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JURISDICTIONAL REQUIREMENTS IN SUITS FOR WHICH CLASS ACTION STATUS IS SOUGHT UNDER RULE 23(b)(3)

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When the federal court's diversity jurisdiction has been properly invoked by the named plaintiff in a suit which subsequently is accorded class action status under Rule 23(b)(3), the representative claims are within the federal court's primary subject matter jurisdiction and it is neither necessary nor desirable to enlarge the ancillary jurisdiction to accommodate such claims.

In 1969, the United States Supreme Court held in *Snyder v. Harris*[1] that separate and distinct claims presented by and for various claimants in a class action may not be added together to satisfy the jurisdictional amount requirement of the diversity statute.[2] The decision precipitated an avalanche of unfavorable comment which has not yet abated[3]—criticism based largely upon the view that

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1. 394 U.S. 332 (1969).

2. First enacted as Section 11 of the Judiciary Act of 1789, 1 Stat. 78, requiring that the amount in controversy exceed $500 in order for the federal courts to have original jurisdiction over suits between parties of diverse citizenship, in its present form the diversity statute 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 interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 1332 (1970).

3. *E.g.*, C. WRIGHT, LAW OF FEDERAL COURTS § 73 at 315-16 (2d ed. 1970) [hereinafter cited as WRIGHT]; Kaplan, *A Prefatory Note to the Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 497 (1969); Starrs, *Consumer Class Action—Part II: Considerations of Procedures*, 49 B.U.L. REV. 407 (1969); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 202-12 (1969); Note, *Federal Rules of Civil Procedure: Rule 23, The Class Action Device and Its Utilization*, 22 U. FLA. L. REV. 631 (1970). *But see* Comment, *Federal Rules of Civil Procedure, Rule 23: Aggregation of Claims to Meet the Jurisdictional Amount*, 22 U. FLA. L. REV. 154 (1969); 17 LOYOLA L. REV. 187 (1970-71).

application of the nonaggregation doctrine to lawsuits for which class action status has been sought because numerous similar claims contain common questions of law or fact, imposes an unnecessary jurisdictional requirement upon those claims[4] and therefore frustrates the purposes of the liberal class action procedures[5] provided by Rule 23 of the Federal Rules of Civil Procedure as amended in 1966.[6]

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4. *See, e.g.*, Zahn v. International Paper Co., 469 F.2d 1033, 1036 (2d Cir. 1972) (Timbers, J., dissenting); 41 CINCINNATI L. REV. 968 (1972); authorities cited note 3 *supra*.

5. In its note to the amended rules, the Advisory Committee indicated that the purpose of the 1966 revision of Rule 23 was not only to eliminate the unwieldy classifications used in the pre-1966 rule but also to provide a procedure for litigating many small, separate-but-similar claims in a single lawsuit. *Advisory Committee Note*, 39 F.R.D. 98 (1966) [hereinafter cited as *Advisory Note*]. This is not to say, however, that the committee contemplated that the revision would make it possible to litigate in federal court separate claims which formerly could not have been maintained because they could not satisfy a statutory amount in controversy requirement. Rather, it would appear that the small claims referred to were those which could have been litigated in federal court but which, because of the time, expense and inconvenience involved, might not be enforced at all in the absence of a device for doing so without either filing a separate lawsuit or intervening in a pre-1966 spurious class action. *But see The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 206 (1969) ("denying aggregation of claims or liabilities to reach the jurisdictional amount nullifies the utility of the federal class action" in cases where the individual claims are small.)

6. Rule 23, as amended in 1966, provides in pertinent part:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

FED. R. CIV. P. 23(b)(3). In addition, the rule provides that

> [t]he judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

FED. R. CIV. P. 23 (c)(3).

Taken together, these provisions provide the procedural mechanism for making judgments rendered in class actions maintained as such because the separate and distinct claims of the class members contain common questions of law or fact which predominate over individual questions, conclusive even upon absent class members. Although it has been suggested that the rule makes such judgments *binding* on absent class members, *e.g.*, Zahn v. International Paper Co., 53 F.R.D. 130 (D. Vt. 1971); Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601 (1968-69), this clearly is an overstatement. As was recognized by the Advisory Committee, the rules cannot and should not attempt to determine the res judicata effect of judgments entered pursuant to the rules; this will have to be determined if and when the res judicata question is raised in a subsequent action. *Advisory Note, supra* note 5. Nevertheless, the rule does make it procedurally possible for the judgment to include class members. *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967).

In addition to the unfavorable comment which it has evoked, the nonaggregation doctrine as applied in *Snyder*—where the named plaintiff's claim was for less than $10,000 and nonaggregation therefore required dismissal of the complaint[7]—has been interpreted in at least one case, *Zahn v. International Paper Co.*,[8] to mean that a lawsuit over which a federal court has diversity jurisdiction may not be maintained as a class action if any unnamed class member would be unable to meet the jurisdictional amount requirement. In that case the named plaintiffs were owners of property fronting on Lake Orwell, Vermont, who brought suit on behalf of themselves and other lakefront property owners to recover damages allegedly sustained as a result of defendant's pollution of the lake. Each of the named plaintiffs met both the citizenship and jurisdictional amount requirements of the diversity statute, but it appeared that the claims of many of the potential class members necessarily would be for less than $10,000. The district court, finding that it would not be feasible to describe a class which would exclude these latter potential claimants, ruled that the suit could not proceed as a class action.

The *Zahn* decision apparently rested on the conclusion that even when a district court clearly has jurisdiction over the named plaintiff's claim, it has jurisdiction over the class action aspects of the suit, under *Snyder*, only if each claim included therein is in

7. Snyder v. Harris, 394 U.S. 332 (1969). The *Snyder* case arose when one of some 4000 shareholders of an insurance company's common stock brought suit against the company's board of directors to recover a portion of the proceeds the directors had received from sale of their own stock. Plaintiff contended that the money which the directors received in excess of the fair market value of the stock represented a payment to obtain control of the company and was required by state law to be distributed among all shareholders. Although plaintiff claimed only $8,740 in damages for herself, she filed the suit as a class action and contended that the claims of all shareholders could be aggregated for purposes of determining the amount in controversy. The district court and the United States Court of Appeals for the Eighth Circuit both rejected plaintiff's contention, holding that the claims were separate and independent and that they therefore could not be aggregated to meet the jurisdictional amount requirement. On certiorari, the *Snyder* case was consolidated with a similar case from the Tenth Circuit, *Gas Service Company v. Coburn*, 389 F.2d 831 (10th Cir. 1968), in which both the district court and the court of appeals had aggregated separate claims of unnamed class members with the named plaintiff's individual claim in order to determine the amount in controversy. The United States Supreme Court affirmed the Eighth Circuit's decision refusing aggregation in *Snyder* and reversed the Tenth Circuit's contrary decision in *Coburn*.

