1973

Zahn v. International Paper Co. - The Aggregation Principle and Its Effect on Jurisdiction in Rule 23 (b)(3) Class Actions

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> The situation is so tangled and bewildering that I sometimes wonder whether the world would be any worse off if the class suit device had been left buried in the learned obscurity of Calvert on *Parties to Suits in Equity*.[1]

CLAIMING DIVERSITY OF CITIZENSHIP, FOUR PLAINTIFFS, owners of lakefront property in Orwell, Vermont, sought compensatory and punitive damages on behalf of themselves and approximately 200 others similarly situated for impairment of their property rights caused by the defendant's alleged pollution of Lake Champlain. Maintenance of the class action was predicated on subsection (b) (3) of Rule 23 of the Federal Rules of Civil Procedure. The initial issue was whether jurisdiction had been obtained over all the members of the proposed class where the four named representative plaintiffs individually met the $10,000 jurisdictional amount requirement of 28 U.S.C. § 1332(a) but a large segment of the unnamed class purportedly did not. Held: Even though each of the four named representative plaintiffs satisfied the jurisdictional amount requirement, diversity suit could not be maintained as a class action under Rule 23(b) (3) of the Federal Rules of Civil Procedure in the absence of a showing that each of the unnamed members of the class independently satisfied the jurisdictional amount requirements of 28 U.S.C. § 1332(a).[2]

The post-operative phase of the reconstructed Rule 23[3] of the Federal Rules of Civil Procedure regarding class actions has witnessed a series of serious complications which have generated criti-

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[1] Z. CHAFEE, SOME PROBLEMS OF EQUITY 200 (1950).

[2] Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir.), *petition for rehearing en banc denied*, 469 F.2d 1040 (2nd Cir. 1972).

[3] The relevant part of Amended Rule 23 reads:
FED. R. CIV. P. 23(a) and (b).

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as a representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive

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cism and controversy. The former Rule 23[4] which predicated its application on a trichotomy of nebulous classifications,[5] was expressly abandoned in 1966 by the amended Rule. Despite the broad animating policy objectives and flexible procedures of the new Rule, subsection (b) (3), resembling the former "spurious class action,"[6] has been construed, for subject matter jurisdictional purposes, within the framework of the mystifying classifications of the original Rule.[7] *Zahn* exemplifies the problems and consequences of employing traditional, rigid notions of aggregation, mater-in-controversy and severability of claims in the application of an innovative and inherently pliable rule of civil procedure for the redress of group injuries.

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of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[4] The pertinent section of old Rule 23 reads as follows:

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

[5] *E.g.*, "true," "hybrid," and "spurious."

[6] The nature of the asserted right in a subdivision (b) (3) class action is usually "several," i.e., involving a claim affected by a common question of law and fact and seeking common relief. *See* 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURES: CIVIL § 559 (1972).

The old "spurious" class action was basically a permissive joinder device. Caution, however, is advised in analogizing the old "spurious" action to the present (b) (3) form:

> There is no significance to the fact that there are three types of class actions set out in the new rule, just as there were in the original rule. Thus, any tendency to suppose that the old names still may be used, although with their definitions altered, must be rejected. Analogizing the categories in the original rule with the provisions in the new Rule (23) (b) not only is wrong but can be dangerously wrong. *Id.* at 514-15.

[7] One of the problematic aspects of the revised Rule 23 is the silence of the draftsmen as to the applicability of the jurisdictional amount statute (28 U.S.C. § 1332) and the aggregation doctrine in the maintenance of a (b) (3) class action for jurisdictional purposes.

The course of the present inquiry begins with a consideration of the current obstacles confronting a diversity (b) (3) class action and proceeds toward an analysis of such considerations and the resulting ramifications. Special emphasis is placed on the policy aspects of the aggregation doctrine, the jurisdictional amount statute (28 U.S.C. § 1332), and the modern class action device, with specific reference to the problematic condition of the current judicial system.[8]

Obstacles to Aggregation of Claims in a (b)(3) Class Action: Preliminary Considerations

Jurisdictional Amount: Aggregation of Claims, Amount in Controversy, Rule 82

Section 11 of the Federal Judiciary Act of 1789 limited access to the federal courts to controversies in which the amount involved exceeded $500.[9] In 1958, a minimum of $10,000 was established as a prerequisite to jurisdiction in federal diversity cases.[10] The applicable statute, 28 U.S.C. § 1332(a), provides that "The district courts shall have original jurisdiction of all civil actions where the matter in controversy[11] exceeds the sum or value of $10,000, exclusive of interest or costs . . . ."

In determining the matter in controversy and the permissibility of aggregation, the established rule, commonly referred to as the "*Pinel* doctrine,"[12] has been that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is sufficient if their interests collectively equal the jurisdictional amount.[13] One of the objectives of the *Pinel* doctrine was to check the excessive resort to the federal courts in the days of *Swift v. Tyson.*[14] These

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[8] Not included within the scope of this discussion is the suitability of the class action device for the specific redress of injuries resulting from environmental pollution. *See, e.g.* Annot., 7 A.L.R. FED. 907-10 (1971).

