the right asserted by plaintiffs, or "the right of individual future consumers to be protected from Ford's allegedly deceptive advertising which is said to injure them in the amount of $11.00

Jurisdiction and the Jurisdictional Amount Requirement, 50 NOTRE DAME LAW. 346, 349 (1974).

102. *See* notes 82-86 *supra* and accompanying text.

103. *See* note 94 *supra* and accompanying text.

104. *See, e.g.*, Snow v. Ford Motor Co., 561 F.2d 787 (9th Cir. 1977); Massachusetts State Pharmaceutical Ass'n v. Federal Prescription Serv., Inc., 431 F.2d 130 (8th Cir. 1970); Lonnquist v. J.C. Penney Co., 421 F.2d 597 (10th Cir. 1970).

105. Snow v. Ford Motor Co., 561 F.2d 787, 790 (9th Cir. 1977).

106. 561 F.2d 787 (9th Cir. 1977).

107. The kit failed to contain a wiring device necessary to connect the electrical system of plaintiff's automobile to the trailer. *Id.* at 788.

108. *Id.* at 790.

each."[109] Thus, to value the matter in controversy from Ford's viewpoint would be equivalent to aggregating thousands of $11.00 claims. The court concluded that where "the equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation [applies] with equal force to the equitable as well as the monetary relief."[110]

The Ninth Circuit has left open the question whether or not a rule 23(b)(1)[111] or 23(b)(2)[112] class action might be valued from the defendant's perspective.[113] Since the rule 23(b)(2) action is used primarily in civil rights cases,[114] jurisdiction is usually invoked under section 1343[115] without regard to monetary value. Suits brought under rule 23(b)(1) tend to involve "common and undivided"[116] rights. When a class of plaintiffs sues on a single right, it is still possible to use the defendant's perspective rule to value the amount in controversy, as the First Circuit did in *Berman v. Narragansett Racing Association*.[117]

In *Berman*, plaintiffs were a class of pursewinners, suing to collect money owed to them *as a class* by the Racing Association under an annual purse agreement. The court found that plaintiffs' interests were common and undivided, since "the amount of individual claims cannot be determined until the contract issue is settled and a formula [is] established."[118] Since the court could not determine plaintiffs' individual shares until the suit had been tried, it necessarily had to value the matter in controversy from the defendant's perspective (the fund which the Racing Association would have to pay to the class of pursewinners). Clearly, the procedure followed in *Berman* was equivalent to aggregat-

109. *Id.* at 791.

110. *Id.* at 790 (quoting Barton Chem. Corp. v. Avis Rent A Car Sys., Inc., 402 F. Supp. 1195, 1198 (N.D. Ill. 1975)).

111. FED. R. CIV. P. 23(b)(1) provides that a class action may be maintained if

> the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications . . . or (B) adjudications . . . 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.

112. FED. R. CIV. P. 23(b)(2) provides that a class action may be maintained if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . to the class as a whole."

113. 561 F.2d at 790 n.4.

114. Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966).

115. 28 U.S.C. § 1343 (1970 & Supp. V 1975).

116. Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 98 (1966).

117. 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970).

118. *Id.* at 316.

ing plaintiffs' claims. However, the court did *not* view this as aggregation, but as an application of the defendant's perspective method of valuation. The district court had "found that since no single plaintiff has a contractual right to a portion of the withheld money, there was no definable amount or matter in controversy."[119] Under the district court's analysis, aggregation was improper because the individual claims could not be valued in monetary terms. Apparently the court felt that plaintiffs' claim to the entire fund was not sufficient; plaintiffs would also have to value the individual portions they sought to aggregate. Arguably this would defeat the action, since defendant would be in a position to claim that plaintiffs' rights were not "common and undivided," but were "separate and distinct."[120] The First Circuit circumvented this result by applying the normal criterion established by the defendant's perspective rule: "the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce."[121]