8. 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973). *See also* Dierks v. Thompson, 414 F.2d 453, 456 (1st Cir. 1969). *But see* Lonnquist v. J.C. Penny Co., 421 F.2d 597, 599-600 (10th Cir. 1970); Potrero Community Action Comm. v. Housing Authority, 410 F.2d 974, 978 (9th Cir. 1969).

excess of $10,000. Implicit in the decision is a well-founded determination that ancillary jurisdiction does not extend to separate and independent claims which are related to plaintiff's claim only in that they contain common questions of law predominating over individual questions[9] [hereinafter referred to simply as separate, or separate and independent, claims],[10] for if such claims were within the court's ancillary jurisdiction they would not need to meet the jurisdictional amount requirement in order for the suit to proceed as a class action.[11] Nevertheless, the case appears to have been incorrectly decided. The conclusion that the suit could not proceed as a class action does not necessarily follow from the determination that the court does not have ancillary jurisdiction over complaints of unnamed class members, even when coupled with a determination that some of the unnamed class members could not have invoked the federal court's primary jurisdiction for adjudication of their own claims.

The *Zahn* court's conclusion that it did not have ancillary jurisdiction over separate claims of unnamed class members is in conformity with established jurisdictional principles. Until recently, it was generally conceded that the mere existence of common questions of law or fact, among claims which have an independent jurisdictional basis and others which do not, does not bring claims of the latter type within the court's ancillary jurisdiction. No matter how similar such claims were to claims properly before the court, it was the prevailing view that they could not be adjudicated by the federal court.[12] Prior to the 1966 amendment of the class action rule there

9. *See* authorities cited note 12 *infra*.

10. Since this paper is concerned only with separate claims whose sole relationship is the existence of common questions which predominate over individual issues, for brevity's sake claims of this type will hereafter be referred to simply as separate claims and this term should be understood to indicate separate claims of the foregoing type.

11. *E.g.*, WRIGHT, *supra* note 3, § 9.

12. H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 937-38 (1953) [hereinafter cited as HART & WECHSLER]; Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 704 (1940-41). *But see* Amen v. Black, 234 F.2d 12 (10th Cir.), *cert. granted*, 352 U.S. 888 (1956), *dismissed per stipulation*, 355 U.S. 600 (1958); Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 575-76 (1937) (permissive intervention by class member requires no independent jurisdictional basis).

Professors Hart and Wechsler had this to say with respect to Professor Moore's assertion that permissive intervention in a "spurious" class action did not require independent jurisdictional grounds: "Professor Moore's principal authority for [this] view is the Shipley case

was no procedural mechanism for making the judgments in class actions involving such claims applicable to separate claims which had not actually been presented by way of intervention prior to entry of final judgment in the class action proceedings.[13] In other words, the judgment affected only the claims of original parties and those who became parties by way of intervention.[14] The rule provided the procedure for intervention by those claimants who could meet the requirements for permissive intervention[15] and who wished to do so, but it did not purport to affect those who could not meet the jurisdictional requirement for intervention—that is, those claims which could not have been litigated in the federal court if brought as separate actions.[16]

After Rule 23 was amended in 1966 to eliminate the intervention requirement, however, it was widely assumed that the effect of that *procedural* change was to remove the *jurisdictional* requirement.[17] Because the amended rule provided the procedural means by which a class action judgment may "include and describe" unnamed claimants whose separate and independent claims are related to the main claim only in that they contain common ques-

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[Shipley v. Pittsburgh & L.E.R., 70 F. Supp. 870, 876 (W.D. Pa. 1947)]. The only authority cited in the Shipley case was Professor Moore." The authors then posed the question, "Is the Supreme Court likely to uphold this use of Rule 23(a)(3) to accomplish so bald an enlargement of federal jurisdiction?" HART & WECHSLER, *supra* note 9, at 937; *see* Kaplan & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 704 (1940-41).

13. 3B J. MOORE, FEDERAL PRACTICE § 23.30 at 23-502 (2d ed. 1969); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1753 at 539-40 (1972) [hereinafter cited as WRIGHT & MILLER]; *Advisory Note, supra* note 5, at 99.

14. *See The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 208 n.31 and authorities cited therein; WRIGHT & MILLER, *supra* note 13.

15. *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 208 n.31 and authorities cited therein; HART & WECHSLER, *supra* note 9, at 937-38; WRIGHT, *supra* note 3, at 21, 331; Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 704 n.66 (1941); *But see* WRIGHT & MILLER, *supra* note 13, at 552-53.

16. *See* Steele v. Guaranty Trust Co., 164 F.2d 387, 388 (2d Cir. 1947) *cert. denied*, 333 U.S. 843 (1948); Wagner v. Kemper, 13 F.R.D. 128, 130 (W.D. Mo. 1952); HART & WECHSLER, *supra* note 9, at 937-38; WRIGHT, *supra* note 3, at 21, 331; Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 704 n.66 (1941). *But see* WRIGHT & MILLER, *supra* note 13, at 552-53.

17. *See, e.g.*, Gas Services Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968), *rev'd sub nom.* Snyder v. Harris, 394 U.S. 332 (1969); Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, B.C. IND. & COM. L. REV. 601 (1968-69); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 399-400 (1967). *See also* Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1219-22 (1966).

tions,[18] it appeared to many courts and commentators alike that such claims were brought within the federal courts' ancillary jurisdiction and therefore no longer need have an independent basis of jurisdiction.[19] In some instances this line of reasoning was carried even further to permit a plaintiff who could not meet the jurisdictional amount requirement to proceed in federal court merely because he had joined with other plaintiffs whose claims satisfied the minimum amount in controversy requirement,[20] or to permit aggregation of the value of the so-called ancillary claim with that of the named plaintiff's claim to meet the minimum amount in controversy requirement which was necessary to invoke the court's diversity jurisdiction in the first instance.[21] It was the rejection of these views that gave rise to such an unfavorable reaction to the *Snyder* Court's determination that the nonaggregation doctrine is applicable to class actions just as it is to other types of lawsuits. It appeared to many critics that the liberalized class action procedure would be deprived of much of its efficacy if individual claims in diversity class actions were required to meet federal court jurisdictional requirements,[22] and it was to eliminate this apparent difficulty that some commentators suggested that ancillary jurisdiction should be expanded to include separate claims containing common questions of law or fact which predominate over individual issues.[23]

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18. *See* note 5 *supra*.

