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Zahn v. International Paper Co.: The Non-Aggregation Rule in Jurisdictional Amount Cases

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ZAHN V. INTERNATIONAL PAPER CO.: THE NON-AGGREGATION RULE IN JURISDICTIONAL AMOUNT CASES

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The general federal question jurisdiction statute[1] and the diversity jurisdiction statute[2] each provide that, as one jurisdictional requisite, the "matter in controversy" must exceed $10,000.[3] The statutes make no explicit provision for cases involving multiple parties where only some or none of the parties asserts or defends against a claim over this amount, although the aggregate of such claims may exceed the required figure. The answers to problems like these have been purely judge-made responses.[4]

In *Zahn v. International Paper Co.*,[5] the United States Supreme Court again declined an invitation to change the content of these rules.[6] When the Court has spoken so recently and so emphatically on an issue, it would not serve much purpose to make an extended argument that the Court should have reached a contrary result.[7] We

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1. 28 U.S.C. § 1331 (1970) provides in part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

2. *Id.* § 1332 provides in part: "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."

3. Several important jurisdictional provisions have no amount-in-controversy requirement. *E.g.*, 28 U.S.C. §§ 1333, 1337, 1343 (1970).

4. *See generally* Note, 68 COLUM. L. REV. 1554 (1968); Note, 27 IND. L. J. 199 (1952); Note, 53 MINN. L. REV. 94 (1968); Note, 80 U. PA. L. REV. 106 (1931).

5. 414 U.S. 291 (1973).

6. It had previously declined a similar invitation in *Snyder v. Harris*, 394 U.S. 332 (1969), *noted in* 17 LOY. L. REV. 187 (1970); 24 U. MIAMI L. REV. 173 (1969); 24 SW. L. J. 354 (1970); 79 YALE L. J. 1577 (1970). See also Maraist & Sharp, *After Synder v. Harris: Whither Goes the Spurious Class Action?* 41 MISS. L. J. 379 (1970).

7. Both the United States Supreme Court's opinion and the Second Circuit opinion, 469 F.2d 1033 (2d Cir. 1972), have already generated a good deal of criticism. *See* Note, 43 U. CINN. L. REV. 444 (1974); *Recent Developments, A Class Action Brought Pursuant to Federal Rule 23 (b) (3) and Under Diversity Jurisdiction Cannot Be Maintained Where the Named Representatives Meet the Jurisdictional Amount But Some Unnamed Plaintiffs Do Not*, 73 COLUM. L. REV. 359 (1973) [hereinafter cited as *Recent Developments*]; Comment, 41 FORD. L. REV. 991 (1973); Note, 35 OHIO ST. L. J. 190 (1974); Note, 26 VAND. L. REV. 375 (1973). In addition, criticism of the Court's

may expect to live with the Court's decision for some time—at least until Congress takes corrective action. Hence, it is important to identify certain cases clearly to be discarded to the extent that they anticipated a trend rejected in *Zahn*. Even more important is a consideration of cases that, although purporting to follow traditional doctrine, arguably stray from it.

ZAHN: NON-AGGREGATION AS AN OBSTACLE TO THE CLASS ACTION

In *Zahn*, plaintiffs sought damages in a class action on behalf of themselves and approximately two hundred other owners and lessors of lakefront property against defendant, whom they claimed to be injuring them by polluting Lake Champlain. Although each representative of the class had a claim over $10,000, the district court denied class status to the action because it was not convinced that each unnamed member of the class could satisfy the jurisdictional amount.[8] On appeal, the Second Circuit affirmed.[9] On a writ of certiorari, the United States Supreme Court again affirmed.[10]

Characterizing the case as falling within rather well-defined rules, the Court refused to change those rules.

> When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a sin-

earlier opinion in *Snyder* covers substantially the same ground. See 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1756 (1972) [hereinafter cited as WRIGHT & MILLER]; *Id.* vol. 7A, § 1782; Bangs, *Revised Rule 23; Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601 (1969); Kaplan, *A Prefatory Note to the Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 497 (1969); Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum—A Post Snyder v. Harris Analysis*, 22 AM. U. L. REV. 79 (1972); Comment, 16 WAYNE L. REV. 1085 (1970); Note, 79 YALE L. J. 1577 (1970).

