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Christopher Willis

AGGREGATION OF PUNITIVE DAMAGES IN DIVERSITY CLASS ACTIONS: WILL THE REAL AMOUNT IN CONTROVERSY PLEASE STAND UP?

*Christopher J. Willis**

With the class action device becoming ever more popular, and with state-law class actions increasing in frequency, the federal courts have been confronted with a number of perplexing issues regarding federal diversity jurisdiction in class actions. The traditional rules regarding federal jurisdiction over state-law class actions have been heavily litigated in recent years, particularly the amount-in-controversy[1] requirement for diversity jurisdiction.[2] This litigation has come mainly from class-action defendants wishing to remove cases filed in state court to federal court, but it has also emanated from class plaintiffs' desire to file actions in a federal forum. This Article explores an amount-in-controversy issue that has sharply divided the lower federal courts in recent years: whether the amount of punitive damages sought by a class of plaintiffs may be aggregated[3] for the purpose of reaching the

* Law clerk to the Honorable James H. Hancock, U.S. District Court for the Northern District of Alabama. J.D., summa cum laude, 1996, Cumberland School of Law, Samford University; B.A., 1993, University of Alabama, Birmingham. In the interest of full disclosure, the author wishes to note that he did extensive work in the *Tapscott* case discussed herein while employed as a law clerk at Sirote & Permutt, P.C. The author wishes to thank Professor Andrew R. Klein, John R. Chiles, C. Lee Reeves, Samuel M. Hill, and Wilson F. Green for their comments on earlier drafts of this Article.

1. The amount-in-controversy requirement of 28 U.S.C. § 1332 will increase from $50,000 to $75,000 effective January 17, 1997. *See* Federal Courts Improvement Act of 1996, P.L. 104-317, § 205 (Oct. 19, 1996).

2. *See* 28 U.S.C. § 1332 (1994).

3. The term "aggregation" is a bit misleading in this context, as it implies adding separate amounts together to reach the threshold. A punitive damage award in a class action is a unitary sum that will later be divided among the class members. Thus, it would be more accurate to pose the issue as whether that award should be divided among the class members for the purpose of determining the amount in controversy. However, all but one of the cases that address this issue refer to it as "aggregation." This Article does the same.

amount-in-controversy requirement for federal diversity jurisdiction.

Until recently no court of appeals had addressed the issue of punitive damages aggregation, but the numerous published district court opinions had established a clear majority against aggregation.[4] The two courts of appeals to weigh in on this issue—the Fifth and Eleventh Circuits—have held that punitive damages claimed in a class action may be aggregated to reach the $50,000 threshold for diversity jurisdiction.[5] The Eleventh Circuit case, *Tapscott v. MS Dealer Service Corp.*,[6] serves as a prime example of how the aggregation issue can arise.

In *Tapscott* the plaintiffs filed a putative class action against a number of retailers of goods in Alabama state court.[7] The complaint alleged various claims under Alabama law arising from the defendants' sales of extended service policies in consumer credit transactions.[8] The state-court pleadings requested unspecified compensatory and punitive damages for the putative class, allegedly comprising approximately ten thousand members.[9] One of the defendants, Lowe's Home Centers, removed the case to the U.S. District Court for the Northern District of Alabama on the basis of diversity of citizenship from the putative class members.[10] After removal the plaintiffs sought remand and filed affidavits asserting that the amount in controversy did not exceed $50,000 for each member of the putative class.[11] The district court denied the motion to remand, reasoning that the amount in controversy was met by the aggregate amount of punitive damages sought for the class, rather than the pro rata damages claimed for each putative class member.[12] The jurisdictional issue was presented to the Eleventh Circuit via interlocutory appeal, and the court of appeals

4. *See infra* Part II.

5. *See* Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996); Allen v. R & H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995). *Allen* was not a class action. Instead, 512 plaintiffs joined under Rule 20 of the Federal Rules of Civil Procedure to assert common claims against the defendants. *See id.* at 1329. Nevertheless, the aggregation analysis is the same whether the multiple claimants are joined under Rule 20 or Rule 23. *See id.*

6. 77 F.3d 1353 (11th Cir. 1996).

7. *See id.* at 1355.

8. *See id.*

9. *See id.* at 1355 & n.2.

10. *See id.* at 1355.

11. *See id.*

12. *See id.*

affirmed the district court's holding.[13]

By allowing the punitive damages claimed by a class of plaintiffs to be viewed in the aggregate, the Eleventh Circuit has made it vastly easier to establish the amount in controversy in class actions. Instead of having the onerous burden of proving that the amount in controversy exceeded $50,000 for each putative class member—a figure of $500 million in *Tapscott*—the *Tapscott* defendants only needed to prove that the total amount of punitive damages claimed by the putative class exceeded $50,000.

The issue of aggregating punitive damages to reach the $50,000 threshold is far from decided. Indeed, ten circuits have yet to address the issue, and district courts outside the Fifth and Eleventh Circuits remain reluctant to allow aggregation. The U.S. Supreme Court has not addressed this issue. This Article brings together and summarizes the discordant case law. Part I sets the stage by detailing the relevant rules enunciated by the Supreme Court. Part II examines the rationales advanced by courts that have disallowed aggregation. Part III looks at the reasoning of courts that have allowed aggregation. Part IV concludes that the pro-aggregation courts have the better argument, from both a precedential and policy perspective.

I. THE STARTING POINT: *SNYDER* AND *ZAHN*

The U.S. Supreme Court has never heard an aggregation case involving punitive damages sought by a class of plaintiffs, but two cases—*Snyder v. Harris*[14] and *Zahn v. International Paper Co.*[15]—

13. *See id.* at 1356 n.4.

14. 394 U.S. 332 (1969).

15. 414 U.S. 291 (1973). There is great debate about whether *Zahn* is still good law in light of the recent enactment of the federal supplemental jurisdiction statute. 28 U.S.C. § 1367 (1994). It can be argued that 28 U.S.C. § 1367's grant of supplemental jurisdiction over all "related" claims means that only the named plaintiff must satisfy the jurisdictional amount. Therefore, a federal court can exercise supplemental jurisdiction over class members whose claims do not exceed $50,000. Two courts of appeals have accepted this argument, while numerous district courts have rejected it. *Compare* Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996) *and In re* Abbott Laboratories, 51 F.3d 524 (5th Cir. 1995) (both holding that *Zahn* has been overruled by § 1367) *with* Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 n.9 (3d Cir. 1993) (not reaching the issue, but listing numerous district court cases that have held that *Zahn* is not overruled).

It is important to note that the *Zahn* holding is not directly relevant to the aggregation issue—*Zahn* reiterated the traditional aggregation rules in dicta—but *Zahn*'s holding concerned supplemental jurisdiction over absent class members whose claims fell below the jurisdictional amount. *See* 1 JAMES W. MOORE ET AL.,

have laid down the general rules applicable to the aggregation issue.