19. *E.g.*, Zahn v. International Paper Co., 469 F.2d 1033, 1036 (2d Cir. 1972) (Timbers, J., dissenting); Lesch v. Chicago & Eastern Ill. R.R., 279 F. Supp. 908 (N.D. Ill. 1968); 73 COLUM. L. REV. 359 (1973); 61 GEO. L.J. 1327 (1933).

20. Lesch v. Chicago & Eastern Ill. R.R., 279 F. Supp. 908, 912 (N.D. Ill. 1968); Lucas v. Seagrave Corp., 277 F. Supp. 338, 347 (D. Minn. 1967). *Contra*, Ciaramitaro v. Woods, 324 F. Supp. 1388, 1390 (E.D. Mich. 1971). *See also* Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 816 (8th Cir. 1969); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Jacobson v. Atlantic City Hosp., 392 F.2d 149, 154 (3d Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558, 563 (3d Cir. 1966).

21. Gas Service Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968), *rev'd sub nom.* Snyder v. Harris, 384 U.S. 332 (1969).

Acceptance of this line of reasoning would require the development of an entirely new concept of ancillary jurisdiction. In its previously accepted form, ancillary jurisdiction exists only because of the close relationship between a claim over which the court already has jurisdiction and one which is not otherwise within the court's jurisdiction. *See* notes 64-73 *infra* and accompanying text. It would appear that until there is a claim which meets the statutory requirement itself, there is no claim within the primary jurisdiction and therefore closely related claims could not be within the court's ancillary jurisdiction either.

22. *E.g.*, authorities cited note 3 *supra*.

23. *E.g.*, Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972) (Timbers, J., dissenting); Lesch v. Chicago & Eastern Ill. R.R., 279 F. Supp 908 (N.D. Ill. 1968); 22 CLEVL.

Although it is the thesis of this article that the federal courts' ancillary jurisdiction should not be broadened to include separate and independent claims whose only connection with the main claim is the existence of common questions of law or fact, it does not necessarily follow that the class action procedure cannot be used in diversity actions even when the claims of the unnamed class members are separate and independent ones which standing alone would not be within the court's jurisidction. Expansion of the ancillary jurisdiction to bring such claims within it would be both unwise and unnecessary[24]—unwise because, as will be shown below, the ancillary jurisdiction can be expanded in this manner only if the constitutional case or controversy requirement is so broadly interpreted as to become virtually meaningless as a limitation on the federal judicial power[25]—unnecessary because in representative suits other than class actions, the existence vel non of diversity jurisdiction historically has turned upon whether the representative himself can invoke the court's jurisdiction, without regard to whether those whom he represents could have done so.[26] There appears to be no sound reason for according class actions different treatment in this respect.[27] Therefore, if the named plaintiff has properly invoked the federal court's diversity jurisdiction for the adjudication of his own claims, and if the court subsequently determines that the named

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L. REV. 204 (1973); 26 VAND. L. REV. 375 (1973).

24. Expanding the ancillary jurisdiction to further the purposes of a procedural rule also would be improper—not only because control of federal court jurisdiction is a legislative function which was not delegated by the Rules Enabling Act, 28 U.S.C. § 2072 (1970), but also because, as the *Snyder* Court pointed out, the rules themselves provide that they "shall not be construed to extend or limit the jurisdiction of the United States district courts," FED. R. CIV. P. 82, and judicial expansion of the jurisdiction to further the purposes of the class action rule would permit the rules to affect the jurisdiction of the district courts indirectly if not directly. *See* 394 U.S. at 338. *But see The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 204 (1969) (While the rules cannot compel a particular interpretation of a jurisdictional statute, "the Court must interpret jurisdictional requirements in the new procedural context established by the rule.").

25. *See* notes 38-40, 74 *infra* and accompanying text.

26. Nelson v. Keefer, 451 F.2d 289, 291 (3d Cir. 1971); General Research, Inc. v. American Employers' Ins. Co., 289 F. Supp. 735, 736 (W.D. Mich. 1968); Lesch v. Chicago & Eastern Ill. R.R., 279 F. Supp. 908, 912 (N.D. Ill. 1968); *see* WRIGHT, *supra* note 3, § 29, at 95 (2d ed. 1970).

27. Professor Wright has suggested that class actions have *not* been treated differently with respect to the diversity of citizenship requirement, WRIGHT, *supra* note 3, § 29, but the present controversy over whether the claims of unnamed class members are within the courts' ancillary jurisdiction suggests that class suits have not been viewed as representative suits in all respects. If they had been, the question of ancillary jurisdiction would never have arisen.

plaintiff is a proper representative of "others similarly situated" and permits the suit to proceed as a class action, there should be no problem with respect to subject matter jurisdiction over the representative claims[28]—not because those claims are within the court's ancillary jurisdiction but, rather, because they are within the court's primary subject matter jurisdiction. Since diversity jurisdiction exists over the plaintiff's own claim, it necessarily will exist over any other claim which that plaintiff properly asserts against the same defendant, whether as a representative or otherwise.[29]

The distinction between subject matter jurisdiction and personal jurisdiction has not always been finely drawn by those who criticize the *Snyder* decision,[30] and this may explain at least some of the adverse reaction elicited by the Court's refusal to reinterpret the jurisdictional statutes to further the procedural reform contemplated by the amendment to Rule 23.[31] But there are many critics who, without blurring the distinction between subject matter and personal jurisdiction, have simply taken the view that restrictions on the federal courts' subject matter jurisdiction must be relaxed when necessary to effectuate an important procedural reform.[32] The weakness of this position becomes evident, however, when one considers the true nature of subject matter jurisdiction.

SUBJECT MATTER JURISDICTION

In general

It is well settled that the federal courts are courts of limited

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28. Since the determination that plaintiff is a proper representative is a judicial one, it could not seriously be contended that federal jurisdiction over the class claims had been obtained collusively or improperly within the meaning of 28 U.S.C. § 1359 which provides that

> [a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

29. *See* notes 57-59 *infra* and accompanying text.

30. *See* note 51 *infra*.

31. The provision in Rule 82 of the Federal Rules of Civil Procedure that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts," applies only to subject matter jurisdiction. Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 445 (1946). Therefore, if the aggregation problem is viewed as a personal jurisdiction problem, or if the personal and subject matter distinctions are blurred when analyzing the problem, the mandate of Rule 82 might be considered to be inapplicable.