8. Zahn v. International Paper Co., 53 F.R.D. 430, 430-31 (D. Vt. 1971). The named plaintiffs made an allegation of jurisdictional amount as to themselves, but none as to the unnamed members of the class. Purporting to apply the test of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), the trial judge speculated that not every member could meet that case's "legal certainty" test. There is no indication of any fact in the opinion to support his assertion. Although the trial court makes a persuasive case for evaluating the unnamed members' claims when it did rather than waiting until the res judicata effect of its judgment might be called into question, 53 F.R.D. at 433-34, the Supreme Court gave no consideration to the propriety of applying the legal certainty test at so early a stage in class litigation. Nor did it question the trial court's rather lax application of the *St. Paul* rule, a laxness inherent in its timing of the rule's application.

9. 469 F.2d 1033 (2d Cir. 1972).

10. 414 U.S. 291 (1973).

> gle title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.[11]

Regarding a Rule 23(b)(3) class action as " 'in effect, but a congeries of separate suits,' "[12] where the parties are "related only by a common question of law and fact,"[13] the Court reached its conclusion by merely applying the traditional rule to the facts of the case. The 1966 revision of Rule 23 eliminating the procedural consequences flowing from the jural relationship among the class members in no way disturbed, in the Court's view, the jurisdictional consequences attendant upon the nature of that relationship.[14]

Its earlier decision in *Clark v. Paul Gray, Inc.*,[15] although, of late, not taken seriously by various commentators,[16] provided ample support for the Court's view.[17] In that case, a number of automobile dealers joined in a suit against state officials in an attack upon a California tax statute. Finding that only one of the plaintiffs had a claim in excess of the required jurisdictional amount, the Court dismissed the other parties for want of jurisdiction. Each plaintiff, observed the Court, must establish jurisdictional amount as to his individual claim. As the *Zahn* Court pointedly observed, it could hardly exercise jurisdiction over claims lacking jurisdictional amount asserted on behalf of unnamed parties when it refused such an invitation by named parties.[18]

In the Court's view, the plaintiffs were asking it to "change the Court's longstanding construction of the 'matter in controversy' re-

11. *Id.* at 294, quoting Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40-41 (1911).

12. 414 U.S. at 296, quoting Steele v. Guaranty Trust Co., 164 F.2d 387, 388 (2d Cir. 1947).

13. 414 U.S. at 297. FED. R. CIV. P. 23 provides in part: "(b) An action may be maintained as a class action if . . . 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. . . ."

14. 414 U.S. at 301. *But see* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 400 (1967) [hereinafter cited as *Kaplan*]. For a brief explanation of amended Rule 23, see C. WRIGHT, LAW OF FEDERAL COURTS § 72 (2d ed. 1970) [hereinafter cited as WRIGHT].

15. 306 U.S. 583 (1939).

16. *See, e.g., Recent Developments* 362-63.

17. Also, the Court's remarks in *Snyder v. Harris*, 394 U.S. 332, 336-37 (1969), especially its approval of *Alvarez v. Pan American Life Ins. Co.*, 375 F.2d 992 (5th Cir. 1967), make the *Zahn* decision not particularly surprising.

18. 414 U.S. at 301.

quirement"[19] found in the diversity jurisdiction statute.[20] Such a change, maintained the Court, would undermine the intent of Congress, which had continuously increased the dollar-amount figure of the requirement with that constuction in mind. This implied ratification of the Court's judicial gloss required Congressional action to modify it.[21]

The majority opinion is remarkable for its silence on a major issue: the possible ameliorating effect of "ancillary jurisdiction" on the "non-aggregation" rule.[22] Although the recent case of *United Mine Workers v. Gibbs*[23] gave the ancillary jurisdiction doctrine new impetus,[24] cases dating from the previous century have allowed the federal courts to take jurisdiction over claims not independently within their jurisdiction if these claims are sufficiently related to claims fully possessed of the necessary jurisdictional requisites.[25] Jurisdiction over a "case" has been thought broad enough to allow consideration of factually related claims so long as at least one claim meets the federal jurisdictional requirements.[26] Ancillary jurisdiction

19. *Id.*

20. The Court's opinion clearly contemplates that its holding will extend as well to federal question cases brought under 28 U.S.C. § 1331 (1970). 414 U.S. at 302 n.11.