In *Snyder* the plaintiff brought a class action asserting claims under Missouri law against the directors of a corporation in which she held stock.[16] She alleged that the directors had purchased the corporation's stock at an unfairly high price in an attempt to obtain control of the company.[17] The plaintiff sought only compensatory damages of $8,740—just short of the $10,000 amount-in-controversy requirement at the time.[18] The plaintiff argued that the 1966 amendments to Federal Rule of Civil Procedure 23 had legislatively overruled the traditional aggregation doctrine, and urged the district court to aggregate her claim with the claims of the other four thousand shareholders whom she sought to represent.[19] The district court rejected this argument and dismissed the action for lack of subject matter jurisdiction.[20] The district court's judgment was affirmed by both the Eighth Circuit[21] and the Supreme Court.[22] The Supreme Court reiterated the traditional rule that

> the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement. Aggregation has been permitted only (1) in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant and (2) *in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest.*[23]

The Supreme Court held that, because the compensatory claims made by the class of shareholders were of a "separate and distinct" nature, they could not be aggregated to reach the jurisdictional

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MOORE'S FEDERAL PRACTICE ¶ 0.97[5], at 926 (Daniel R. Coquillette et al. eds., 2d ed. 1994) (noting that "*Zahn* was not an aggregation case; it was a supplemental jurisdiction case"). So, the discussion of *Zahn* in this Article leaves aside the § 1367 issue, concentrating only on the aspect of *Zahn* that reaffirms the traditional rules concerning aggregation of multiple plaintiffs' claims.

16. *See Snyder*, 394 U.S. at 333.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See* Snyder v. Harris, 268 F. Supp. 701, 705 (E.D. Mo. 1967).
21. *See* Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968).
22. *See Snyder*, 394 U.S. at 341-42.
23. *Id.* at 335 (emphasis added).

amount.[24]

The Supreme Court reaffirmed the traditional aggregation doctrine in *Zahn*. In that case the named plaintiff sought to represent a class of waterfront property owners who claimed that the defendant paper company had discharged pollution into the water near their homes.[25] The named plaintiff had a claim for more than the $10,000 requirement, but the district court found that the absent class members' claims did not satisfy the jurisdictional amount and denied class certification.[26] The Second Circuit affirmed,[27] as did the Supreme Court.[28] Specifically, the Supreme Court held that, in a class action, *all* of the putative class members must satisfy the amount-in-controversy requirement *individually* when their demands are separate and distinct.[29] The Court also reiterated the classic aggregation rule:

> When two or more plaintiffs, having *separate and distinct* demands, unite for convenience and economy in a single suit, *it is essential that the demand of each be of the requisite jurisdictional amount*; but when several plaintiffs unite to enforce a *single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.*[30]

Snyder and *Zahn* conclusively established that, when class-action plaintiffs assert separate and distinct claims, aggregation is improper. However, neither case gives any guidance to a court attempting to decide whether a particular interest is separate and distinct or common and undivided. Various federal courts have grappled with the question of whether a punitive damage award

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24. *See id.* at 341-42.

25. *See Zahn*, 414 U.S. at 291-92.

26. *See* Zahn v. International Paper Co., 53 F.R.D. 430, 434-35 (D. Vt. 1971).

27. *See* Zahn v. International Paper Co., 469 F.2d 1033, 1036 (2d Cir. 1972).

28. *See Zahn*, 414 U.S. at 302.

29. *See id.* at 301. This holding is brought into question by 28 U.S.C. § 1367. *See* 1 MOORE ET AL., *supra* note 15, ¶ 0.97[5], at 927-28.

30. *Zahn*, 414 U.S. at 294 (emphasis added) (citing Troy Bank v. G. A. Whitehead & Co., 222 U.S. 39, 40-41 (1911)). *Snyder* and *Zahn* were certainly not the first cases to announce the dichotomy between separate and distinct and common and undivided interests; the general rule governing aggregation appears to be nearly as old as diversity jurisdiction itself. For early cases applying the rule, see *Gibson v. Shufeldt*, 122 U.S. 27, 30 (1887); *Davies v. Corbin*, 112 U.S. 36, 40-41 (1884); *The "Connemara,"* 103 U.S. 754, 755-56 (1880); and *Shields v. Thomas*, 58 U.S. (17 How.) 3, 3-6 (1854).

sought by a class of plaintiffs is a common or separate interest.[31] The next two parts of this Article summarize the reasoning advanced by courts reaching both conclusions.

II. THE CASE AGAINST AGGREGATION

A number of district courts have rejected the argument that a punitive damage fund sought by a class of plaintiffs should be aggregated to reach the $50,000 threshold. These courts have advanced three arguments in support of their holdings: (1) the policy of limiting federal diversity jurisdiction represented by *Zahn*, (2) the fact that individual class members could bring separate claims and seek separate awards of punitive damages, and (3) the belief that aggregation is only appropriate when all of the plaintiffs' claims arise from a single transaction or event, rather than separate transactions.[32]

A. The Policy of Limiting Federal Diversity Jurisdiction

Several district courts that have rejected the aggregation argument have justified their holdings by reasoning that to allow aggregation of punitive damages would be contrary to the policies expressed in *Zahn*, perhaps referring to the "policy" of limiting federal diversity jurisdiction.[33] This reference to *Zahn* is puzzling

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31. *See infra* Parts II & III.

32. Some of the citations in this section are to opinions from district courts within the Fifth and Eleventh Circuits. These cases have been overruled by *Allen* and *Tapscott*. I discuss them here solely to evaluate their reasoning.

33. *See* Asten v. Southwestern Bell Tel. Co., 914 F. Supp. 430, 433 (D. Kan. 1996); Garcia v. General Motors Corp., 910 F. Supp. 160, 166 (D.N.J. 1995); Visintine v. SAAB Auto., A.B., 891 F. Supp. 496, 499 (E.D. Mo. 1995); Bassett v. Toyota Motor Credit Corp., 818 F. Supp. 1462, 1466-68 (S.D. Ala. 1993); Hayes v. Fireman's Fund Mortgage Corp., No. 91-C-4544, 1991 WL 255529, at *3 (N.D. Ill. Nov. 25, 1991); Goldin v. American Airlines, No. 90-C-768, 1990 WL 77630, at *2-3 (N.D. Ill. May 21, 1990). Both *Bassett* and *Goldin* rely on *Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365 (9th Cir. 1982). *Goldberg* rejected a claim that an attorney's fee award claimed by a plaintiff class could be aggregated; the *Goldberg* court observed that aggregation "would seriously undermine and [is] contrary to the rule expressed by the Supreme Court in *Zahn*." *Id.* at 1367. *Goldberg* did not discuss the issue of whether the attorney's fee was a common and undivided interest or a separate and distinct one.

Bassett also relied heavily on *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978). *Lindsey* contains a brief remark about aggregation of class members' claims, and cites both *Snyder* and *Zahn*. *See id.* at 594. Although the plaintiff class did request punitive damages in *Lindsey*, it is not apparent whether the Fifth Circuit was even presented with the issue of whether the punitive damages sought were a common and undivided interest of the class. The *Lindsey* opinion does not discuss

since the only policy actually expressed by the Court in *Zahn* was that separate and distinct claims could not be aggregated to reach the jurisdictional amount.[34] *Zahn*'s holding was based upon the *assumption* that the class members' interests were separate and distinct, and *Zahn* says nothing about how a court should differentiate between common and separate claims.[35] The reliance of these opinions on *Zahn* seems circular since the courts decide not to allow aggregation based on *Zahn*, while *Zahn*—by its own terms—only applies if the claims are separate and distinct. By merely invoking *Zahn*, these courts have assumed the conclusion to the question presented and have bypassed the real issue—whether a punitive damages fund sought by a class falls into the separate and distinct category or is really a common and undivided interest.