32. *E.g.*, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 204-05 (1969).

jurisdiction[33] and that any plaintiff who invokes the federal judicial power must affirmatively allege sufficient facts to overcome a presumption that the federal court does not have subject matter jurisdiction over his lawsuit.[34] Article III of the Constitution sets the limits within which the federal courts may be given jurisdiction,[35] but until Congress actually gives the courts jurisdiction over matters of a particular type they do not have the power to entertain such matters.[36] Every federal court plaintiff therefore must be able to point to a jurisdictional statute which gives the court power to entertain his lawsuit, and the statute itself must be within the jurisdictional boundaries set by Article III.[37]

Since Article III authorizes extension of the federal judicial power only to "cases" or "controversies" which fit into one of the nine categories enumerated therein,[38] the first requirement that must be met by any claim for which federal adjudication is sought is that it be presented in the context of a case or controversy within the meaning of those terms as used in the Constitution.[39] It follows, then, that any claim which itself is not within one of the Article III subject matter categories must be so related to a claim which *does* meet that requirement that the two claims together constitute a

33. 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 21 (Wright ed. 1960); F. JAMES, CIVIL PROCEDURE § 12.1 (1965); WRIGHT, *supra* note 3, §§ 7, 8.

34. FED. R. CIV. P. 8(a); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182 (1935); Turner v. President, Directors & Company of the Bank of North America, 4 U.S. (4 Dall.) 8, 11 (1799); Bingham v. Cabot, 3 U.S. (3 Dall.) 382, 383 (1798); 1 J. MOORE, FEDERAL PRACTICE § 0.4[1] (2d ed. 1972).

35. Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

36. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 762 (1824).

37. *E.g.*, Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850); 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 21 (Wright ed. 1960).

38. U.S. CONST. art. III, § 2 provides that the federal judicial power shall extend: [1] to all cases . . . arising under this Constitution, the Laws of the United States, and Treaties . . . [2] to all Cases affecting Ambassadors, other public Ministers and Consults;—[3] to all cases of admiralty and maritime Jurisdiction;—[4] to controversies to which the United States shall be a party;—[5] to Controversies between two or more States;—[6] between a State and Citizens of another State;—[7] between Citizens of different States;—[8] between Citizens of the same State claiming Lands under Grants of different States, and [9] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

39. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937); Muskrat v. United States, 219 U.S. 346, 356 (1911).

single case or controversy for jurisdictional purposes.[40] Only in these circumstances can a claim of a type not provided for by Article III be adjudicated in federal court.

Congress has enacted statutes which give the federal courts jurisdiction over at least some cases within each of the nine categories[41] enumerated in Article III. Section 1331 of the Judicial Code, for example, gives the district courts original jurisdiction over those cases arising under federal law in which the amount in controversy exceeds $10,000,[42] while section 1332 confers original jurisdiction over those diversity of citizenship cases in which the amount in controversy exceeds $10,000.[43] In enacting the general federal question statute Congress did not give the federal courts the power to hear all cases arising under federal law, as it could have done under the Constitution; it imposed a minimum amount-in-controversy requirement which also must be met before the federal court has the power to hear such cases. Similarly, Congress has not given the federal courts the power to hear all cases in which individuals of diverse citizenship are adversaries. While the Constitution requires only that there be at least one plaintiff and one defendant of diverse citizenship,[44] the diversity statute requires that diversity of citzenship exist between each plaintiff and each defendant,[45] so that there are no adverse parties of the same citizenship. In addition, unless the claims of the several plaintiffs arise out of a single right in which they have an undivided interest, the statute requires that the claims of each plaintiff have a value in excess of $10,000.[46] Thus, while neither complete diversity nor a minimum amount in controversy is required by the Constitution, both are required by the diversity statute and claims of plaintiffs who cannot meet these requirements must be dismissed for lack of jurisdiction.[47]

40. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Hurn v. Ousler, 289 U.S. 238, 245 (1933).

41. *See* note 37 *supra*.

42. 28 U.S.C. § 1331 (1970).

43. 28 U.S.C. § 1332 (1970).

44. State Farm Fire & Cas. Co. v. Tashire, 387 U.S. 523 (1967).

45. State Farm Fire & Cas. Co. v. Tashire, 387 U.S. 523 (1967); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

46. Pinel v. Pinel, 240 U.S. 594, 596 (1916); Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40 (1911).

47. Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1972); Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967).

While any court unquestionably must have jurisdiction over both the subject matter of a suit and the parties to that suit before it can adjudicate the claims presented therein, if subject matter prerequisites are satisfied the fact that the court is unable to acquire personal jurisdiction over one or more parties does not deprive the court of *subject matter* jurisdiction. Therefore, if the federal court has diversity jurisdiction over a named plaintiff's claim, and if the court subsequently permits that plaintiff to serve as the representative of others similarly situated for purposes of litigating common issues,[48] the fact that the court could not have acquired personal jurisdiction over some of the unnamed represented persons may be relevant to the question of whether those individuals are bound by any final judgment entered in the suit,[49] but it is not relevant to the question of whether the subject matter of the suit is cognizable in federal court.[50] Diversity jurisdiction exists by virtue of the diverse nature of the citizenship of those who are asserting claims and defenses[51] rather than by virtue of the nature of the claims and defenses themselves. When it exists, however, it gives the district court jurisdiction only over the subject matter of the suit, just as do other jurisdictional statutes. Whether the court has jurisdiction over particular individuals is quite another question.[52]

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48. *See* note 27 *supra*.

49. *See generally* WRIGHT & MILLER, *supra* note 13, § 1757.

50. *Id.*

51. When a lawsuit is brought by a representative, it is that representative—not the represented individual—who asserts the claim, and it is the representative's citizenship that is important for purposes of diversity jurisdiction. *See also* notes 25 & 26 *supra* and accompanying text.

52. Examples of confusion between personal and subject matter jurisdiction are numerous. In *Zahn v. International Paper Co.*, 53 F.R.D. 430 (D. Vt. 1971), for example, where the district court was faced with the problem of determining whether each individual claim must meet the jurisdictional amount requirement in order for the suit to proceed as a class action, the district court stated that "[W]e must initially determine whether there is jurisdiction over all the members of the proposed class." 53 F.R.D. at 430. The court then went on to state that

> [t]he question is whether federal courts have jurisdiction *over all members of an allegedly otherwise proper class*, in a class suit in which the claims of the class members are separate and distinct, if some members of the class individually meet the jurisdictional requirement as to the amount in controversy and others, who are not named representatives, do not.

53 F.R.D. at 431 (emphasis added). The court thus appeared to be focusing on the class members themselves rather than on their claims.