21. In this regard, the Court echoed its views in *Snyder v. Harris*, 394 U.S. 332, 338-41 (1969).

22. This silence is all the more remarkable in the face of the provocative discussion of ancillary jurisdiction in Justice Brennan's dissent, 414 U.S. at 302-12, and in Judge Timbers' dissent, 469 F.2d at 1036-40.

23. 383 U.S. 715 (1966). For a discussion of *Gibbs*, see Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968); Note, 81 HARV. L. REV. 657 (1968); Note, 44 TEX. L. REV. 1631 (1966). See also Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759 (1972); Note, 62 COLUM. L. REV. 1018 (1962); Note, 51 IOWA L. REV. 151 (1965).

24. Gibbs sanctioned the use of what might be more precisely termed "pendent jurisdiction," assumption of power over an alternative claim or ground of relief based on state law which the plaintiff asserts against the defendant in a federal question case. However, *Gibbs* is consistent with the more general principle that jurisdiction over a "case" gives jurisdiction over constituent parts not within the court's jurisdiction had they been pressed separately and independently from the rest of the case. The Court's favorable reference to the numerous procedural devices designed to bring additional parties into a lawsuit as an impetus for its decision certainly implies that the Court considered its decision in accord with the more general principle of ancillary jurisdiction. 383 U.S. at 724. For a fuller discussion of the terminological difference between "ancillary jurisdiction" and "pendent jurisdiction," see 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23 (1960, Supp. 1970).

25. *E.g., Ex parte* Tyler, 149 U.S. 164 (1893); Phelps v. Oaks, 117 U.S. 236 (1886); Krippendorf v. Hyde, 110 U.S. 276 (1884); Freeman v. Howe, 65 U.S. (24 How.) 450 (1861).

26. *See, e.g.*, Siler v. Louisville & N.R.R., 213 U.S. 175 (1909); Warren G. Kleban Eng'r Corp. v. Caldwell, 490 F.2d 800 (5th Cir. 1974).

has served to justify intervention,[27] permissive joinder of parties,[28] joinder of claims,[29] compulsory counterclaims,[30] crossclaims,[31] and impleader.[32] The doctrine has been used with equal facility in both

27. *E.g.*, Witchita R.R. & Light Co. v. Public Util. Comm'n, 260 U.S. 48 (1922); Phelps v. Oaks, 117 U.S. 236 (1886); Stewart v. Dunham, 115 U.S. 61 (1885). WRIGHT & MILLER, vol. 7A, § 1917 summarizes the law as follows: Intervention under FED. R. CIV. P. 24(a) may be accomplished through the use of ancillary jurisdiction, unless the proposed intervening party falls within the limits of FED. R. CIV. P. 19(b). In the latter instance, intervention must be denied, and the action dismissed. Ancillary jurisdiction, moreover, may not be employed to effect intervention under FED. R. CIV. P. 24(b). Of course, not all claims asserted under Rule 24(b) would meet the "common nucleus of operative fact" test established in *Gibbs*, 383 U.S. at 725. However, the authors may be unwarranted in discounting the force of *Witchita*, which cuts against their position. They maintain that Witchita is no longer pertinent because the procedural rules have so drastically changed the device of intervention. Nevertheless, as *Zahn* so well illustrates, changes in procedural rules have not altered the Court's jurisdictional pronouncements. Given the facts of *Witchita*, one may conclude that permissive intervenors may also utilize ancillary jurisdiction.