For rule 23(b)(2)[122] class actions not covered by section 1343,[123] it is possible that the defendant's perspective rule might be used to meet the jurisdictional amount requirement.[124] However, the Ninth Circuit has made its position clear: before the question of aggregation may be approached, "the amount in controversy must . . . be capable of measurement in terms of pecuniary value."[125] In class actions requesting only injunctive relief (rule 23(b)(2) actions) this can sometimes cause difficulties. In *Jackson v. American Bar Association*,[126] the plaintiff class consisted of 2,600 law students attending schools not accredited by the ABA. The ABA granted these students a status different from that held by students attending accredited schools. The plaintiffs sought only an injunction to remove this distinction. They sought to gain the rights and privileges held by the students attending accredited schools, including the right to run for office in the student division of the ABA. The court decided that it could not define these rights in monetary terms, and therefore could not grant jurisdiction.

In conclusion, the lower courts' interpretations of *Snyder* and *Zahn*

119. *Id.* at 314.

120. Snyder v. Harris, 394 U.S. 332, 335 (1969).

121. 414 F.2d at 314 (quoting Ronzio v. Denver & R.G.W.R.R., 116 F.2d 604, 606 (10th Cir. 1940)).

122. FED. R. CIV. P. 23(b)(2). *See* note 112 *supra*.

123. 28 U.S.C. § 1343 (1970 & Supp. V 1975).

124. *See* notes 131-41 *infra* and accompanying text. Note however that the case discussed—*Committee for GI Rights v. Callaway*—involves constitutional rights.

125. Jackson v. American Bar Ass'n, 538 F.2d 829, 832 (9th Cir. 1976).

126. 538 F.2d 829 (9th Cir. 1976).

have indicated that to use the defendants' perspective rule in class actions is just another method of aggregating plaintiffs' claims and may not be used in a rule 23(b)(3) action. It is still possible that the defendant's perspective rule may be considered in a 23(b)(1) action, or in those 23(b)(2) actions not governed by section 1343.[127] The Ninth Circuit has not indicated what course it will follow. It is probable that the court will follow the First Circuit's example in *Berman*, if the rights of the 23(b)(1) action are "common and undivided."[128] This approach is explicitly permitted by *Snyder*. It is also possible that the defendant's perspective rule may be used in 23(b)(2) actions, as long as the interests involved can be valued in monetary terms.

C. Valuing Constitutional Rights in Class Action Suits

As a result of the amendment to section 1331,[129] an entire class of cases involving constitutional rights no longer has to meet the specific monetary barrier provided in that section. However, the jurisdictional amount requirement must still be met when the defendant is a municipal corporation, a county or a school board.[130] Because these cases still arise under section 1331, it is relevant to examine the method which courts will employ to value the matter in controversy in a class action where plaintiffs allege a constitutional violation.

The most significant post-*Snyder* decision involving a constitutional claim in a class action setting is *Committee for GI Rights v. Callaway*.[131] Plaintiffs, soldiers stationed in Europe, were subjected to an Army drug abuse program. Under this program, any suspected drug abuser was publicly identified as such, had his driver's license and passes suspended, and had his civilian clothing confiscated. Plaintiffs sought to enjoin the Army from continuing to harass the soldiers by bringing a rule 23(b)(2) class action.

The court took the usual approach to the problem of valuing constitutional claims, and held that although such claims are difficult to measure, "that difficulty does not make the claim non-justiciable under Section 1331(a)."[132] The court went on to provide a means of meeting the jurisdictional amount requirement—by adopting the defendant's perspective rule. If the court considered the cost to the Army of terminating or

127. 28 U.S.C. § 1343 (1970 & Supp. V 1975).
128. Snyder v. Harris, 394 U.S. 332, 335 (1969).
129. *See* note 67 *supra*.
130. *See* note 74 *supra*.
131. 518 F.2d 466 (D.C. Cir. 1975).
132. *Id.* at 472 (quoting Gomez v. Wilson, 477 F.2d 411, 420 n.51 (D.C. Cir. 1973)).