The mere fact that diversity jurisdiction exists only because of the diverse citizenship of the adverse parties must not be allowed to obscure the fact that it is still the *claim* over which

Multiple-Claim Suits

The foregoing principles present few problems when applied to a complaint filed by a single plaintiff stating a single claim against one or more defendants, but the situation becomes more complicated when a complaint sets forth multiple claims, some of which have an independent jurisdictional basis and some of which do not. Do the multiple claims necessarily involve multiple cases or controversies, each of which must have an independent jurisdictional basis, or does the mere fact that they are joined together in a single lawsuit mean that they constitute only a single case or controversy? Both of these questions must be answered in the negative; whether the claims constitute single or multiple controversies is not dependent upon whether procedural rules permit their joinder in a single lawsuit but in every instance must be determined by examining the relationship which exists among the various claims.[53]

Some guidance for resolution of the case or controversy problem can be found in Mr. Chief Justice Marshall's statement that

> [w]hen a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.[54]

While it might appear that the foregoing language refers only to the situation in which a single claim involves questions which are not within any of the nine Article III categories along with questions to which the constitutional grant does extend, more recent Supreme Court decisions leave no doubt that the underlying principle is broader than this and that multiple claims may be so related as to constitute a single case or controversy.[55] In this event, the federal court does not exceed constitutional limitations by adjudicating

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the court acquires diversity jurisdiction, not the claimants themselves. If the claim is asserted by a proper representative, the citizenship of the represented person is irrelevant to the subject matter jurisdiction issue.

53. *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Hoffman v. McClelland, 264 U.S. 552, 558 (1924); Julian v. Central Trust Co., 193 U.S. 93, 113 (1904); Krippendorf v. Hyde, 110 U.S. 276, 284 (1884); Dunn v. Clarke, 33 U.S. (8 Pet.) 1, 3 (1834).

54. Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738, 821 (1824).

55. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); Hurn v. Ousler, 289 U.S. 238 (1933).

even those claims which would not have been cognizable in federal court had they been presented alone,[56] provided the case contains at least one claim which fits within the Article III categories.[57]

It is clear, then, that multiple claims do not necessarily constitute multiple cases or controversies, and it should be equally clear that multiple cases or controversies do not lose their identity as such merely because they are joined together in a single civil action. If they did, federal court jurisdiction would be limited not by the constitutional case or controversy requirement but solely by the rules of procedure governing joinder of claims, and federal court subject matter jurisdiction therefore could be expanded or contracted by the simple expedient of amending the rules which govern joinder procedures.

Pendent jurisdiction. In order to avoid exceeding constitutional limitations, multiple-claim suits usually must be examined to determine whether the asserted claims are all part of a single case or controversy or whether they are in fact separate controversies which have been joined together in a single lawsuit and which therefore must each have an independent basis of subject matter jurisdiction. Such an analysis is unnecessary when a single plaintiff invokes the court's diversity jurisdiction, for if one of plaintiff's claims meets the diversity of citizenship requirement, they will all do so.[58] Furthermore, since the statutory amount-in-controversy requirement is met if the total value of the claims asserted by the plaintiff is in excess of $10,000,[59] each of the claims will have an independent basis of jurisdiction if any one of them does. But if jurisdiction is predicated upon any other jurisdictional statute, the plaintiff's several claims must be analyzed to determine whether each must have an independent jurisdictional basis. For example, the mere fact that plaintiff has one claim against a nondiverse defendant which raises a federal question does not give the federal court subject matter jurisdiction over unrelated state claims which plaintiff has against that same defendant,[60] even though there is a procedural device for joining

56. Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824).

57. *Id.*

58. Since in these circumstances the adverse parties are identical with respect to each claim, the conclusion in the text is inescapable.

59. *E.g.*, Lemmon v. Cedar Point, Inc. 406 F.2d 94, 96 (6th Cir. 1969); 1 J. MOORE, FEDERAL PRACTICE § 0.97 [1], at 882 (2d ed. 1972).

60. Delman v. Federal Prods. Corp., 251 F.2d 123, 126 (1st Cir. 1958); Eisenmann v.

such claims.[61] However, if the several claims "derive from a common nucleus of operative fact . . . and . . . are such that he would ordinarily be expected to try them all in one judicial proceeding,"[62] the claims constitute a single case or controversy. If any one of the claims satisfies the jurisdictional prerequisites, there is no constitutional impediment to adjudication of all in a single lawsuit in the federal court.[63] Thus a plaintiff who has invoked the court's primary jurisdiction under an appropriate jurisdictional statute is permitted to invoke the court's pendent jurisdiction for the adjudication of all other claims he has against the same defendant, provided the claims for which pendent jurisdiction is asserted have a common nucleus of operative fact with the primary claim.[64]

Ancillary jurisdiction. When a federal court plaintiff has properly invoked the court's subject matter jurisdiction for the adjudication of his own claims, separate claims which are asserted by individuals other than the plaintiff himself, but which are incidental or supplementary to the plaintiff's claim, are within the court's ancillary jurisdiction.[65] For example, both counterclaims and crossclaims arising out of the transaction or occurrence which is the subject matter of the original action, and claims relating to property over which the court has jurisdiction, have been held to be within the court's ancillary jurisdiction because they are incidental to the main action.[66] Furthermore, intervention by other persons to assert claims arising out of the same transaction or occurrence is permitted under the ancillary jurisdiction if the intervenor's rights may be impaired by adjudication of the main controversy.[67] So long as the main claim is one over which the court has subject matter jurisdiction, the court has jurisdiction to adjudicate an incidental claim

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Could-National Batteries, Inc., 169 F. Supp. 862, 865 (E.D. Pa. 1958).

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

62. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

63. *Id.*

64. *Id.*

65. Krippendorf v. Hyde, 110 U.S. 276, 281 (1884); Iowa v. Union Asphalt & Roadoils, Inc., 409 F.2d 1239, 1244 (8th Cir. 1969); Silberg, *Ancillary Jurisdiction in the Federal Courts*, 12 J. AIR L. & COM. 288, 292 (1941). *See generally* 41 CINCINNATI L. REV. 968 (1972).

66. Moore v. New York Cotton Exchange, 270 U.S. 593 (1926) (counterclaim); Freeman v. Howe, 65 U.S. (24 How.) 450 (1860) (property in control of federal court); R.M. Smythe & Co. v. Chase Nat'l Bank, 291 F.2d 721 (2d Cir. 1961) (cross-claim).