28. *E.g.*, Mas v. Perry, 489 F.2d 1396 (5th Cir. 1974); Schulman v. Huck Finn, Inc., 472 F.2d 864 (8th Cir. 1973); Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971); Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969); Connecticut General Life Ins. Co. v. Craton, 405 F.2d 41 (5th Cir. 1968). As discussed in the text at note 42 *infra*, the Supreme Court has reserved opinion on the propriety of this development. Moor v. County of Alameda, 411 U.S. 693 (1973). The Fifth Circuit has recently followed this lead and avoided comment on the issue, notwithstanding its prior remarks. Mobile Oil Corp. v. Kelley, 493 F.2d 784 (5th Cir. 1974). For commentary, see Fortune, *Pendent Jurisdiction—The Problem of "Pendenting" Parties*, 34 U. PITT. L. REV. 1 (1972); Comment, 73 COLUM. L. REV. 153 (1973); Comment, 20 LOY. L. REV. 176 (1974). In any event, ancillary jurisdiction has not been thought proper to effect the joinder of parties under FED. R. CIV. P. 19. *See* Ranger Ins. Co. v. United Housing of New Mexico, Inc., 488 F.2d 682 (5th Cir. 1974); Morrison v. New Orleans Pub. Serv. Inc., 415 F.2d 419 (5th Cir. 1969).

29. Forest Laboratories, Inc. v. Pillsbury Co., 452 F.2d 621 (7th Cir. 1971); Schwab v. Erie Lackawanna R.R., 438 F.2d 62 (3d Cir. 1971), *noted in* 46 N.Y.U.L. REV. 634 (1971), 50 TEX. L. REV. 537 (1972); Beverly Hills Nat'l. Bank & Trust Co. v. Compania de Navegacione Almirante S.A., 437 F.2d 301 (9th Cir. 1971); Adkins v. Kelly's Creek R.R., 338 F. Supp. 888 (S.D. W.Va. 1970), *aff'd*, 458 F.2d 26 (4th Cir. 1972). *Cf.* River Brand Rice Mills, Inc. v. General Foods Corp., 334 F.2d 770 (5th Cir. 1964); Hazel Bishop, Inc. v. Perfemme, Inc., 314 F.2d 399 (2d Cir. 1963); Pursche v. Atlas Scraper & Eng'r Co., 300 F.2d 467 (9th Cir. 1962).

30. Moore v. New York Cotton Exchange, 270 U.S. 593 (1926). For a discussion of this area, see Green, *Federal Jurisdiction over Counterclaims*, 48 NW. U. L. REV. 271 (1953).

31. *E.g.*, Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 617n.14 (1966); Scott v. Fancher, 369 F.2d 842 (5th Cir. 1966); Childress v. Cook, 245 F.2d 798 (5th Cir. 1957).

32. *E.g.*, United States v. United Pac. Ins. Co., 472 F.2d 792 (9th Cir. 1973); Schwab v. Erie Lackawanna R.R., 438 F.2d 62 (3d Cir. 1971); H.L. Peterson Co. v. S.W. Applewhite, 383 F.2d 430 (5th Cir. 1967); Stemler v. Burke, 344 F.2d 393 (6th

federal question and diversity cases.[33] Rather than fragment a case, the federal courts have attempted to resolve the dispute with the greatest possible convenience and economy if the claims arise from a "common nucleus of operative fact."[34] However, this liberality has not, until recently, manifested itself in cases where the lacking jurisdictional requisite is the jurisdictional amount.[35]

An uneasy, seldom acknowledged tension has always existed between the non-aggregation rule and the broader concept known as ancillary jurisdiction.[36] *Zahn* well illustrates and perpetuates the tension that has resulted from the side-by-side growth of these two lines of cases inconsistent in broad principle. Some years ago the Court decided that only the named parties in a class suit need have diversity from the opponent of the class.[37] To be consistent, the *Zahn* Court should have allowed the retention of the unnamed parties' claims which were lacking in jurisdictional amount. Since both diversity and amount in controversy are jurisdictional requisites, it is not apparent

Cir. 1965); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); Southern Milling Co. v. United States, 270 F.2d 80 (5th Cir. 1959); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959); Waylander-Peterson Co. v. Great N. Ry., 201 F.2d 408 (8th Cir. 1953).