Also outside the confines of this article, although particularly relevant to the aggregation problem in a (b) (3) class action, is the propriety or potential availability of the ancillary jurisdiction concept as a vehicle to circumvent the strictures of the aggregation and amount-in-controversy formulae. *See, e.g.,* Alvarez v. Pan-American Life Insurance Co., 375 F.2d 992 (5th Cir. 1967); *contra,* Lesch v. Chicago & Eastern Ill. R.R. Co., 279 F. Supp. 908 (N.D. Ill. 1968); *see particularly* Judge Timbers' dissent in *Zahn,* 469 F.2d 1033 (2d Cir. 1972); *also* note 53 *infra.*

[9] 1 Stat. 78.

[10] 72 Stat. 415.

[11] The old term was "matter in dispute." The statutory language was altered in 1911 to its present terminology. Judicial Code of 1911, 36 Stat. 1091.

[12] 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 555 (1972).

[13] Pinel v. Pinel, 240 U.S. 594 (1915); Clay v. Field, 138 U.S. 464 (1891); Thomson v. Gaskill, 315 U.S. 442 (1942); Oliver v. Alexander, 6 Pet. 143, 8 L. Ed. 349 (1830).

[14] Kalven and Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684, 704-05 n. 66 (1941). *See also Developments in the Law: Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874 (1958).

theoretical tests for determining the amount in controversy for federal jurisdiction purposes originated prior to and independently of the federal class action device. However, the *Pinel* doctrine of "no aggregation except" was applied to the original federal class action in 1939 so as to preclude aggregation of distinct and separate claims for obtention of diversity jurisdiction in the case of *Clark v. Paul Gray, Inc.*,[15] wherein permissible aggregation was limited to "true" class actions,[16] i.e., those actions which involved so-called joint, common, or secondary rights. Such a mechanically strict interpretation of matter-in-controversy, in relation to the nature of the class action before the court, comported with the compartmentalization-pigeonholing aspects of the old Rule 23. In addition, it purportedly reduced the federal caseload.

Despite the anticipation of the proponents of the new class action that the old classification system would incur the ignominious demise that it rightly deserved and would not be shackled to the youthful amended Rule 23,[17] the Supreme Court in *Snyder v. Harris*[18] in effect reaffiliated the class action with the "accursed labels"[19] and mandated that parties to a class action would not be allowed to aggregate their claims in order to establish the required amount in controversy unless a "joint" or "common" interest could be shown. The *Snyder* decision was predicated on three major considerations, which, to this day, as evidenced by the *Zahn* holding, remain as obstacles to the effective and equitable implementation of the (b) (3) provision of Rule 23: (1) established judicial interpretation of amount in controversy as precluding aggregation of separate and distinct claims for the purpose of obtaining jurisdiction;[20] (2) Federal Rule of Civil Procedure (82)[21] as a proscription against permitting a change in

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[15] 306 U.S. 583 (1939). Dissenting Judge Timbers properly distinguishes *Clark*. Zahn v. International Paper Co., 469 F.2d 1033, 1038-39 (2d Cir. 1972).

[16] *E.g.*, where aggregation was precluded in a "hybrid" class action, Sturgeon v. Great Lakes Steel Corp., 143 F.2d 819 (6th Cir. 1944); in a "spurious" action, Central Mexican Light & Power Co. v. Munch, 116 F.2d 85 (2d Cir. 1940).

[17] Wright, *Class Actions*, 47 F.R.D. 169, 183; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (1), 81 HARV. L. REV. 356, 399-400 (1967); Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1214 (1966).

[18] Snyder v. Harris, 394 U.S. 332 (1969) (Fortas, J. dissenting) [hereinafter referred to as *Snyder*].

[19] Kalven and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 707 n. 73 (1941).

[20] Snyder v. Harris, 394 U.S. 332, 336. The thrust of the argument was that revision and adoption of amended Rule 23 of the Fed. R. Civ. P. did not operate to modify the "settled doctrine" of no-aggregation-except, citing *Pinel v. Pinel*, 240 U.S. 594 (1915) and *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939).

[21] Rule 82 of the Fed. R. of Civ. P. reads in part:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of the actions therein . . . .

aggregation practices;[22] and (3) implied legislative purpose in re-enacting the jurisdictional amount statute.[23]

In order to appreciate the import of *Zahn*, it is necessary to recognize, or at least attempt to perceive, the boundaries and ambience of *Snyder*. The holding in *Snyder* was formulated in a situation in which none of the representative plaintiffs before the court possessed the necessary jurisdictional amount.[24] As has been suggested by one commentator, *Snyder* clearly prevents the use of the (b) (3) class action in diversity cases in circumstances in which no member of the class has a claim in excess of $10,000.[25] Another observer has interpreted the "hollow sound" of *Snyder* to require that *each individual representative plaintiff* must himself have a demand over $10,000.[26] Despite the rather cryptic linguistic construction of *Snyder*, it would not be entirely unreasonable to engraft upon that case a strict construction so as to plunge the (b) (3) class action onto the type of procrustean bed that the *Zahn* court has so "reluctantly" supplied.[27] In theory and practice, *Zahn* has