67. Wichita R.R. Light Co. v. Public Utilities Comm'n, 260 U.S. 48, 54 (1922); Phelps v. Oaks, 117 U.S. 236 (1886); *see* WRIGHT, note 3 *supra*, §§ 9, 75.

either in the same proceeding[68] or in an ancillary proceeding.[69] It appears, then, that the Supreme Court has viewed the primary and ancillary claims together as constituting a single case or controversy within the meaning of those terms as used in Article III, for if the ancillary claim were a separate case or controversy, then, in entertaining an ancillary claim which does not fall within one of the Article III categories, the court would be entertaining a case or controversy over which it cannot constitutionally have jurisdiction. Obviously the federal courts do not have ancillary jurisdiction which is not authorized by the Constitution; this would be a contradiction in terms, since the limits of the federal judicial power are set by Article III.[70] It necessarily follows that any claim which the Supreme Court recognizes as being within the federal courts' ancillary jurisdiction implicitly is recognized as part of the same case or controversy as a claim which, because it fits within one of the nine categories enumerated in Article III, is within the court's primary jurisdiction.

In sum, while federal court jurisdiction cannot constitutionally be expanded to include cases or controversies which are not authorized by Article III, *claims* which standing alone would not be within the scope of the federal judicial power are within the pendent or ancillary jurisdiction if they are so related to a claim which is within the federal court's subject matter jurisdiction that taken together the several claims constitute a single case or controversy.

The Supreme Court has never expressly defined the outer limits of federal ancillary jurisdiction. Until recently, however, there has been substantial unanimity among courts and commentators alike that the mere existence of common questions of law or fact falls short of bringing separate claims within its boundary;[71] something more is required. The recommendation that the ancillary jurisdiction be expanded to include such claims[72] overlooks the fact that the federal court's ancillary jurisdiction is not something apart from its subject matter jurisdiction, to be used to gain entrance to the fed-

68. *See* Moore v. New York Cotton Exchange, 270 U.S. 593 (1926).

69. Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921); Johnson v. Christian, 125 U.S. 642 (1888); Minnesota Company v. St. Paul Company, 69 U.S. 609 (1864).

70. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

71. WRIGHT, *supra* note 3, § 9, at 21, § 75, at 331.

72. *See* note 23 *supra* and accompanying text.

eral court when subject matter jurisdiction is lacking;[73] ancillary jurisdiction *is* subject matter jurisdiction—limited by the Article III case or controversy requirement—and it cannot be used to circumvent constitutional and statutory restrictions on the federal judicial power if the federal courts are to continue to be the courts of limited jurisdiction which Article III authorized the Congress to create.

Separate and independent claims having common questions of law or fact with the main claim can be brought within the federal court's ancillary jurisdiction only if the case or controversy requirement is interpreted so broadly as to make the several claims constitute a single case or controversy merely because they contain common questions which predominate over individual questions.[74] The implications of such a broad interpretation would be far-reaching indeed, expanding federal jurisdiction well beyond that which has existed in the past and utterly frustrating the congressional intent to limit the diversity jurisdiction which has been manifested in the repeated raising of the amount in controversy requirement.[75] Moreover, the effects of such an interpretation would not be limited to diversity cases or to class actions; they would be felt in any situation in which a defendant's conduct has caused harm to more than one person, whether in the same transaction or occurrence or otherwise, so long as the various claims contained common questions of law or fact.

Class actions

Unquestionably the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure provided for a "generally welcomed and long-needed reform" in federal class action procedures,[76] and the

73. The ancillary jurisdiction is regarded by some as a means of avoiding jurisdictional requirements, however. As noted in *Zahn v. International Paper Co.*, 469 F.2d 1033 (1972): "Lower federal courts, including ours, were quick to recognize that ancillary jurisdiction was available to solve jurisdictional problems, such as lack of diversity or amount in controversy, which were often attendant upon utilization of joinder procedures." 469 F.2d at 1036 (Timbers, J., dissenting).

74. *See The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 209 (1969).

75. In § 11 of the Judiciary Act of 1789, 1 Stat. 78, the diversity jurisdiction was limited to cases in which the amount in controversy exceeded $500. This figure was increased to $2000 in 1887, 24 Stat 552; to $3000 in 1911, 36 Stat. 1091; and to $10,000 in 1958, 72 Stat. 415.

76. Snyder v. Harris, 394 U.S. 332, 342 (1969) (Fortas, J., dissenting). This view of the 1966 amendment as a welcome relief from the problems associated with the pre-1966 tripartite classification scheme (true, hybrid and spurious) has been shared by all courts and commentators who have had occasion to discuss the new rule.

purpose of the rule concededly should not be frustrated by unduly restrictive judicial interpretation. But as the *Snyder* Court pointed out, the amount in controversy requirement which was at issue in that case[77] is a jurisdictional prerequisite and judicial interpretation of how the amount in controversy must be computed is a matter of statutory interpretation rather than rule interpretation.[78] Similarly, the case or controversy requirement is a jurisdictional prerequisite and the scope of a single case or controversy is a matter of constitutional rather than rule interpretation.[79]

Snyder v. Harris[80] did not address itself to the underlying case or controversy problem which would be presented if aggregation to satisfy the statutory requirement were permitted; since the Court concluded that aggregation was precluded by prior interpretations of the jurisdictional statute, it obviously was unnecessary to consider what problems would have been raised by a contrary determination. The Court did point out, however, that aggregation is a jurisdictional problem and that if aggregation of separate claims were proper at all it would be proper in all types of lawsuits—not just in class actions.[81] It is in these other types of suits that the case or controversy problem would arise most frequently.[82] The effect of permitting aggregation in the *Snyder*-type situation, where aggregation of the named plaintiff's claim with the representative claim is sought, would be to require the district court to determine whether the case was an appropriate one to be maintained as a class action before it could even consider the question of whether the subject matter of the suit was within the court's judicial power. Once a named plaintiff has been accepted as a proper representative of the unnamed class members and the suit is permitted to proceed as a class action for purposes of adjudicating the common issues, the representative claims are—for purposes of the class action—

77. *See* note 7 *supra*.

78. Snyder v. Harris, 394 U.S. 332, 336-38 (1969). *Accord*, Zahn v. International Paper Co., 469 F.2d 1033, 1035 (1972).

79. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). *But see* Zahn v. International Paper Co., 469 F.2d 1033, 1036 (2d Cir. 1972) (Timbers, J., dissenting).

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

81. *Id.* at 340.