Perhaps by referring to *Zahn*, these courts are impliedly rejecting aggregation on the basis that it would expand federal diversity jurisdiction. At least one commentator has suggested that the policy behind *Zahn* was to limit the diversity caseload of the federal courts,[36] and a number of courts refusing to allow aggregation have noted that one reason for doing so is "to keep the diversity caseload of the federal courts under some modicum of con-

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the issue of whether punitive damages are common and undivided or separate and distinct; it simply recited that, generally, class members' claims cannot be aggregated. *See id.*

At least one other court has followed *Bassett*'s lead in finding that *Lindsey* forecloses punitive damages aggregation. *See* Granier v. Eparka Shipping, Inc., Nos. CIV.A. 94-3990 to 94-3992, 1995 WL 91129, at *2 (E.D. La. Mar. 1, 1995). However, both courts of appeals bound by *Lindsey*—the Fifth and Eleventh Circuits—have not interpreted it as a holding precluding punitive damages aggregation, despite specific citation to *Lindsey* in both circuits' opinions. *See* Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357 n.9 (11th Cir. 1996); Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1332 n.9 (5th Cir. 1995).

34. *See supra* notes 15, 25-30 and accompanying text.

35. There is some language in *Zahn* that can be read to mean that class members' interests are *never* common and undivided when they invoke Rule 23(b)(3)—the "spurious" class action. *See* Zahn v. International Paper Co., 414 U.S. 291, 296-97 (1973). However, a better reading of this portion of *Zahn* is that when plaintiffs are united *only* by the commonalities of law and fact required by Rule 23(b)(3), their interests are not *necessarily* common and undivided. *Zahn* does not foreclose the possibility that Rule 23(b)(3) class members might have a common and undivided interest in the recovery sought; it merely states that the prosecution of the action under Rule 23(b)(3) is not *enough* to create a common and undivided interest. This reading is particularly appropriate when one considers the issue the Court was addressing at that point in *Zahn*—the effect of the 1966 Amendments to the Federal Rules of Civil Procedure on the traditional aggregation rules.

36. *See* 1 MOORE ET AL., *supra* note 15, ¶ 0.97[5], at 927.

trol."[37]

However, rejecting the aggregation argument on this basis is incorrect for two reasons. First, it substitutes a general policy concern for the established legal rule as the basis for deciding a jurisdictional issue. Second, and more important, there are countervailing policy concerns that balance the need to cut down on the federal courts' workload. If the rationale behind diversity removal jurisdiction is that out-of-state defendants will be subject to bias at the hands of local courts, and their interest in avoiding bias only becomes significant enough to justify removal when the amount in controversy exceeds $50,000, it seems quite clear that the same policy interests favor the removal rights of a defendant faced with a $500,000,000 punitive damage claim by a class of ten thousand plaintiffs.[38] The same is true with respect to a case filed in federal

37. Haisch v. Allstate Ins. Co., No Civ-96-1647, 1996 WL 617339, at *6 (D. Ariz. Oct. 22, 1996) (citing Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993)); *see* Hamel v. Allstate Indem. Co., No. CIV.A. 95-6554, 1996 WL 106120, at *1 (E.D. Pa. Mar. 5, 1996); Pierson v. Source Perrier, S.A., 848 F. Supp. 1186, 1188 (E.D. Pa. 1994); *see also* Bishop v. General Motors Corp., 925 F. Supp. 294, 298-99 (D.N.J. 1996) (stating that the purpose behind the amount-in-controversy requirement is to limit the federal docket to substantial cases).

38. Commentators have been debating the continued vitality of the "local bias" justification for diversity jurisdiction for years, and a consensus is nowhere in sight. The Federal Courts Study Committee concluded that the amount of such bias is "probably small." REPORT TO THE FEDERAL COURTS STUDY COMMITTEE OF THE SUBCOMMITTEE ON THE ROLE OF FEDERAL COURTS AND THEIR RELATION TO THE STATES, *reprinted in* 1 FEDERAL COURTS STUDY COMMITTEE: WORKING PAPERS AND SUBCOMMITTEE REPORTS 452 (1990); *see also* 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3601, at 356-57 (1984) (concluding that "it is difficult to believe that prejudice against a litigant based upon his being a citizen of a different state, is a significant factor"). *But see* Ian Anderson et al., *Report of the New York County Lawyers' Association Committee on the Recommendation of the Federal Courts Study Committee to Abolish Diversity Jurisdiction*, 158 F.R.D. 185, 200-02 (1995) (arguing that the Federal Courts Study Committee was mistaken in concluding that no local bias exists); Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 201-05 (1982) (arguing that local bias still exists). Congress has chosen not to eliminate diversity jurisdiction, and to the extent that the local bias rationale for diversity still exists, a class action with a huge punitive damage claim certainly invokes that rationale.

Unable to come up with any real empirical evidence of local bias, supporters of diversity jurisdiction have also defended its continued existence by noting that federal courts tend to be of higher quality than state courts. *See* 13B WRIGHT ET AL., *supra* § 3601 (noting that "[t]here may be merit to this argument"); Marsh, *supra*, at 210-12 (arguing that the superiority of federal courts to state courts justifies diversity jurisdiction). This rationale, if accepted, argues strongly in favor of allowing aggregation. Large class actions—the most common context in which the aggregation issue arises—carry with them complex jurisdictional, choice-of-law, causation, and other issues. If diversity jurisdiction is justified by higher-quality courts, then surely

court—a class of plaintiffs should be able to avail themselves of a federal forum when widespread wrongdoing is alleged, and the $50,000 amount-in-controversy threshold should not be applied to keep hundred-million-dollar cases out of federal court.

In short, the rejection of the aggregation argument cannot rest on an appeal to *Zahn* or the policy of limiting federal diversity jurisdiction. *Zahn* tells us nothing about which interests are separate and distinct rather than common and undivided, and the policy considerations favoring aggregation are at least as strong as those that counsel against it.

B. The Availability of Individual Claims

Some courts have held that a punitive damages fund sought by a class of plaintiffs is not a common and undivided interest because, if the class members brought their claims individually, each could make a separate claim for punitive damages.[39] The availability of individual actions, each with a claim for punitive damages, leads these courts to conclude that the class members' interests in the punitive damages sought are separate and distinct.[40]

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complex cases are those most deserving of a federal forum. In addition to the putative higher quality of federal courts generally, the federal system gives litigants the opportunity to make use of the Judicial Panel on Multidistrict Litigation, an opportunity not afforded in state courts. Because mass tort cases, and other class actions, are often litigated in separate class actions filed in separate states, the interests of consistency and judicial economy argue in favor of allowing those cases greater access to the federal system and the Multidistrict panel. These policy arguments, while certainly not dispositive of the aggregation issue, certainly act as a counterweight to the principle of limiting diversity jurisdiction often used to reject aggregation.

39. *See, e.g.,* Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1341 (5th Cir. 1995) (DeMoss, J., dissenting); *Haisch*, 1996 WL 617339, at *5; *Bishop*, 925 F. Supp. at 297; Hasek v. Chrysler Corp., No. 95 C 579, 1996 WL 48602, at *2 (N.D. Ill. Feb. 5, 1996); Visintine v. SAAB Auto., 891 F. Supp. 496, 498 (E.D. Mo. 1995); Anderson v. Shell Oil Co., CIV.A.No. 93-2235, 1994 WL 702022, at *1 (E.D. La. Dec. 13, 1994); Teal v. Associates Fin. Life Ins. Co., CIV.A.No. 94-D-732-N, 1995 WL 376930, at *3 (M.D. Ala. Sept. 29, 1994); Clement v. Occidental Chem. Corp., CIV.A.No. 94-1315, 94-1316, 94-1317, 1994 WL 479155, at *2 (E.D. La. Aug. 30, 1994) ("Plaintiffs here could individually assert a punitive damages claim."); *Pierson*, 848 F. Supp. at 1189; Smiley v. Citibank, N.A., 863 F. Supp. 1156, 1163 (C.D. Cal. 1993); Hayes v. Fireman's Fund Mortgage Corp., No. 91 C 4544, 1991 WL 255529, at *3 (N.D. Ill. Nov. 25, 1991); Kasky v. Perrier Group of Am., No. CIV. 91-0489, 1991 WL 577038, at *1-2 (S.D. Cal. Sept. 16, 1991).