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[22] In 1934 Congress gave the Supreme Court the power to enact rules of civil procedure for the federal courts, 28 U.S.C. § 2072 (formerly § 723 c), the Rules Enabling Act. In *Sibbach v. Wilson*, the Court held that such rule-making authority was limited and could not be exercised "to extend or restrict the jurisdiction conferred by statute." 312 U.S. 1, 10 (1941). *See also* Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

The Rule 82 argument, in effect, maintains that the principle of aggregation comes within the ambit of jurisdiction which has been traditionally relegated to Congress rather than to the rule-making power delegated by Congress to the Supreme Court. *See, e.g.* Alvarez v. Pan-American Life Insurance Co., 375 F.2d 992, 995 (5th Cir. 1967), maintaining that such jurisdiction had not been expanded in such a *sub silentio* manner. The assumption of the courts in positing Rule 82 as a proscription against aggregation of distinct and separate claims is that a change of such a practice is tantamount to a judicial distention of subject-matter jurisdiction.

[23] The contention here is double-barreled: first, that Congress has, by consistently reenacting the jurisdictional amount statute without comment, adopted the circumscribed judicial interpretation of "amount-in-controversy," (albeit in *sub silentio* fashion?); second, that Congressional enactment of the jurisdictional amount statute was actuated (but it must be noted, only in part) by the desire to check the rising caseload of the Federal courts. *See* Snyder v. Harris, 394 U.S. 332, 338-40 (1969); *see also* Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601 (1969).

[24] Mrs. Snyder's claim, for instance, amounted allegedly to $8,740. If aggregation had been permitted, the jurisdictional amount of the 4,000-membered class would have presumably amounted to approximately $1,200,000. The other representative plaintiff in the companion case alleged damages to himself of only $7.81; but, if his claim had been coupled with the claims of approximately 18,000 other class members, the aggregate amount would have been in excess of $10,000. *See* Snyder, v. Harris, 394 U.S. 332, 333-34 (1969).

[25] Wright, *Class Actions*, 47 F.R.D. 169, 184. *See also* 3 B.J. MOORE, FEDERAL PRACTICE, § 23.95 (2d ed. 1948) for contention that the distinct claims of the original parties has to equal or exceed the jurisdictional amount. *Contra*, Zahn v. International Paper Co., 53 F.R.D. 430, 432 (D. Vermont 1971), the district court asserting that it felt "bound by the clear language of the Supreme Court."

[26] Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969).

[27] Indeed, Professor Wright, while suggesting the soundness of Snyder as dubious, observes:

> There are indications that it *{Snyder}* also means that that device cannot be used in diversity cases save for the extraordinary situation in which every member of the class has a claim in excess of $10,000., though this is not an inevitable

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carried the *Snyder* rationale and the principle of no aggregation to its logical, and perhaps unwarranted, extreme.[28]

Administrative Burdens

Courts do not operate in vacuums or concern themselves solely with the application or exposition of legal principles. Oftentimes, external factors exert noticeable pressure. An influential contextual factor apparently responsible for the gradual truncation of the (b)(3) action in federal diversity cases is the onslaught of litigation to which the federal courts have been subjected.[29] In 1960, before the revision of Rule 23, former Chief Justice Earl Warren spoke of the crushing burdens and stresses on the federal judicial system.[30] Twelve years later, the honorable Chief Justice Warren Burger reported that the judges of the 11 courts of appeals had experienced a massive increase in the volume of litigation: from 4,200 appeals in 1962 to 14,500 appeals in 1972.[31] The Chief Justice stated:

> The re-examination of federal jurisdiction to limit its scope is long overdue, and I hope the Congress will see, as the legal profession has, that some of the anomalies of federal jurisdiction must be corrected.[32]

The exigencies of the present situation ostensibly indicate that the impetus is not one of straining to retain jurisdiction, especially in circumstances where the potential administrative burdens of a particular case are crushing[33] and reasonable equitable resolution can

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conclusion and it would aggravate the damaging effect the *Snyder* decision has had on an attempt to modernize the law of class actions. Wright, *Class Actions*, 47 F.R.D. 169, 184 (1969).

See also 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 565 (1972).

[28] The possibile untenability of the *Zahn* extension of the *Snyder* decision is nurtured by the fact that nowhere in the *Snyder* opinion can a statement be extracted to reflect precisely the holding that *Zahn* espouses. In fact, J. Black's prefatory statement in *Snyder* seems to substantiate such an observation:

> The issue presented by these two cases is whether separate and distinct claims presented by and for various claimants in a class action may be added together to provide the $10,000 jurisdictional amount in controversy. Snyder v. Harris, 394 U.S. 332, 333 (1969).

[29] Consider the following statement:

> There is no compelling reason for this court to overturn a settled interpretation of an important congressional statute [28 U.S.C. § 1332] in order to add to the burdens of an already overloaded federal court system. *Id.*, at 341.

[30] Warren, *Address by the Chief Justice of the U.S.*, 25 F.R.D. 213 (1960), noting that there was a backlog of approximately 74,000 cases.