As long as the original claim is within the court's subject matter jurisdiction, the third-party claim need not meet original subject matter jurisdiction requirements. However, once a third-party defendant is impleaded, the original plaintiff must meet the jurisdictional requisites if he desires to assert a claim against the third-party defendant. Kenrose Mfg. Co. v. Fred Whitaker Co., No. 72-1007 (4th Cir. Aug. 7, 1972), *aff'g* 53 F.R.D. 491 (W.D. Va. 1971), *noted in* 30 WASH. & LEE L. REV. 295 (1973); Friend v. Middle Atlantic Transp. Co., 153 F.2d 778 (2d Cir. 1946). On the other hand, a third-party defendant desirous of asserting a claim against the original plaintiff may use ancillary jurisdiction to dispense with normal jurisdictional requisites. Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970), *noted in* 59 KY. L. J. 506 (1970); 49 N.C.L. REV. 503 (1971). For further discussion of these issues, see Note, 51 NW. U. L. REV. 354 (1956); Note, 57 VA. L. REV. 265 (1971).

33. *See, e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Phelps v. Oaks, 117 U.S. 236 (1886); Freeman v. Howe, 65 U.S. (24 How.) 450 (1861); Mas v. Perry, 489 F.2d 1396 (5th Cir. 1974); Scott v. Fancher, 369 F.2d 842 (5th Cir. 1966).

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

35. *See* notes 57, 80-81 *infra*.

36. Compare Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), *with* Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1973). *See* note 38 *infra*.

37. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). Although the district court's opinion in this case describes the plaintiffs' interest as "common but indivisible," *Id.* at 361, the Court's use of ancillary jurisdiction does not rest on any principle analogous to that underlying the non-aggregation rule. Its discussion of *Stewart v. Dunham*, 115 U.S. 61 (1885), to support its conclusion indicates that the nature of the plaintiffs' interest was unimportant to its holding. Rather, jurisdiction over the named parties' claim was sufficient to give jurisdiction over the unnamed parties' claim. Moreover, the district court's characterization of the parties' jural relationship appears to be incorrect. *See Kaplan* 380-81.

why, for reasons of convenience and economy, one may be dispensed with through the use of ancillary jurisdiction and the other may not.[38]

The Court's argument that Congress had impliedly ratified its interpretation of the statute's "matter in controversy" language does not adequately resolve this anomalous situation.[39] In fact, no direct evidence suggests that Congress, by tinkering only with the dollar amount figure in the statute, meant to approve the Court's judicial gloss on "matter in controversy." If Congress kept in mind the Court's gloss on the statute as it enacted successive versions, that awareness must have included a recognition that the Court's interpretation of "case"[40] in its development of ancillary jurisdiction sharply conflicted with its reading of "matter in controversy." One could then reasonably infer that, if Congress, perceiving this irrational tension, had any intentions in this area, it would intend for the Court to sort out its wildly conflicting doctrines. Less reasonable is the inference that Congress intended to ossify the Court's construction of "matter in controversy" and allow this conflict to continue.[41] The Court's "head-in-the-sand" attitude about the interaction of ancillary jurisdiction with the non-aggregation rule cannot be justified by the Court's implied assertion that Congress also had its head in the sand. Unfortunately, at this point, only the Congress, not appellants, can set the matter straight.

Nor would it be reasonable to conclude that *Zahn* affects the use of ancillary jurisdiction in other situations. The Court's silence cuts both ways, preserving intact both lines of cases, as inconsistent as they may seem. The continued vitality of ancillary jurisdiction is illustrated by a United States Supreme Court case decided less than a year before *Zahn*. In *Moor v. County of Alameda*,[42] the Court point-

38. See *Stewart v. Dunham*, 115 U.S. 61 (1885), where the Court allowed intervention of non-diverse parties in the trial court, but dismissed appeals as to those parties in whose favor a judgment below the appellate jurisdictional amount had been rendered. Appeals were heard only where the appellee had recovered a judgment in excess of the jurisdictional amount. The Court made no comment about this disparity.