40. Language in one older Supreme Court case can be read to support this argument. *See* Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 41 (1911) (holding that two plaintiffs' interest in a vendor's lien was common and undivided because it was a claim "neither can enforce in the absence of the other"). The cases seem to be in agreement that the success or failure of individual claims must affect the rights of coplaintiffs in order to allow aggregation, but that rule becomes the starting point,

The logical fallacy in this reasoning is that, in its emphasis on the availability of individual actions, it ignores the fact that the plaintiffs have chosen to pursue their claims *as a class.* They are all seeking to punish the defendant for the same act or same series of related acts, and their pursuit of class adjudication makes it clear that they have joined together to punish and deter the defendant's wrongdoing with a *single* award of punitive damages awarded by the jury *for the class as a whole.* Although the class members' punitive damages might be separate and distinct if each class member pursued an individual action, the class action unites the class members, and they seek their punitive damages as a single fund awarded for the benefit of the entire class without regard to how much of the fund will later be awarded to each class member.[41]

In addition, the "individual action" argument assumes that each class member could assert a claim against the defendant for the same conduct or course of conduct without affecting the rights

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not the conclusion, in the punitive damages context. It might be argued that numerous individual suits for punitive damages could proceed without affecting one another, but the success or failure of individual plaintiffs' claims will affect the rights of coplaintiffs if a single award of punitive damages is made in a class action. So, for those courts that apply this test, the real focus is on whether the procedural posture of the case—class action versus individual claim—affects the plaintiffs' interest in the recovery. Because punitive damages are not designed to serve the compensatory needs of individual plaintiffs, the better argument is that they are always common and undivided, but single-plaintiff suits simply present no opportunities for aggregation. In the class action context, the role of punitive damages—punishing and deterring class-wide wrongful conduct—is more closely aligned with the procedural posture of the case and aggregation is clearly appropriate.

In addition, while *Troy Bank* notes that neither plaintiff could enforce the vendor's lien at issue without the other's presence, this factor is not a necessary element of a common and undivided claim. For example, in *Davies v. Corbin,* 112 U.S. 36 (1884), a number of judgment creditors sued to require a county tax collector to collect a tax to pay their judgments. *See id.* at 39-40. The Supreme Court specifically noted that each of the individual creditors possessed the right to compel collection of the tax, even though it would benefit all of the plaintiffs. *See id.* at 41. So, while the necessity of joining all the plaintiffs in an action may have supported aggregation in *Troy Bank,* it is not a *necessary* prerequisite to aggregation. This conclusion is further supported by the fact that, of all of the Supreme Court's aggregation cases, only *Troy Bank* emphasizes the necessity of joining all of the potential plaintiffs in order for any of the claimants to recover. *See Troy Bank,* 222 U.S. at 41. Most of the cases applying the aggregation rule use the test later adopted by the First Circuit—if the defendant has no interest in the apportionment of the recovery among the plaintiffs, the plaintiffs' interest is common and undivided. *See* Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 316 (1st Cir. 1969).

41. *See Allen,* 63 F.3d at 1334.

of other class members to recover punitive damages.[42] However, a large punitive damage award recovered by the first plaintiff to receive a judgment against a defendant could very well make it impossible for the defendant to pay future punitive awards, or could reduce the amount of such awards, since prior punitive damage awards and the defendant's ability to pay are factors considered in assessing punitive damages.[43] A defendant's liability for punitive damages, or its ability to pay such damages, is not unlimited. Therefore, individual suits for punitive damages could have a very real effect on later punitive damage awards based on the same conduct.

The fact that the class members' demands *could be* separate and distinct if they pursued their claims individually does not mean that the punitive damages sought by the class when they choose to proceed *together* are also separate. In fact, it seems more logical to conclude that, since the punitive damage award will be made for the class as a whole, it is a common interest subject to aggregation.

C. The Source of the Rights Asserted

The final rationale advanced in opposition to the aggregation of punitive damages in class actions is the source-of-the-rights test. Courts employing this test reason that if the claims of the class members arise from separate and distinct transactions—such as separate insurance contracts or separate sale or loan transac-

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42. *See Hayes*, 1991 WL 255529, at *3 (citing Hughes v. Encyclopedia Britannica, 199 F.2d 295, 300 (7th Cir. 1952)) ("Claims are considered separate and distinct when the class members can individually bring a separate action without affecting the rights of other class members.").

43. *See, e.g.*, Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989) (holding the financial position of the defendant and any previous punitive awards arising from the same conduct are factors to be considered in reviewing punitive damages). In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the U.S. Supreme Court found that Alabama's system for awarding punitive damages did not violate due process because of the presence of the *Green Oil* factors in judicial review of punitive awards. *See id.* at 18-19. Presumably, a series of punitive damage awards that repetitively punish the same defendant for the same conduct will reach a point after which further awards will offend due process. *See id.* at 18 (warning that fixing punitive damage awards could "invite extreme results that jar one's constitutional sensibilities").

Other states also require consideration of the defendant's financial position or prior punishment for the same conduct when punitive damages are reviewed. *See, e.g.*, Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn, 907 P.2d 506, 520 (Ariz. Ct. App. 1995); Adams v. Murakami, 54 Cal. 3d 105, 117, 813 P.2d 1348, 1355-56, 284 Cal. Rptr. 318, 325-26 (1991); Bill Branch Chevrolet v. Burkert, 521 So. 2d 153, 155 (Fla. App. 1988).

tions—then their interests in the relief sought are also separate and distinct and cannot be aggregated.[44]

This argument suffers several flaws. First, it ignores the Supreme Court's guidance on this issue. In two cases—*Troy Bank v. G.A. Whitehead & Co.*[45] and *Davies v. Corbin*[46]— the Supreme Court allowed aggregation of plaintiffs' interests that arose from separate and distinct transactions. In *Troy Bank* a landowner sold the defendant a parcel of land, taking two promissory notes and a vendor's lien as security for the debt.[47] The seller then assigned each of the promissory notes to one of the plaintiffs in separate contractual transactions.[48] When the two plaintiffs sued together to enforce the vendor's lien, the Supreme Court held that their in-

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44. *See* Haisch v. Allstate Ins. Co., No Civ-96-1647, 1996 WL 617339, at *5-6 (D. Ariz. Oct. 22, 1996); *In re* Ford Motor Co. Bronco II Prod. Liab. Litig., No. MDL-991, 1996 WL 257570, at *4 (E.D. La. May 16, 1996); Villarreal v. Chrysler Corp., No. C-95-4414, 1996 WL 116832, at *3 (N.D. Cal. Mar. 12, 1996); Hamel v. Allstate Indem. Co., No. CIV.A.95-6554, 1996 WL 106120, at *2 (E.D. Pa. Mar. 5, 1996); Teal v. Associates Fin. Life Ins. Co., CIV.A.No. 94-D-732-N, 1995 WL 376930, at *3; Parham v. Stouffer Foods Corp., 882 F. Supp. 1018, 1019 (M.D. Ala. 1995); Hall v. ITT Fin. Serv., 891 F. Supp. 580, 583 (M.D. Ala. 1994); Bassett v. Toyota Motor Credit Corp., 818 F. Supp. 1462, 1466-68 (S.D. Ala. 1993); Poindexter v. National Mortgage Corp., No. 91 C 4223, 1991 WL 278454, at *2 (N.D. Ill. Dec. 23, 1991). The *Bassett* court wrote:

> In the opinion of the undersigned, where relief is sought for the breach of separately negotiated contracts, it is difficult, if not impossible, to imagine how the interests to be adjudicated could be characterized as a common interest belonging to the group as a whole rather than to the individual plaintiffs. In the case *sub judice*, each class member has a separate insurance contract and could in theory bring an individual action for the Defendant's alleged improper conduct with regard to those contracts. Thus, this class cannot be said to possess a "common and undivided interest" and are in fact stating separate and distinct claims, the value of which must be analyzed in order to determine whether the jurisdictional amount has been met or exceeded.