[31] Burger, *Report on the Problems of the Judiciary*, 93 S. Ct. 3, 10 (Supp. 1972).

[32] *Id.*, at 12.

[33] Consider the formidable challenges and potential for ensnarlment in the following class actions.

School District of Philadelphia v. Harper & Row, Publishers, Inc., 267 F. Supp. 1001, 1003 (E.D. Pa. 1967), a suit brought under the anti-trust laws alleging a national conspiracy and involving a class " 'purported to encompass . . . all public libraries . . . and other educational institutions, organized and situated throughout the U.S. * * *'." Such libraries and school systems were estimated to aggregate 60,000 in number. Suit was

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be achieved through other channels.[34] In addressing itself to this particular problem, the *Zahn* court implicitly justified its application of the aggregation doctrine on a policy basis, alleging that the court's holding comported with the "underlying purpose" of the jurisdictional amount statute, namely to check the rising caseload in the federal courts.[35] The consequence of this development within the context of the contemporary administration of justice is a peculiar interplay of policies involving the old doctrines of aggregation and matter in controversy within the class action domain.

Obstacles to Aggregation of Claims in a (b)(3) Class Action: Analysis

Re Judicial and Legislative Construction

Irrespective of the decimating effects on the (b) (3)'s potential in diversity cases for therapeutic[36] application, the *Zahn* decision affords an auspicious opportunity again to focus attention upon the trumped-up rationales utilized in restricting the expansivity of the (b) (3) device. The persistent judicial reliance on the principle that 28 U.S.C. § 1332(a) mandates that separate and distinct claims cannot be aggregated in order to satisfy the minimum jurisdictional amount precipitates a need to evaluate the strengths of the two bases upon which such reliance is posited: the first relates to the traditional judicial and legislative constructions of the jurisdictional amount statute;[37] the second concerns the controlling policy considerations underlying the jurisdictional amount statute.

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dismissed. Although the primary focus of the problem was the absence of common questions of law and fact, the court added: "Additional considerations which constrain us to deny the maintenance of this suit as a class action are the difficulties certain to be encountered in its management as a class action." (at 1004). *See also* 54 VA. L. REV. 314 (1968).

Cf. Eisen v. Carlisle & Jacquelin, an action by an odd-lot investor on behalf of himself and approximately 3,750,000 others similarly situated. Despite the Olympian challenges, the court retained jurisdiction. The case has had a protractive day in court. 391 F.2d 555 (2d Cir. 1968); 52 F.R.D. 253 (S.D. N.Y. 1971); 54 F.R.D. 565 (S.D. N.Y. 1972).

See also Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971), involving an action by a credit card holder on his own behalf and others similarly situated, approximately 60,000, for alleged violations of the Truth in Lending Act.

At this juncture, it is advisable to recall that the *Zahn* case was brought on behalf of approximately 200 purported class members.

[34] *See* notes 61 and 69, *infra.*

[35] Zahn v. International Paper Co., 469 F.2d 1033, 1035 (2d Cir. 1972). *See e.g.,* Snyder v. Harris, 394 U.S. 332, 340 (1969); *also Weithers, Amended Rule 23: A Defendant's Point of View (Symposium),* 10 B.C. IND. & COM. L. REV. 515, 520-23 (1969); and note 29, *supra.*

[36] Judge Weinstein, in *Dolgow v. Anderson,* spoke of this "therapeutic" or "prophylactic" potential of the class action device with specific reference to the area of securities regulation and the public interest. The scholarly opinion is noteworthy for its penetrating analysis and positive orientation toward the class action. 43 F.R.D. 472, 485-88 (E.D. N.Y. 1968).

[37] *Snyder v. Harris* represents the controlling viewpoint that the settled judicial construction of amount in controversy will not be overturned in the absence of a compelling reason and in the light of the consistent congressional reenactment of the statutory language. 394 U.S. 332 (1969).

The court in *Zahn*[38] partially bottomed its decision, wherein each of the unnamed (b) (3) class members would have to satisfy independently the $10,000 requirement, on the statutory language of 28 U.S.C. § 1332, at the same time incorporating by reference the majority's position in *Snyder*. The present construction of the jurisdictional statute reflects, as discerned by former Justice Fortas in *Snyder*,[39] a current failure to appreciate the nature of the jurisdictional statute and the context in which it has developed. The residual impact of this strict, limited construction, whereby the judiciary deems itself incapable of reforming the old practices to fit the new procedural mechanism, is to fossilize the matter-in-controversy requirement[40] and hinder the development of amended Rule 23. Several observations are pertinent in assessing the contention that 28 U.S.C. § 1332 precludes aggregation. First, the jurisdictional amount requirement is, in its application, a judge-made doctrine, and, as such, is capable of being redefined and reevaluated by those who have previously determined its lineaments.[41] Secondly, the propriety of determining by judicial reevaluation the functional application of the jurisdictional amount requirement is further reenforced by the fact that over the years "Congress has never expanded or explained the bare words of these successive jurisdictional amount statutes."[42] Third, to infer from or find in Congressional silence alone the adoption of a particular construction of a particular doctrine generally requires proof of "very persuasive circumstances."[43] Fourth, an examination of the historical application and development of the judicially formulated aggregation doctrine for purposes of delineating the matter-in-controversy reveals that the atmosphere was basically one in which the mechanical tripartite concepts of jural

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[38] "Rather it is clear in the light of *Snyder*, 394 U.S. at 336, that the critical focus in resolving the issue before us must be on 28 U.S.C. § 1332." Zahn v. International Paper Co., 469 F.2d 1033, 1035 (2nd Cir. 1972).