39. The Court did not even mention its argument in *Snyder v. Harris*, 394 U.S. 332, 340 (1969), that the jurisdictional amount requirement must be maintained to insure the independence of state governments. In a case like *Snyder*, where no plaintiff's claim met the jurisdictional amount, perhaps the argument had force. *Zahn*, however, is difficult to distinguish from *Ben-Hur*. Hence, the Court was driven to its implied ratification argument.

40. In fact, 28 U.S.C. §§ 1331, 1332 (1970) use the phrase "civil action" rather than "case", but the Court evidently considers the two terms synonymous in this context. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

41. *See generally* Snyder v. Harris, 394 U.S. 332, 347-50 (1969) (Fortas, J., dissenting); H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1401-05 (tent. ed. 1958).

42. 411 U.S. 693 (1973).

edly identified the issue, canvassed the authorities, and reserved opinion in a federal question case where plaintiff attempted to employ ancillary jurisdiction to join an additional party defendant against whom plaintiff asserted a claim that neither involved a federal question nor rested on diversity of citizenship. In light of so recent a pronouncement and given the separate paths pursued by the non-aggregation rule and ancillary jurisdiction, the Court's silence on the latter doctrine in *Zahn* should not be implied to express any opinion on the development of ancillary jurisdiction. Rather, by preserving the non-aggregation rule, *Zahn* merely denies ancillary jurisdiction a natural area of expansion. The Court's opinion stresses its desire to maintain the status quo. By preserving the non-aggregation rule, the Court has doubtless preserved an anomaly, not destroyed it. We may expect such a decision, if it comes at all, to be a more studied approach.

If the Court were concerned about the unmanageable nature and disruptive effects of the class action, it could have nevertheless admitted the existence of jurisdiction over the small, but related claims. On the facts of the case, a class action would not necessarily proceed after a finding of jurisdiction. If, on remand after a finding of jurisdiction, the trial court were to refuse to entertain the smaller claims, it would be acting within the permissible range of its discretion. Although the facts giving rise to liability to each plaintiff sprang from a common nucleus of operative fact, as required by *Gibbs*,[43] computation of damages to individual parcels of real estate would have involved numerous determinations of fact, each one unique to each member of the class. There is every reason to believe that the *Gibbs* theory of ancillary jurisdiction allows the district court enough discretion to disentangle itself from such a gargantuan task if so minded. Under *Gibbs* the court is not required to consider every ancillary claim over which it has jurisdiction,[44] but has discretion to decline to hear some of these claims. By refusing to explore the jurisdiction-discretion dichotomy of ancillary jurisdiction and by continuing to follow the non-aggregation rule, the Court has frustrated the use of class actions where, although the parties' interests are not "common" in the narrow meaning of the non-aggregation rule, the litigation may be as conveniently terminated for one plaintiff as for thousands of plaintiffs.[45]

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

44. *Id.* at 726-27. *See also* Almenares v. Wyman, 453 F.2d 1075, 1085-86 (2d Cir. 1971). Additionally, one might conclude that a class action is not the appropriate *procedural* device in a case of this sort. *See* FED. R. CIV. P. 23(b)(3) (Committee Note of 1966); *Kaplan* 393.

45. *See* Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971).

The Court's firmness on the jurisdictional point seems particularly unnecessary in light of *Eisen v. Carlisle & Jacquelin*,[46] decided shortly after *Zahn*. If one thinks that the class action needs to be tamed,[47] *Eisen*, with its insistence on personal notice to other members of the plaintiff class, accomplishes the task much more effectively. By and large, the class actions causing outcry and consternation have been in the antitrust and securities fraud areas, where no jurisdictional amount is required. *Eisen*, not *Zahn*, places the most severe limitations on actions in these as well as other areas.