82. In any case in which multiple plaintiffs unite to assert separate claims in a single lawsuit, with one claim in excess of the jurisdictional amount and the other smaller, permitting aggregation would eliminate the statutory problem, but there would be a question as to whether the small claim was within the constitutional limits of the judicial power.

plaintiff's claims. Moreover, with jurisdiction alleged under the diversity statute, it should not matter whether or not plaintiff's several claims constituted separate cases or controversies.[83]

It does not follow from the foregoing, however, that aggregation would be appropriate in cases of the *Snyder* type, under that portion of the aggregation doctrine which permits aggregation of claims asserted by a single plaintiff against a single defendant.[84] When a single plaintiff files a complaint in which he seeks to recover both for himself and on behalf of others similarly situated, he is in effect filing an individual lawsuit for himself and is, at the same time, asking the court to let him represent others similarly situated. If the court does not have jurisdiction over the plaintiff's claim under the diversity, general federal question or some other jurisdictional statute, plaintiff's complaint must be dismissed for lack of jurisdiction and the class action question is never reached.[85] Conversely, if the court has jurisdiction over the subject matter of plaintiff's lawsuit but subsequently determines that the suit is not a proper one to be maintained as a class action under Rule 23,[86] the complaint is not dismissed; the action simply proceeds as plaintiff's individual lawsuit.[87] Jurisdictional amount must be determined without regard to the amounts involved in the claims of unnamed class members—not only because of the well-established principle that jurisdiction attaches, if at all, at the time the complaint is filed[88] and is not

83. *See* notes 57 & 58 *supra* and accompanying text.

84. 394 U.S. at 335.

85. *See, e.g.*, WRIGHT & MILLER, *supra* note 13, at 547-48.

86. *See* note 5 *supra*.

87. *E.g.*, Zahn v. International Paper Co., 53 F.R.D. 430, *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973). *But see* WRIGHT & MILLER, *supra* note 13, § 1759, at 574-75 (The action "may be dismissed under Rule 23(c)(1) . . . or the court may decide to allow the litigation to go forward as an individual action. . . ."). The suggestion that the court has discretion to dismiss the entire action if it is not an appropriate one for a class action is a curious one. How could a plaintiff who has properly invoked the court's diversity jurisdiction for determination of his own claim be deprived of his right to litigate that claim in federal court merely because he mistakenly had believed that he could represent those similarly situated? Indeed, Rule 23(c)(1) on its face does not permit such a conclusion. It provides only that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so *maintained*." [Emphasis added].

88. *See, e.g.*, St. Paul Mercury Indem. Co. v. Red Cap Co., 303 U.S. 283 (1938); Sun Printing & Pub. Ass'n. v. Edwards, 194 U.S. 377 (1904); 1 J. MOORE, FEDERAL PRACTICE §§ 0.98[1], [2]; 0.93 [5] (2d ed. 1972).

affected by events which transpire after the lawsuit is begun,[89] but also because when a suit is filed as a class action there is no assurance that the unnamed class members will permit the plaintiff to serve as their representative[90] or that the court's initial determination that the suit may proceed as a class action will not be altered at some time prior to entry of final judgment.[91] If plaintiff's own claims have not satisfied the jurisdictional amount requirement, occurrence of either of the foregoing would make it quite clear that the requisite amount in controversy had never been present and that, even though the proceedings might be far advanced at the time, the case is not in fact one over which the court has jurisdiction.

The existence of subject matter jurisdiction consistently has been, and should continue to be, dependent upon whether the statutory requirements are met when the suit is filed—not upon the possibility that they might be met at some future point in time. *Snyder v. Harris*[92] recognized that this is necessary in class actions just as it is in other types of actions. It has nothing to do with whether joinder of the unnamed class members would be procedurally possible, or with whether the case is a proper one for maintenance as a class action under Rule 23. It simply points up the fact that in order to invoke the jurisdiction of the federal court the plaintiff must have claims which meet federal jurisdiction requirements when the suit is filed—no matter what kind of suit is filed.

Although *Snyder* established that in a class suit the named plaintiffs must meet the jurisdictional requirements independently of the claims of those similarly situated, it did not directly answer the question of whether the separate claims of those similarly situated must also meet the statutory requirements if the suit is to proceed as a class action. However, it is clear at this point that the

89. *See* authorities cited note 86 *supra*.

90. Those similarly situated, who would otherwise be within the class, have an unconditional right to be excluded from the class if they so request. FED. R. CIV. P. 23(c)(2). *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 50-51 (1967).

91. Under subsection (c)(1) of Rule 23 the district court is required to make a determination as to whether the action may proceed as a class action "as soon as practicable after commencement of the action," but such an order "may be conditional, and may be altered or amended before the decision on the merits." FED. R. CIV. P. 23(c)(1).

92. 394 U.S. 332 (1969).

Snyder principle requires unnamed class members to meet jurisdictional requirements only if the representative nature of the claims asserted by the plaintiff on behalf of the class members is disregarded and the unnamed class members are considered to the parties to the litigation, making it necessary for their separate claims to have an independent base of jurisdiction if they are to be asserted in federal court.[93] If this were the correct approach, it would appear that the unnamed class members would have to meet not only the jurisdictional amount requirement of the diversity statute but also the diversity of citizenship requirement. But it has been widely stated that the citizenship of unnamed class members is irrelevant even when their claims are separate and distinct rather than joint or common,[94] and in *Snyder* the Court appeared to assume that this is true.[95] Such an assumption presupposes that the separate and independent claims are within either the court's primary jurisdiction or its ancillary jurisdiction. Since under the generally accepted view separate claims related only in that they contain common questions of law or fact are not within the ancillary jurisdiction,[96] it appears that the assumption set forth above was predicated on the fact that the class claims are asserted by a representative—whose citizenship is determinative—rather than by the class members themselves, and the claims therefore are within the court's primary jurisdiction.

Recognition of the representative nature of a class suit is consistent with established jurisdictional principles and gives full play to the use of the class action procedural device to settle in a single lawsuit issues which are common to large numbers of claims. Fail-

93. In *Zahn v. International Paper Co.*, 53 F.R.D. 130 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973), the district court, the Second Circuit and even the United States Supreme Court, read statements contained in pre-1966 cases to the effect that each *plaintiff* must satisfy the jurisdictional amount requirement—language which the *Snyder* Court also had quoted—as being directly applicable to the question of whether *unnamed class members* must do so. 53 F.R.D. at 431, 469 F.2d at 1035, 42 U.S.L.W. at 4088-90.

94. *See generally* WRIGHT, *supra* note 3, § 72, at 314-15.

95. As the *Snyder* Court phrased it:

> Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant.

394 U.S. at 340. The foregoing statement was, however, dictum.

96. *See* authorities cited note 12 *supra*.

ure to consider this characteristic of a class suit, on the other hand, leads to the unwarranted conclusion either that the court's ancillary jurisdiction must be expanded or that nonaggregation of claims precludes maintenance of a class action unless each class member meets the jurisdictional amount requirement, thus depriving the class action device of much of its efficacy in expediting the disposition of claims which contain predominant questions of law or fact. This is what the courts did in *Zahn v. International Paper Co.*,[97] and it is this, rather than the nonaggregation doctrine, which frustrated use of the class action device in that case.