[39] Snyder v. Harris, 394 U.S. 332, 342 (1969).

[40] For example, whether the *Snyder* decision intimates that judicial reinterpretation is possible cannot be decided without first making a determination as to whether the "compelling reason" and "consistent congressional reenactment" are conjunctively or disjunctively related to the exception suggested. *Id.* at 341. Immutability of the statute may not necessarily be the logical import of *Snyder*.

[41] Consider:

> This Court . . . has from the beginning rejected a doctrine of disability at self-correction . . . [W]e cannot evade our own responsibility for reconsidering in the light of further experience . . . the validity of distinctions which this Court has itself created." Helvering v. Hallock, 309 U.S. 106, 121-22 (1940).

[42] Snyder v. Harris, 394 U.S. 332, 347 (1969).

[43] Girouard v. U.S., 328 U.S. 61, 69-70 (1946), cited by J. Fortas in Snyder v. Harris, 394 U.S. 332, 348 (1969). *See also* Helvering v. Hallock, 309 U.S. 106, 119 (1940). *See generally* Note, *Legislative Adoption of Prior Judicial Construction: The Girouard Case and the Reenactment Rule*, 59 HARV. L. REV. 1277 (1946).

relationships, indigenous to old Rule 23, prevailed[44] and the concomitant emphasis was on rigid pigeon-holing, a cul-de-sac that the new Rule purposely sought to avoid. Fifth, the contention that Rule 82 presents a barrier to the judicial reformulation of the aggregation concept was disposed of by former Justice Fortas in the following manner:

> Making judicial rules for calculating jurisdictional amount responsive to the new structure of class actions is not an extension of the jurisdiction of the federal courts, but a recognition that the procedural framework in which the courts operate has been changed by a provision [Rule 23] *having the effect of law.*[45] [Emphasis supplied.]

These considerations seriously undermine the argument that the jurisdictional amount statute precludes the exercise of judicial discretion in redefining the amount-in-controversy concept for the purpose of promoting a "welcomed and long-needed reform in federal procedure."[46] An observation, made in 1939 by Justice Frankfurter, in circumstances militating against adherence to and perpetuation of a rigid judicial formula, is noteworthy:

> Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications.[47]

A dilemma occurs, however, when that principle derives its strength from the very source that sustains a countervailing principle.

28 U.S.C. 1332: A Conflict In Principles

While the *Zahn* court found sustenance for its decision from the traditional statutory construction of 28 U.S.C. § 1332, such fidelity to legal construction did not appear to be the sole inducing factor. Rather, the argument assumed a distinctly prescriptive tenor with the vortex clearly nestled in one of the policy considerations of 28 U.S.C. § 1332. The significance of this oblique approach is twofold: first, in view of the present state of the federal judiciary, the particular policy emphasis may become more conveniently parochial, resulting in a possible greater reluctance by other federal courts to

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[44] *See* Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601, 604-05 n. 17 (1969); *see also* Comment, *Federal Procedure-Class Actions: Amended Rule 23 of the Federal Rules of Civil Procedure Does Not Permit Aggregating Claims to Achieve the Necessary "Amount in Controversy" Where Interests are Separate and Distinct — Snyder v. Harris, 394 U.S. 332 (1969)*, 21 SYRACUSE L. REV. 326, 330 (1969).

[45] Snyder v. Harris, 394 U.S. 332, 336 (1969).

[46] *Id.* at 342 (J. Fortas).

[47] Helvering v. Hallock, 309 U.S. 106, 122 (1940).

admit a subdivision (b) (3) type class action into the embrace of federal jurisdiction;[48] secondly, such an approach suggests a peculiarly paradoxical situation in which the very source (28 U.S.C § 1332) utilized to promote the policy of limiting the federal caseload can be cited as opposing authority for encouraging the entertainment of class actions presenting significant claims.

Germane to the successive increases in the monetary amount for diversity jurisdiction is the underlying Congressional intent to require an amount "not so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies."[49] Inherent in this Congressional statement of purpose is a subtle tension between two equally meritorious but potentially conflicting policy concerns, both of which have quietly surfaced in the presently overburdened judicial system.[50] On the one hand, the establishment of a minimal jurisdictional amount represents a practical and self-protective attempt to alleviate the congestion in the federal courts and secure operational efficiency by diminishing the federal caseload and limiting accessibility to the federal forums. The results reached in cases like *Zahn* and *Snyder* theoretically comport with such objectives.[51] On the other hand, the Congressional intent to prevent judicial congestion is implicitly qualified by the accompanying policy consideration that denial of jurisdiction is to be limited to "petty controversies." The denial of access to a federal forum to plaintiffs who collectively present a significant claim within the form of a class suit is antithetical to one of the implicit policy concerns of the jurisdictional amount statute.[52] The concession that those who satisfy the jurisdictional amount may remain in federal court to vindicate their rights does not justify the denial to others similarly situated to join with those who have been permitted to present a commonly shared substantial controversy.[53] In their respective emphases on the desirability of

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[48] A finding of "spuriousness" or severability plus the existence of named or unnamed class members, unable to satisfy the jurisdictional amount, would facilitate such reluctance.