Bassett, 818 F. Supp. at 1467.

The source-of-the-rights test also finds support in the language of some appellate court opinions deciding whether relief other than punitive damages is common or separate. *See* Griffith v. Sealtite Corp., 903 F.2d 495, 498 (7th Cir. 1990) (holding that where the "underlying causes of action" are separate and distinct, aggregation is impermissible); Burns v. Massachusetts Mut. Life Ins. Co., 820 F.2d 246, 250-51 (8th Cir. 1987) (holding that plaintiffs whose causes of action arise from separate insurance contracts may not aggregate). However, this argument was expressly rejected in both *Tapscott* and *Allen*. *See* Tapscott v. MS Dealer Serv. Corp, 77 F.3d 1353, 1358 (11th Cir. 1996); *Allen*, 63 F.3d at 1331 n.6.

45. 222 U.S. 39 (1911).

46. 112 U.S. 36 (1884).

47. *See* Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40 (1911).

48. *See id.*

terest in the lien was "common and undivided."[49] The Supreme Court held that "while their claims under the notes were separate and distinct, their claim under the vendor's lien was single and undivided, and the lien was sought to be enforced as a common security for the payment of both notes."[50]

In *Davies* several persons sued a county and obtained separate and distinct judgments against the county.[51] Later they jointly sued to require the county tax collector to collect a tax on the county's citizens to satisfy their judgments.[52] Although each plaintiff's interest arose from a separate and distinct judgment, the Supreme Court held that their interest in enforcing the tax was common and undivided and allowed aggregation.[53]

There can be no doubt that *Troy Bank* and *Davies* remain good law, despite their age. In *Snyder v. Harris*[54] the Supreme Court insisted that it would not change the traditional aggregation rules because of the 1966 amendments to the Federal Rules of Civil Procedure and traced the aggregation rule all the way back to 1832.[55] In addition, the Court in *Snyder* twice cited *Troy Bank* as representing an example of the proper statement of the rules governing aggregation.[56] *Zahn v. International Paper Co.*,[57] the Supreme Court's latest statement on aggregation—albeit in dicta—also cites *Troy Bank* with approval and states that the aggregation rules "were firmly rooted in prior cases dating from 1832, and have continued to be the accepted construction" of the "matter in controversy" language in 28 U.S.C. § 1332.[58] So, the Supreme Court's holdings applying the ancient common and undivided test clearly reject the notion that aggregation is improper when the individual plaintiffs' interests arise from separate transactions. Rather, the Supreme Court's holdings require an inquiry into the plaintiffs' individual or group entitlement to the relief claimed.[59]

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49. *Id.* at 41.
50. *Id.*
51. *See* Davies v. Corbin, 112 U.S. 36, 37 (1884).
52. *See id.*
53. *See id.* at 40-41.
54. 394 U.S. 332 (1969).
55. *See id.* at 335-39.
56. *See id.* at 336-37.
57. 414 U.S. 291 (1973).
58. *See id.* at 294-95 (footnote omitted).
59. The source-of-the-rights test would also generate the wrong result in mass tort claims for compensatory damages. The well-accepted law is that claims for compensatory damages are separate and distinct because each plaintiff individually

The second problem with the source-of-the-rights test is that it fails to take into account the nature of the punitive damages fund in a class action. Even if the plaintiffs' underlying claims arise from separate and distinct transactions, it does not follow that a single punitive damages fund sought by the class as a whole is a separate and distinct demand. It seems more logical to conclude the opposite—that when the class of plaintiffs comes together and attempts to collect a single award of punitive damages that (1) will be awarded to the class as a whole and (2) will accomplish the same goal of punishment and deterrence with respect to all of the class members, it has created a potential recovery of punitive damages in which class members share a common and undivided interest.

Finally, the source-of-the-rights test would draw an arbitrary, illogical line with respect to aggregation. If the plaintiffs were claiming to be injured as a result of a single act by the defendant—for example, a plane crash, chemical spill, or other single event—then presumably the source-of-the-rights test would operate to allow aggregation since the underlying causes of action asserted by the plaintiffs all arose from the same event, rather than separate transactions. However, if a defendant injured a class of plaintiffs by repeating the exact same conduct—for example insurance fraud—in each separate transaction, aggregation would be forbidden. The source-of-the-rights test would thereby operate to allow aggregation and disallow it in two contexts logically indistinguishable from one another—where the plaintiffs are entitled to punitive damages as a group because the single act of the defendant

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"owns" the right to collect those damages, which are designed solely to satisfy each plaintiff's particular losses. *See, e.g.*, Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colombia, S.A., 988 F.2d 559, 563 (5th Cir. 1993) (stating that compensation for the personal injuries sustained by the plaintiffs are clearly individual and not aggregable).

However, if the source-of-the-rights test is the proper way to determine whether a group of plaintiffs have separate and distinct or common and undivided interests, then any claim for compensatory damages that arises from a single event would be subject to aggregation. This would be the case regardless of how individual in function or entitlement were the damage claims. Focusing on the plaintiffs' shared or individual rights to collect the relief sought, as the Supreme Court cases require, gives the correct and well-accepted result with respect to individual compensatory damages. Because the right to recover those damages belongs only to each individual plaintiff, they are considered separate and distinct whether they arise from a single event or separate transactions. Applying the entitlement analysis to punitive damages claimed on behalf of a class yields the result that the plaintiffs own the right to the relief sought as a group. *See infra* Part IV.

harmed them and where the plaintiffs are entitled to punitive damages as a group because the many identical, related acts of the defendant harmed them.[60] Moreover, in both contexts the plaintiffs will share any punitive damages awarded to the class, thus highlighting their common interest.

III. THE CASE FOR AGGREGATION

A number of courts have decided that a punitive damage award claimed in a class action is a common and undivided interest shared by all of the class members.[61] Those courts have relied on various combinations of three rationales to support their holdings. First, the function of punitive damages under state law is punishment and deterrence, not compensation, so class members share an interest in a class punitive damage award designed to punish class-wide wrongdoing.[62] Second, the fact that the punitive damages award would be proven by evidence regarding the defendant's conduct toward the entire class, rather than individual evidence for each class member, supports the conclusion that the award "belongs" jointly to all of the class members.[63] Third, once a punitive damages award is made to the class, the success or failure of individual class members' claims would not affect the overall size of the award.[64] This Part examines these three rationales.

A. The Nature and Function of Punitive Damages

Compensatory damages, as a general rule, have always been considered separate and distinct interests because their function is solely to compensate a single injured party for that party's injuries, and the right to those damages belongs exclusively to that one party.[65] No individual class member can assert any rights to any

60. Drawing the line between single and separate underlying events could also prove problematic. For example, victims of insurance fraud could attempt to show that their injuries resulted from a single scheme to defraud, concocted by the defendant and then implemented through separate insurance transactions.

61. *See* cases discussed *infra* Parts III.A-C

62. *See infra* Part III.A.

63. *See infra* Part III.B.