The Supreme Court did not hold in *Zahn* that a class action may never be maintained unless all *potential* class members meet the jurisdictional amount requirement; it simply affirmed the lower courts' determinations that all who are actually included within the class must do so. Thus the Court simply left undisturbed the district court's determination that in the circumstances of that case it would not be feasible to attempt to describe a class which would include only those property owners whose claims exceeded $10,000.[98] The Court's decision is an unfortunate one, however, for it ignores the representative nature of a class suit and in so doing reaches a result which was not required by its earlier well-reasoned decision in *Snyder v. Harris*.[99]

At first blush it might appear that the *Zahn* decision will inevitably result in unnecessary relitigation of those common issues which the *Zahn* plaintiffs sought to litigate on behalf of themselves and those similarly situated (*i.e.*, if those who were potential class members bring individual suits in the state courts of Vermont after the *Zahn* case has been decided on the merits in federal court). But this is not necessarily true. It will be true only (1) if the defendant, International Paper Company, wins the lawsuit—in which case those who were not represented in the prior suit can put the defendant to the trouble of relitigating the whole matter, since the decision will not be res judicata with respect to such claimants and they will not be collaterally estopped to do so because they have not had

97. 53 F.R.D. (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 42 U.S.L.W. 4087 (U.S. Dec. 17, 1973).

98. 42 U.S.L.W. at 4088.

99. 394 U.S. 332 (1969).

their day in court,[100] or (2) if International Paper loses the suit *and* the Vermont courts continue to impose the mutuality requirement as a prerequisite to application of the collateral estoppel doctrine.[101]

Whatever the outcome in these particular cases, however, it is clear that, under the *Zahn* rationale, in jurisdictions which permit collateral estoppel to be invoked only when the parties or their privies were mutually bound by the earlier decision, defendants such as International Paper Company in the *Zahn* case may take advantage of each new opportunity to contest the issues—putting each new plaintiff to the trouble of litigating all issues no matter how many times the original defendant has lost on those issues in prior suits.

It is equally clear that in jurisdictions which have abolished the mutuality requirement—and there are many[102]—the *Zahn* decision will leave potential class members, who are excluded because of the smallness of their claims, in the position of being able to take advantage of a prior favorable decision without the concomitant disadvantage of being precluded by an unfavorable one.

In sharp contrast to the foregoing, when named plaintiffs are allowed to represent those similarly situated, both the defendant and all potential claimants who do not opt out of the class[103] should,

100. Although it is beyond the scope of this article to analyze in detail the doctrines of res judicata and collateral estoppel, it should be noted that in general res judicata bars suits on the same claim (including all issues which were or could have been litigated therein) between the same parties or their privies, while collateral estoppel traditionally has precluded relitigation of issues which actually were fully and fairly litigated in, and whose resolution was essential to the final determination of, a prior suit between the same parties or their privies. F. JAMES, CIVIL PROCEDURE § 11.9 (1965).

101. In recent years many jurisdictions have abolished the mutuality requirement. It does not appear that the Vermont courts have taken this step as of the present writing, but in light of the trend in that direction, the possibility of their doing so should not be discounted. *See, e.g.*, authorities cited note 102 *infra*.

102. *E.g.*, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 458-63 (5th Cir. 1971); Bahler v. Fletcher, 474 P.2d 329 (Ore. 1970); Schwartz v. Bronx City Public Administrator, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725 (1969); Bernhard v. Bank of America Nat'l Sav. & Trust Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942).

103. FED. R. CIV. P. 23(c)(3) provides in part that

> [t]he judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

at least in most instances,[104] be barred by the doctrine of res judicata from relitigation, whether the prior decision was favorable or unfavorable.

The implications of the *Zahn* decision are not restricted to cases in which jurisdiction is predicated on the diversity statute;[105] the same undesirable and unnecessary result will obtain when federal jurisdiction in the original suit is predicated upon the general federal question statute[106] or any other statute which imposes a minimum-amount-in-controversy requirement. Excluded class members will never be precluded by a prior unfavorable judgment,[107] while the original defendant will, as a practical matter, never be able to take advantage of a prior judgment in its favor[108] but may well be collaterally estopped to relitigate issues which were determined unfavorably to it in the prior action.

CONCLUSION

Aggregation of the separate and distinct claims of multiple claimants in order to determine the amount in controversy for jurisdictional purposes is contrary to well-established jurisdictional principles whether the claims are asserted in a class action or otherwise. Enlargement of the ancillary jurisdiction for this purpose necessarily would require reinterpretation of the constitutional case or controversy requirement and would have far-reaching undesirable effects on federal jurisdiction in general. But when a federal court plaintiff has invoked the federal court's diversity jurisdiction for adjudication of his own claims, and the court subsequently determines both that the named plantiff is an adequate representative

104. The res judicata or collateral estoppel effect of a particular judgment cannot be authoritatively determined by the rendering court but must be determined by the court in which such an effect is asserted, taking into account any due process or other problems which might be presented by its application in a particular situation. *See* note 6 *supra* and authorities cited therein.

105. 28 U.S.C. § 1332 (1970).

106. 28 U.S.C. § 1331 (1970).

107. If mutuality is required for collateral estoppel, then in these circumstances the prior decision will be irrelevant; if mutuality is not required, collateral estoppel can be invoked, but obviously it can be invoked only against one who was a party to the suit. In the case set out in the text, therefore, it could be invoked against the defendant but not against the plaintiff.

108. Whether mutuality is required or not, collateral estoppel cannot be invoked against one who was not a party or in privity with a party to the prior suit. *See generally* cases cited note 102 *supra*.

of those similarly situated and that the case should proceed as a class action, the representative claims are within the court's primary subject matter jurisdiction even though some or all of the claims of unnamed class members would not have met the requirements of the diversity statute if presented alone. Expansion of the federal courts' ancillary jurisdiction to encompass such claims is therefore not necessary to further the procedural reform contemplated by the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure.

Restricting class membership to those potential claimants whose individual claims meet the minimum amount in controversy requirement of an applicable jurisdictional statute will result in much unnecessary relitigation of common issues, but it should be recognized that this was not required by the nonaggregation doctrine. Rather, it is the result of a failure to resolve the jurisdictional question in class suits according to those principles which traditionally have been applied to determine jurisdictional questions in representative suits.