[49] S. REP. NO. 1830, 85th Cong., 2d Sess. 4 (1958); 1958 U.S. CODE & CONG. NEWS 3099, 3101

[50] The *Zahn* court focused upon the reduction-of-litigation factor and did not address itself to the correlative policy consideration of "petty controversies."

[51] The "theoretical" qualification is particularly pertinent here in the *Zahn* case. If as the facts suggest, *(see, e.g.,* 53 F.R.D. 430, 431 (1971)), there are more than the four named plaintiffs of the 200-membered class who satisfy the jurisdictional amount, then the possibility of duplicate litigation in the federal courts on a similar issue is not remote, despite the availability of joinder.

[52] The situation in *Zahn* and *Snyder* certainly cannot be flippantly categorized as petty.

[53] This practice, more common in cases involving the reciprocally related theory of pendent jurisdiction, is oftentimes referred to as "riding on another's coat-tails" theory. *See* note 8, *supra.*

See particularly Judge Timbers' focus on the ancillary jurisdiction concept. Zahn v. International Paper Co., 469 F.2d 1033, 1036-38 (2d Cir. 1972). Further distension, however, of the slowly evolving ancillary jurisdiction concept so as to protectively cloak the (b) (3) subsection of the revised class action would be advisably unnecessary were it not for the draconian interpretation and application of the *Snyder* holding.

[44] *Id.* at 1160.

affording equitable opportunity to litigate significant claims, the jurisdictional amount statute and the class action device are complementary. The sobering reality, however, is that the present judicial system is neither particularly disposed nor equipped to entertain "the broadest scope of action consistent with fairness to the parties . . . ."[54]

Ramifications of the *Zahn* Rationale

The "Small Fellow" and the Open Forum

> The class action was an invention of equity * * * mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from equitable wrongs . . . .[55]

The recognition that individuals making up a group are usually "in no position to act for themselves because of their lack of knowledge and the disproportion between the expense of seeking redress and their individual stake in the controversy"[56] was one of the motivational factors that prompted a revision of the old Rule 23. At the time of revision, the new Rule was viewed as an attempt to provide a vehicle for redressing injuries to a large number of persons, who as individuals would be without effective strength to bring into the courts those who had impaired their rights or caused them injury.[57] This observation is substantiated by the Advisory Committee's Notes on the desirability and function of a (b) (3) class suit:

> The interests of individuals in conducting separate lawsuits may be so strong as to call for a denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, *or the amounts at stake may be so small that separate lawsuits would be impracticable.*[58] [Emphasis supplied.]

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[54] "Under the Rules . . . joinder of claims, parties and remedies is strongly encouraged." United Mine Workers of America v. Gibbs, 383 U.S. 715, 724 (1966). Although the statement was made in reference to the suggested breadth of pendent jurisdiction in federal question cases, the reason and policy underlying the standard advocated are no less significant to the issue of entertaining federal jurisdiction in class actions.

[55] Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

[56] Kalven and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 714 (1941).

[57] Eisen v. Carlisle & Jacqueline, 391 F.2d 555, 560 (2d Cir. 1968); *See* Kaplan, *a Prefatory Note*, 10 B. C. IND. & COM. L. REV. 497 (1969); Ford, *Federal Rule 23: A Device For Aiding the Small Claimant*, 10 B. C. IND. & COM. L. REV. 501, 504 (1969).

[58] *Advisory Committee's Notes*, for Proposed Fed. R. Civ. P. 23, 39 F.R.D. 98, 104 (1966).

To hold, as the *Snyder* rationale did, that separate and distinct claims may not be aggregated (presumably by those representative plaintiffs before the court) in a "spurious-type" class suit for diversity purposes certainly handicapped the viability of the (b) (3) class action.[59] But *Zahn's* extension of *Snyder* to the point of precluding a (b) (3) diversity class action except in the extraordinary situation in which every member of the class satisfies the $10,000 jurisdictional amount contravenes one of the salient features of the reconstructed class action. The consequence is that accessibility to a federal forum for (b) (3) class action purposes is restricted to a very select and perhaps non-existent group.[60] Furthermore, in response to the argument that such claims can be adjudicated just as effectively in a state forum, the following has been contended:

> The notion that the litigants are free to pursue their rights in a state court may not always be realistic if the state procedural system tends to discourage class actions or if the individual claims are so small that the class members are remitted to a small claims court or a court of limited jurisdiction that is not authorized to hear class actions.[61]

Judicial Economy, Mince Pie, and Equity

The Advisory Committee's Notes, in adumbrating the advantages of a (b) (3) class suit, explained:

> Subdivision (b) (3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.[62]

The beneficiaries of this economy principle are the parties themselves and the judicial system. The thrust of the policy is broader in scope than the parochial aspect of the federal jurisdictional amount statute yet complementary to its component policy objective. The primary concern is to prevent multiplicity of litigation within the judicial framework or, as one observer stated, ". . . to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions . . . ."[63] With regard to the adversary, the class action protects him from

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[59] *See*, note 67, *infra*.