64. *See infra* Part III.C.

65. *See, e.g.*, Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colombia, S.A., 988 F.2d 559, 563 (5th Cir. 1993) (holding that compensatory damages claimed by a putative class of fishermen were separate and distinct because each class member sought only to recover for his or her own individual economic and personal injuries).

other class member's compensatory damages. Punitive damages, on the other hand, serve no compensatory purpose under most states' laws; rather, they are designed to further society's goals of punishment and deterrence.[66] In addition, most states view punitive damages as left to the discretion of the trier of fact and hold that no plaintiff has any right to receive punitive damages.[67]

A number of the courts that have allowed aggregation of punitive damages have relied on these features of the nature of punitive damages to support their holdings. These courts reason that the goal of a punitive damage award in a class action is to punish and deter the defendant for its conduct toward the class as a whole, a goal the class members have a collective interest in achieving.[68] In addition, unlike class members' claims for compensatory damages, the right to the class punitive damage award does not "belong" to individual plaintiffs—it is a collective award de-

66. *See, e.g.*, Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1358 (11th Cir. 1996) (applying Alabama law); Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1332-33 (5th Cir. 1995) (applying Mississippi law); Williams v. Monsanto Co., CIV.A.Nos.93-4237, 94-3725, 94-3727, 1996 WL 162134, at *2 (E.D. La. Apr. 4, 1996) (applying Louisiana law); Turpeau v. Fidelity Fin. Serv., 936 F. Supp. 975, 979 (N.D. Ga. 1996) (applying Georgia law); Gilmer v. Walt Disney Co., 915 F. Supp. 1001, 1012-14 (W.D. Ark. 1996) (applying Arkansas law); Brooks v. Georgia Gulf Corp., 924 F. Supp., 739, 741 (M.D. La. 1996) (applying Louisiana law); *In re* Norplant Contraceptive Prod. Liab. Litig., 907 F. Supp. 244, 246 (E.D. Tex. 1995) (applying Texas law) (citing Estate of Moore v. Commissioner, 53 F.3d 712, 715 (5th Cir. 1995)). The Fifth Circuit in *Allen* called this the "almost unanimous" view of the function of punitive damages, noting that only Connecticut, New Hampshire, and Michigan recognize a compensatory function for those damages. *See Allen* 63 F.3d at 1332 & n.10. (citing 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.4(B), at 17 & n.3 (2d ed. 1989)).

67. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 14 (5th ed. 1984).

68. *See Tapscott*, 77 F.3d at 1358-59; *Allen*, 63 F.3d at 1332-34; Lailhengue v. Mobil Oil Corp., 775 F. Supp. 908, 913-14 (E.D. La. 1991); *In re* Northern Dist. Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 911 (N.D. Cal. 1981), *vacated and remanded on other grounds*, 693 F.2d 847 (9th Cir. 1982). Although the *Allen* court spent considerable energy discussing the fact that the role of punitive damages under Mississippi law was in accord with the law of the vast majority of states, the panel's opinion denying rehearing and rehearing en banc stated that its result was one under Mississippi law only and was not to be interpreted as announcing a holding applicable to other states' laws. *See* Allen v. R & H Oil & Gas Co., 70 F.3d 26 (5th Cir. 1995). Courts that have followed *Allen* have ignored this remark, concluding, as the *Allen* court did, that other states' punitive damages laws are functionally identical to that of Mississippi. *See Tapscott*, 77 F.3d at 1358 (applying Alabama law); *Williams*, 1996 WL 162134, at *2 (applying Louisiana law); *Gilmer*, 915 F. Supp. at 1013-14 (applying Arkansas law); *Brooks*, 924 F. Supp. at 741 (applying Louisiana law); *In re Norplant Contraceptive Prod. Liab. Litig.*, 907 F. Supp. at 246 (applying Texas law).

signed to benefit the class as a whole, rather than being directed at compensating individual plaintiffs.[69] Due to these "fundamentally collective"[70] goals served by an award of punitive damages in a class action, courts have had little trouble characterizing such an award as a common and undivided interest belonging to the class as a whole, rather than to individual class members.

B. Reliance on Group Evidence

Some courts allowing aggregation look to the evidence that will be used to prove the amount of damages for a particular claim in order to classify it as separate and distinct or common and undivided. According to courts allowing aggregation, claims that must be quantified by individual evidence are separate and distinct; claims that require proof only of the defendant's conduct toward the class as a whole are deemed common and undivided.[71]

In a class action involving punitive damages, the amount of those damages will be set by the trier of fact examining the defendant's conduct toward the class as a whole; individual evidence regarding the wrong done to each class member will typically not be considered.[72] By bringing a punitive damage claim in a class action, the plaintiffs are requesting the trier of fact to punish and deter the defendant's conduct toward the class as a whole. Viewed in this light, the reliance on evidence of the defendant's conduct toward the class as a whole makes the punitive damages claimed for the class common and undivided; if the amount of the award is set by reference to group evidence, rather than individual factors unique to each plaintiff, the punitive damages appear to be a recovery in which the class members share an interest. After all, since the amount of the award is not determined by looking at class members' individual evidence, the award is truly undivided since no particular plaintiff can claim any entitlement to a particu-

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69. *See Asociacion Nacional de Pescadores*, 988 F.2d at 563. However, some courts have disagreed, concluding that their states' punitive damages laws reflected individual, rather than collective, interests. *See* Harrison v. Union Carbide Corp., Civ.A.Nos. 95-1316, 95-1558, 95-1993, 95-2820, 1995 WL 731672, at *3 (E.D. La. Dec. 7, 1995) (refusing to follow *Allen* because Louisiana punitive damages law is different from Mississippi law); *Pierson*, 848 F. Supp. at 1189 (applying Pennsylvania law).

70. *Allen*, 63 F.3d at 1333.

71. *See Tapscott*, 77 F.3d at 1358-59; *Asociacion Nacional de Pescadores*, 988 F.2d at 563; *Williams*, 1996 WL 162134, at *2; *Lailhengue*, 775 F. Supp. at 913-14.

72. *See Tapscott*, 77 F.3d at 1358; *In re* Shell Oil Refinery, 136 F.R.D. 588, 593 (E.D. La. 1991).

lar amount of the punitive damages.[73]

Of course, this rationale is closely related to the rationale regarding the nature and function of punitive damages discussed in the preceding section, and may simply be the same argument explained in a different way. Regardless, by looking to whether the amount of damages will be set by reference to individual or group evidence, the courts have identified a useful factor that can aid in distinguishing common and undivided interests from separate and distinct ones.[74]

C. *The* Berman *Test: The Defendant's Interest in the Distribution of the Award and the Success or Failure of Individual Claims as Affecting the Amount Recovered by Other Plaintiffs*

Another method used by courts favoring aggregation of punitive damages is a two-prong test to distinguish separate and distinct claims from common and undivided ones. This test is commonly associated with the First Circuit's decision in *Berman v. Narragansett Racing Association.*[75]

In *Berman* a class of horse owners sued several horse tracks, claiming that they were due a percentage of the track's "breakage," that is, the money retained by the track owners after they rounded down the payment of each winning bet to the nearest

73. In *Tapscott* the Eleventh Circuit qualified its holding that class action punitive damages should be aggregated by noting that, in some instances, punitive damages claimed in a class action might be determined by looking at individual evidence. In such cases, the court observed that "aggregation of punitive damages may very well be inappropriate." *Tapscott*, 77 F.3d at 1359 n.13. Following this logic, some courts have refused to aggregate punitive damages when the amount of the damages would be tied to each class member's individual compensatory damages. *See* Borgeson v. Archer-Daniels Midland Co., 909 F. Supp. 709, 717-19 (C.D. Cal. 1995) (no aggregation of treble damages claimed under California's antitrust laws because each class member's recovery of treble damages would be directly tied to his or her compensatory damages); Pierson v. Source Perrier, S.A., 848 F. Supp. 1186, 1189 (E.D. Pa. 1994) (no aggregation because Pennsylvania law requires a "reasonable relationship" between each class member's compensatory and punitive damages). *But see In re* Brand Name Prescription Drugs Antitrust Litig., Nos. 94 C 897, MDL No. 997, 1996 WL 568793, at *5-6 (N.D. Ill. Oct. 2, 1996) (allowing aggregation of statutory penalties under the Alabama antitrust statute).