altering the program, plaintiffs' claim far exceeded $10,000.[133]

The court's application of the defendant's perspective rule is significant in light of *Snyder v. Harris* and its aftermath. The Ninth Circuit found in *Snow v. Ford Motor Co.*[134] that application of the defendant's perspective rule was merely an attempt to evade *Snyder's* prohibition against the aggregation of claims. It also found that every lower court which examined this question in a 23(b)(3) class action setting had refused to apply that rule.[135] The *Snow* court referred to *Callaway*, but distinguished it on the grounds that it was a rule *23(b)(2)* class action. Even though *Snow* involved a *23(b)(3)* action, the suit asked mainly for injunctive relief, and the court considered only the injunction in attempting to value the amount in controversy. Thus, the procedural distinction between *Snow* and *Callaway* did not merit the contrary conclusions reached in those cases. The only important distinction to be made is between "common and undivided" rights and "separate and distinct" rights—the former may be aggregated and the latter may not.[136] The court in *Callaway* did not attempt to make such a distinction, but instead held that "the jurisdictional amount is . . . satisfied with respect to all of the plaintiffs because of the costs that the army would incur if the plaintiffs prevailed."[137] In other words, that court avoided the issue of aggregation simply by applying the defendant's perspective rule to every plaintiff. This is exactly what the Ninth Circuit in *Snow* held to be impermissible.[138]

The only real difference between *Snow* and *Callaway* is that the former involved business rights while the latter involved constitutional rights. *Callaway* simply followed a line of cases treating constitutional rights more liberally than other rights.[139] The court was reluctant to dismiss the suit for failure to meet the jurisdictional amount requirement,

133. The court assessed the value of the claim as follows:

> The cost to the Army . . . would be the cost of (1) stopping the drug inspections entirely or providing a warrant procedure for inspections; (2) providing a hearing prior to the imposition of administrative measures; [and] (3) eliminating other challenged aspects of the drug program . . . . Considering both the prospective tangible cost of additional hearings and intangible cost of drug abuse among personnel as the result of an adverse ruling, we agree . . . that the cost to defendants might well exceed $10,000.

518 F.2d at 473.

134. 561 F.2d 787 (9th Cir. 1977).

135. *Id.* at 789-90.

136. Snyder v. Harris, 394 U.S. 332, 335 (1969).

137. 518 F.2d at 473.

138. 561 F.2d at 790.

139. *See* notes 54-55 *supra* and accompanying text.

especially since "[t]he constitutional issues raised by the plaintiffs [were] not frivolous."[140]

In light of *Snow*, it is unlikely that the Ninth Circuit will adopt the *Callaway* approach. *Snow* unequivocally held that the defendant's perspective rule could not be used in a rule 23(b)(3) class action. Although the court explicitly refused to extend this prohibition to rule 23(b)(2) actions, it seems improbable that this formal distinction would cause a different result in a rule 23(b)(3) action where injunctive relief is sought. *Snow* recognized that aggregation is permissible only if the rights involved are "common and undivided."[141] To permit aggregation (or use of the defendant's perspective rule as a means of accomplishing the same purpose), the Ninth Circuit will have to find that constitutional rights are common and undivided, regardless of which section of rule 23 is invoked by the plaintiffs.

IV. CONCLUSION

The jurisdictional amount requirement equates the substantiality of the matter in controversy with its monetary worth. This approach is inappropriate in certain instances where, for example, the claims presented involve intangible or constitutional rights. A strict application of the jurisdictional amount requirement would keep these claims out of federal court. Clearly, the better view is to permit valuation from the defendant's perspective as well as the plaintiff's. By considering the impact of the claim on *either* party, the court may still obey Congress' mandate to keep petty controversies out of federal court; yet there is a greater opportunity for all substantial claims to be heard. Use of the defendant's perspective rule still equates the substantiality of an action with its monetary worth, but its effect is less harsh.

Karen L. Williams

140. 518 F.2d at 473.
141. 561 F.2d at 790.