[60] For a good discussion of the preferability in promoting group redress of group injuries as opposed to private enforcement, *see* Kalven and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 714-20 (1941).

[61] 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1756, at 561 (1972); *see also* Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2d. Cir. 1972).

[62] *Advisory Committee's Notes*, for Proposed Fed. R. Civ. P. 23, 39 F.R.D. 98, 103-04 (1966).

[63] Kaplan, *A Prefatory Note*, 10 B. C. IND. & COM. L. REV. 497 (1969).

unnecessary vexation and expense.[64] Professor Chafee, in discussing the equitable nature of representative class suits and their distinctive capacity to avoid inconvenient, multiple, and uneconomical litigation, opined that the adversary is safeguarded from the danger that the aggregate of the separate jury verdicts might exceed the limit of his liability, such fund or limited liability being ". . . like a mince pie, which cannot be satisfactorily divided until the carver counts the number of persons at the table."[65] In addition, the class action, by focusing upon a number of common controversies in one litigable unit, promotes uniformity of decision as to persons similarly situated. The *Zahn* holding creates the risk of multiple litigation, economic hardship for the redress of individual injuries, and divergent adjudications regarding an issue with common questions of law and fact.

Correlatively, the economy principle is designed to benefit the judicial system as a whole. The catholic viewpoint of Rule 23 is particularly significant in view of the sky-rocketing caseloads of the state judiciaries.[66] The denial of a federal forum in a situation comparable to the facts in *Zahn* may result in the undesirable and uneconomical dissipation of state judicial energies and resources in the event that the class members seek to redress their injuries individually or multiply.

Conclusions

The result reached in *Zahn* is responsive to the plea of limiting the scope of federal jurisdiction in a period of intense judicial stress. Adherence to the principle espoused in *Zahn* will not totally vitiate the class action device, or even subsection (b) (3), for that matter. The import of the holding, for example, would not affect

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[64] An indiscriminate use of the class action device, however, may have severely detrimental effects on the defendants. *See* Weithers, *Amended Rule 23: A Defendant's Point of View*, 10 B. C. IND. & COM. L. REV. 515, 521-26 (1969).

[65] Z. CHAFEE, SOME PROBLEMS OF EQUITY 169 (1950).

[66] Consider, for example, the plight of the Florida judiciary. The Florida circuit courts in 1970, while purportedly disposing of approximately 120,000 cases, were 13,000 cases behind. The Florida Supreme Court level was then projected to reach a record of 1,500 cases in 1971 or 50% more than the so-called "crisis year" of 1952. The cases deposited in the Florida district courts produced an amount that averaged in 1970 more than 300 cases per judge. *See* Roberts, *The State of the Judiciary*, 45 FLA. B.J. 394 (July 1971).

The Chief Justice of the Massachusetts Supreme Judicial Court, in cataloguing the problems besetting that state's judiciary, reported:

> Each Supreme Judicial Court justice now must write more than fifty opinions per year in contrast with approximately twenty to twenty-three opinions per judge in New York, New Jersey, North Carolina and California and even less in Louisiana and North Dakota. The figure is nearly double the national median. In addition each justice must familiarize himself with two hundred or more other cases . . . .

Tauro, *The State of the Judiciary*, 56 MASS. L.Q. 207, 236 n. 13 (1971).

See also Don Vito, *An Experiment in the Use of Court Statistics*, 56 JUDICATURE 56 (Aug.-Sept. 1972) re backlogs of criminal cases in major metropolitan judiciaries.

securities fraud cases or those dealing with federal questions in which no minimum monetary amount is required. The already extraordinary development of Rule 23 in civil rights, anti-trust, securities, consumer, and mass tort cases will not necessarily be stunted.[67] But, as noted previously, adherence to the *Zahn* rationale will have a debilitating effect on one of the essential purposes of the new Rule — to enable a court to determine the rights and claims of a class of similarly situated and commonly affected individuals, including small claimants, by one common final judgment through a device which promotes the efficient and convenient presentation of a substantial controversy worthy of adjudication.

The holding in *Zahn* is undesirable in a number of respects. First, the expansion of the *Snyder* decision appears to have been unnecessary in view of the particular factual situation. If, as the facts suggest, the court could not find an appropriate class or any advantage in maintaining the suit as a class action,[68] then these two considerations would have been sufficient under the new Rule to deny class action status.[69] Convenience, desirability, flexibility, and judicial discretion are integral components of subdivision (b) (3).[70] Second, whether the reduction of the federal caseload will be justifiably facilitated is questionable at this time.[71] Third, from the standpoint of over-all judicial economy, the practical effect of the holding, while possibly serving the interests of the federal judiciary, is to foster a potentially considerable amount of duplicate litigation.