74. The Supreme Court endorsed the idea that the type of evidence used to establish a claim for damages is relevant to the aggregation inquiry. In *Shields v. Thomas*, 58 U.S. (17 How.) 3 (1854), the Court, discussing the aggregation rule, cited prior cases where compensatory damages were held to be separate and distinct because each plaintiff's claim rested "altogether on its own evidence and merits." *Id.* at 3.

75. 414 F.2d 311 (1st Cir. 1969).

dime.[76] The *Berman* court accepted the argument that the class of horse owners possessed a common and undivided interest in the breakage fund and aggregated their claims to reach the jurisdictional amount.[77] The court placed heavy reliance on two closely related factors: (1) that the amount of the defendant's liability would remain fixed no matter how the fund was divided among the plaintiffs, so the defendant had no interest in how the amount recovered was divided among the plaintiffs, and (2) that the success or failure of individual plaintiffs' claims would increase or decrease the amount recovered by other class members.[78]

The *Berman* test for determining whether a particular interest is separate and distinct or common and undivided has been accepted by some courts,[79] but others have argued that *Berman* was impliedly overruled by *Zahn*.[80] The courts expressing the latter view seem to read *Zahn* as forbidding aggregation in *all* Rule

76. *See id.* at 313.

77. *See id.* at 314-16.

78. *See id.* These two factors are really two sides of the same coin. If a fund is recovered for a group of plaintiffs who must then divide it among themselves, any fund that remains fixed in amount regardless of the number of plaintiffs who share it will necessarily also meet the second part of the test because each plaintiff will receive more if fewer class members share the fund.

In addition, the emphasis on whether the defendant has any interest in the apportionment of the award among the plaintiffs is a bit misleading. Any time an award is made on a group basis, the defendant will be disinterested in the distribution of the recovery. However, when plaintiffs have separate and distinct claims, the defendant will have the incentive to challenge each plaintiff's entitlement to recovery since doing so will reduce its overall liability. In the common and undivided context, the defendant gains nothing by challenging a particular plaintiff's entitlement to share in the award because dollars not collected by that plaintiff will simply be shared by the other plaintiffs rather than reducing the defendant's overall liability. The *Berman* court explained this in a roundabout manner by announcing the rule about the defendant's lack of interest in the plaintiffs' division of the recovery and then highlighting the fact that the defendant's total liability would remain the same no matter how the recovery was divided among the plaintiffs. *See id.* at 316.

79. *See* Sellers v. O'Connell, 701 F.2d 575, 579 (6th Cir. 1983) ("An identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased."); *see also* Asociacion Nacional de Pescadores a Pequena Escala O Artesasales de Colombia v. Dow Quimica de Colombia, 988 F.2d 559, 563 (5th Cir. 1993) (holding an interest separate and distinct because "in this case one plaintiff's recovery is neither dependent upon, nor necessarily reduced by, another's"). For cases that accept the *Berman* test and apply it to allow punitive damages aggregation, see cases cited *infra* note 83.

80. *See* United States v. Southern Pac. Trans. Co., 543 F.2d 676, 683 (9th Cir. 1976); Borgeson v. Archer-Daniels Midland Co., 909 F. Supp. 709, 718 (C.D. Cal. 1995); Kasky v. Perrier Group of America, Inc., No. Civ.91-0489-R(M), 1991 WL 577038, at *2 (S.D. Cal. Sept. 16, 1991).

23(b)(3) class actions, but *Zahn* assumed that the interests of its class members were separate and distinct and did not decide the issue of whether members of a 23(b)(3) class could *ever* have common and undivided interests.[81] The holding of *Zahn*, that all class members with separate and distinct demands must individually satisfy the jurisdictional amount, had nothing to do with the tests enunciated in *Berman*, and the argument that *Zahn* in some way overruled *Berman* ignores the distinct nature of the issues presented in the two cases. *Zahn* gave the lower courts no guidance on how to distinguish between common and undivided and separate and distinct interests, which was the focus in *Berman*. Moreover, the *Berman* test makes logical sense; if a fund is awarded to a class of plaintiffs and will remain fixed in amount no matter how many plaintiffs divide it, then it looks very much like a recovery for the class *as a group*, rather than simply an assemblage of individual claims awarded together for convenience. If we define a common and undivided interest as one that belongs to the group, rather than to individual plaintiffs, the *Berman* test does an excellent job of isolating such interests. Finally, the *Berman* test, with its focus on the defendant's lack of interest in the apportionment of a fund awarded to a group, finds direct support in a number of older Supreme Court cases applying the traditional aggregation rule.[82]

A punitive damage fund sought in a class action has both of the characteristics of the fund discussed in *Berman*, which led the First Circuit to allow aggregation in that case. The punitive damages would be awarded as a single fund for the benefit of the whole class and the amount of the award would be based upon the conduct of the defendant with respect to the class as a whole—not

81. For more discussion, see *supra* note 15, and *supra* notes 25-30 and accompanying text. *See also* 1 MOORE ET AL., *supra* note 15, ¶ 0.97[5], at 933 (stating that "it is important to remember that the determination of whether aggregation is proper is independent of the type of class action asserted").

82. *See* Gibson v. Shufeldt, 122 U.S. 27, 30 (1887) (holding that an interest is common and undivided if the plaintiffs "claim it under one common right, the adverse party having no interest in its apportionment or distribution among them" and contrasting separate and distinct claims as ones that are challenged as to each individual plaintiff by the defendant); Davies v. Corbin, 112 U.S. 36, 40-41 (1884) (holding an interest common and undivided because the defendant had no interest in the plaintiffs' division of the recovery among themselves); The "Connemara", 103 U.S. 754, 755 (1880) (holding that claim was common and undivided where the amount was due the plaintiffs collectively rather than individually); Shields v. Thomas, 58 U.S. (17 How.) 3, 5 (1854).

the defendant's conduct with respect to any single plaintiff. Once the punitive damages were assessed, its amount would remain fixed no matter whether it was ultimately shared by ten or ten thousand plaintiffs.[83] Thus, the success or failure of individual class members' claims would necessarily reduce or enlarge the share received by all of the other class members.[84] In addition, the defendant's liability for the punitive damages would be the same regardless of how the award was distributed among the plaintiff class members.[85] These characteristics show that a class punitive damage award is a common and undivided award for the benefit of the class *as a group*, rather than simply a collection of awards that can be allocated to individual plaintiffs.

The function and nature of punitive damages under state law, the reliance on evidence of class-wide wrongdoing by the defendant, and the *Berman* test all support the conclusion that a class punitive damage award is a common and undivided interest held by the class as a group. Some courts, however, have resisted aggregating punitive damages to reach the $50,000 threshold required for diversity jurisdiction. The next Part of this Article compares the arguments for and against aggregation and concludes that the courts allowing aggregation have the better argument.

IV. IN SUPPORT OF AGGREGATION

The aggregation of punitive damages in class actions to reach the federal jurisdictional amount is an issue that has sparked controversy among the federal district courts. A number of courts have rejected the argument that a class of plaintiffs has a common and undivided interest in a punitive damage recovery, but the rationales offered in opposition to aggregation are largely unsatisfying. Courts rejecting aggregation on the basis of *Zahn* misinterpret the case; *Zahn* did not offer any guidance in determining whether a set of plaintiffs have common or separate interests. Courts placing emphasis on the availability of individual actions for the class members have neglected to analyze the aggregation

83. *See* Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1359 & n.14 (11th Cir. 1996); Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1334 (5th Cir. 1995) (citing *Berman*, 414 F.2d at 316); Lailhengue v. Mobil Oil Corp., 775 F. Supp. 908, 913-14 (E.D. La. 1991); *In re* Northern Dist. Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 911 n.117 (N.D. Cal. 1981), *vacated and remanded on other grounds*, 693 F.2d 847 (9th Cir. 1982).

84. *See supra* note 83.

85. *See supra* note 83.

issue in the context actually presented, where the plaintiffs have joined together to prosecute their action as a group. In addition, the Supreme Court's aggregation cases do not establish the availability of individual actions as a test for differentiating between common and undivided and separate and distinct interests. Further, courts emphasizing the right to individual lawsuits have ignored the practical effect the first plaintiffs' recovery of punitive damages might have on later plaintiffs; the first successful claimant might exhaust or reduce the punitive damages available for successive plaintiffs. Finally, courts emphasizing the transactional source of the class members' claims ignore precedent and fail to draw a distinction between the nature of punitive and compensatory recoveries—a punitive damage fund sought by a class to punish a defendant for a course of conduct affecting the entire class belongs more logically to the class as a whole than to the individual class members.

Courts that have allowed aggregation have recognized that a punitive damage fund sought by a plaintiff class has all of the characteristics traditionally used to describe a common and undivided interest. The punitive damages award would be decided by a jury considering the defendant's conduct with respect to the class as a whole and ignoring the merits of any particular plaintiff's claim. The punitive damages would not serve the compensatory interests of individual class members but society's goals of punishment and deterrence. The award, once fixed, would remain the same in amount no matter how many plaintiffs ultimately divided it, and the success or failure of each class member's claim for a piece of the punitive damage fund would directly affect the amount available to the other class members. It is difficult to see how a recovery could be more common and undivided than one possessing all of these characteristics.

The pro-aggregation courts also adhere more closely to the Supreme Court's guidance on this issue. The *Berman* test for determining whether a recovery is common and undivided or separate and distinct traces its roots back to the earliest Supreme Court decisions interpreting 28 U.S.C. § 1332, decisions that the Court has reaffirmed in modern cases.[86] Courts rejecting aggregation have done so by varying the legal rules enunciated by the Supreme

86. *See* Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 315 (1st Cir. 1969); *see also* notes 54-59 and accompanying text..

Court. An excellent example is the requirement announced by some courts that common and undivided interests arise from the same transaction.[87] That requirement is soundly rejected by the Supreme Court's aggregation holdings, a fact that many lower courts have overlooked. Applying the traditional aggregation rules to a class punitive damages award easily results in the conclusion that the award is a common and undivided interest, and those courts reaching the opposite conclusion have done so by either ignoring or contorting those rules.

Finally, courts that have allowed aggregation have interpreted 28 U.S.C. § 1332 in a manner consistent with its policy justifications. The two most frequently cited justifications for diversity jurisdiction support aggregation. If diversity jurisdiction is necessary to protect out-of-state defendants from the bias of local courts,[88] it makes little sense to argue that a defendant's interest in avoiding bias is not substantial enough to warrant federal jurisdiction in large class actions with many millions of dollars at stake. If diversity jurisdiction is necessary to allow substantial cases access to higher-quality federal courts,[89] large, complex class actions are clearly deserving of jurisdiction—a higher-quality court is surely better able to handle the complex issues characteristic of class actions. In addition, the policies of judicial economy and consistency argue in favor of aggregation. Keeping large class actions in state court raises the possibility of numerous parallel class actions proceeding in separate state courts to challenge the same conduct. Allowing these cases access to the federal courts creates opportunities for use of the Judicial Panel on Multidistrict Litigation, which can avoid duplicative litigation and assure consistent results, at least at the pretrial stage. Aggregation of punitive damages interprets § 1332 to achieve the goals traditionally assigned to diversity jurisdiction.

Now that aggregation of punitive damages is the law in two circuits, there will be some changes in class action practice. First, for those class actions where claims for punitive damages are likely to be susceptible of class-wide treatment,[90] federal courts may be-

87. *See supra* note 44.
88. *See supra* note 38.
89. *See supra* note 38.
90. An excellent example would be a products liability class action where the plaintiffs seek punitive damages for the defendant's reckless design of a particular product.

come the arena for more litigation, either by defendants' removals or plaintiffs' filings of such cases in federal court. As a result, we might predict greater use of the Multidistrict Panel in mass tort cases that were previously confined to various state courts.

For other types of class actions, we can expect plaintiffs' attorneys to think twice before asserting a claim for punitive damages. For example, a consumer credit class action for statutory damages or penalties might be filed in state court without any claim for common-law fraud, if the plaintiffs wish to stay in state court. A fraud claim is typically thought to be unsuited to class treatment due to individual issues of reliance that would have to be established for each class member. Dismissing such a claim would allow plaintiffs to remain in state court in exchange for confining their claims to more modest claims for compensatory damages and statutory penalties.

For those plaintiffs who wish to assert punitive damage claims and remain in state court, we might predict a greater incidence of procedural manipulation—more intensive efforts to find and join a nondiverse defendant or efforts to avoid asserting a claim for punitive damages until after the one-year time limit for removal of diversity cases[91] has expired. We can expect more removals based on fraudulent joinder arguments and more litigation over equitable exceptions to 28 U.S.C. § 1446(b) as defendants attempt to counter these measures.

Finally, the cases allowing aggregation of punitive damages might give rise to even further expansion of diversity jurisdiction in class actions. Following *Allen* and *Tapscott*, district courts might use similar analyses to hold that attorney's fees or injunctive relief sought in class actions are also common and undivided interests.[92] These expansions of diversity jurisdiction, if not reversed by the Supreme Court, will likely intensify the calls for the abolition of diversity jurisdiction or at least for a legislative pronouncement regarding aggregation.

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91. *See* 28 U.S.C. § 1446(b) (1995).

92. *See* Earnest v. General Motors Corp., 923 F. Supp. 1469, 1472 (N.D. Ala. 1996) (following *Tapscott* and holding that both punitive damages and injunctive relief were common interests of the class). *But see* Blair v. Source One Mortgage Servs. Corp., 925 F. Supp. 617, 622 (D. Minn. 1996) (stating that injunctive relief cannot be aggregated).

V. CONCLUSION

The increased use of the class action device and the ubiquity of claims for punitive damages in the class action context have created a previously unrecognized common and undivided interest. The traditional aggregation rules compel the conclusion that punitive damages sought for a class of plaintiffs are common and undivided. Allowing aggregation of class action punitive damages preserves the integrity of the traditional aggregation rules and represents an exercise of diversity jurisdiction where it is most needed—in complex cases that are most likely to benefit from a federal forum.[93] Before rejecting aggregation of punitive damages, courts outside the Fifth and Eleventh Circuits should give careful consideration to this argument's historical foundations and policy justifications.

93. *See supra* note 38 and accompanying text.