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[67] 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1753, at 541 n. 45 (1972). *See,* for example, Annot., 8 A.L.R. FED. 461-502 (1971); Annot., 8 A.L.R. FED. 415-451 (1971); Annot., 7 A.L.R. FED. 907-910 (1971).

[68] *See* Zahn v. International Paper Co., 53 F.R.D. 430, 433 (D. Vt. 1971); 469 F.2d 1033, 1039 (2d Cir. 1972).

[69] A number of alternatives are available upon dismissal of class action: joinder, consolidation, intervention, resort to administrative agency, and possible class action in state forum. *But see* Sabbey, *Rule 23: Categories of Subsection (b),* 10 B. C. IND. & COM. L. REV. 539, 553-54 (1968) as to possible impracticability of such alternatives. It has also been suggested that the split trial device might be effective in the administration of (b) (3) actions. The commentator however does not subscribe to the theory that aggregation is or should be permissible in (b) (3) actions. Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39.

[70] *Advisory Committee's Notes,* for Proposed Fed. R. Civ. P. 23, 39 F.R.D. 98, 102-104 (1966).

[71] "It is true that, in practice, the bulk of class actions lodged in federal courts are based on jurisdictional statutes in which amount in controversy plays no part." Kaplan, *A Prefatory Note,* 10 B. C. IND. & COM. L. REV. 497, 498 (1969).

Consider also the following observation:

> Almost all of the actions sought to be maintained as class actions under Subsection (b) (3) since the amendment of F. R. Civ. Procedure 23 in 1966 have alleged either securities frauds or anti-trust violations. Katz v. Carte Blanche Corp. 53 F.R.D. 539, 541 (W.D. Pa. 1971).

See also Currie, *The Federal Courts and the American Law Institute, Part II,* 36. U. CHI. L. REV. 268, 297 (1969), author advising abolishment of jurisdictional amount requirement in view of the alleged draining of judicial resources which the requirement has produced.

Fourth, in view of the possible limited scope of *Snyder* and the critical dissatisfaction that it has caused, the foundation for the court's extension of the aggregation doctrine so as to preclude maintenance of a (b) (3) action except in circumstances in which every class member possesses the requisite jurisdictional amount will certainly be subject to careful examination.[72]

The new Rule 23 purportedly represented a significant departure from the philosophy and conceptualistic orientation of the old Rule.[73] The old tripartite classification of juristic relationships, utilized under the old Rule primarily to determine the binding effect of the class action judgment on outsiders, was abandoned as the effect-of-judgment issue was resolved by subsection (c) of the new Rule. The formidable complexity and obscurity of the old categories were recognized to be the insidious defects of the old Rule.[74] Yet the five post-operative years have witnessed the commission of the same errors which were indigenous to the old Rule. Both *Snyder* and *Zahn* categorize the interests of the class members and thereby cement the new Rule in the old traditions and pitfalls. By focusing on the identity rather than on the solidarity of interests, whether for purpose of determining jurisdictional amount or maintenance of a suit as a class action, the problem of fashioning an effective group remedy becomes an increasingly difficult task. The old classifications do not and were not intended to coincide with the new.[75] The present dilemma and controversy suggest a crucial need to re-examine the tendency toward resorting to and perpetuating the old trichotomy of classifications which sclerosed the original Rule. The persistenly problematic position of the revised Rule and the need for flexible, responsive judicial procedures must be reckoned with, either by the judiciary or the legislature. At the same time, it must be recognized

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[72] There is an intimation that separate questions as to the incurrence of damages by the plaintiffs would justify dismissal in view of the possible administrative burdens. Zahn v. International Paper Co., 53 F.R.D. 430, 434 (D. Vt. 1971); 469 F.2d 1033, 1036 (2d Cir. 1972). It has been recognized, however, that the factor of computation of damages alone does not justify dismissal where the prerequisites to the maintenance of a class action are met and manageability is not an impossibility. *See* Eisen v. Carlisle & Jacqueline, 391 F.2d 555, 567 (2d Cir. 1968). A separate consideration of damages can be ordered.

[73] 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1752, at 515 (1972).

[74] *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 245, 246 (1950); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 376-400 (1967); *See also* Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 56 COLUM. L. REV. 818, 822 (1946); Kalven and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 707 (1941); Ford, *The History and Development of Old Rule 23 and the Development of Amended Rule 23*, 32 ANTITRUST L.J. 254 (1966).

[75] 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1752, at 514 (1972). *See also* note 6, *supra*.

that the conflict between the equitable demands of the class action and the pragmatic dictates of the over-taxed judiciaries are not necessarily incapable of harmonization. Resolution of that conflict is peculiarly within the Congressional domain.[76]

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[76] The Judicial Conference of the U.S., the policy making body of the Federal Judiciary, for instance, voted to recommend to Congress the creation of 62 more federal judgeships and 340 additional probation officers. New York Times, Oct. 29, 1972, at 20, col. 5.

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