Zahn's limitations, although ineffectual in many class actions, may extend to other procedural devices noted for their convenience to the parties and greatly circumscribe their utility. Viewed in this light, *Zahn* presents us with a field ripe for Congressional action.

POST-ZAHN REASSESSMENT OF THE LOWER COURTS' EFFORTS IN CLASS ACTION AND JOINDER CASES

Property

For the present, *Zahn* requires new efforts to understand and apply a rule sometimes discarded or misapplied.[48] The Court's classic test permits aggregation only in a case where the plaintiffs "unite to enforce a single title or right, in which they have a common and undivided interest."[49] The test seems workable enough in cases where co-owners of property or interests in property bring suit. Thus, under the rule co-owners of a lien on real estate may assert the total value of the lien jointly held by them in order to meet the jurisdictional amount.[50] On the other hand, tenants in the same building may not aggregate their claims in a class action against their landlord.[51] Each tenant's leasehold interest is deemed separate and apart from his neighbor's, although the leases creating all the interests may be quite similar. Likewise, various property owners are not allowed to aggre-

46. 94 S. Ct. 2140 (1974).

47. See Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971), for an example of the criticism leveled at the class action.

48. Joinder and class action cases will be treated together without distinction in light of the Court's view that they do not significantly differ with regard to the operation of the non-aggregation rule. *See* text at notes 15-18 *supra*.

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

50. *Id.*

51. Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970); Potrero Hill Community Action Comm. v. Housing Authority, 410 F.2d 974 (9th Cir. 1969); Mattingly v. Elias, 325 F. Supp. 1374 (E.D. Pa. 1971), *rev'd in part on other grounds*, 482 F.2d 526 (3d Cir. 1973); English v. Town of Huntington, 335 F. Supp. 1369 (E.D.N.Y. 1970).

gate their claims to bring a class action to abate a nuisance, since each has a separate interest in his own property.[52] However, even in cases of property rights, the courts apply the non-aggregation rule with less than rigorous consistency.[53]

Contracts

In order to aggregate contract rights, the plaintiffs must assert rights so interlocked that one might lawfully demand payment for the group and payment of this one creditor would serve as payment of the entire group of creditors. Creditors *in solido* under the Louisiana Civil Code most nearly approximate the creditors who, for federal jurisdictional purposes, may aggregate their claims.[54] Aggregation is not permitted when plaintiffs merely have similar contracts with defendant;[55] nor, for that matter, would plaintiffs claiming rights from a single document necessarily be able to aggregate their claims.[56]

After *Zahn*, a case like *F.C. Stiles Contracting Co. v. Home Insurance Co.*[57] may no longer be considered good law. Plaintiff sued to enforce insurance contracts against three insurers, each of whom had insured a percentage of the loss. The plaintiff's rights against any one insurer were in no way dependant upon his rights against the others. Two of the three individual claims were jurisdictionally insuf-

52. City of Inglewood v. Los Angeles, 451 F.2d 948 (9th Cir. 1972); *accord*, Alfonso v. Hillsborough County Aviation Authority, 318 F.2d 724 (5th Cir. 1962). *See also* Rogers v. Hennepin County, 239 U.S. 621 (1916); Wheless v. St. Louis, 180 U.S. 379 (1901); Jones v. North Bergen, 331 F. Supp. 1281 (D.N.J. 1971); Booth v. Lemont Mfg. Corp., 304 F. Supp. 235 (N.D. Ill. 1969).

53. *See* Washington Market Co. v. Hoffman, 101 U.S. 112 (1879) (separate tenants in one building could aggregate); Skokomish Indian Tribe v. France, 269 F.2d 555 (9th Cir. 1959) (holders of separate parcels claiming to derive title from a common source could aggregate).

54. *See* LA. CIV. CODE arts. 2088, 2091.

55. *See* Givens v. W.T. Grant Co., 457 F.2d 612 (2d Cir. 1972); Spears v. Robinson, 431 F.2d 1089 (8th Cir. 1970); Lonnquist v. J.C. Penney Co., 421 F.2d 597 (10th Cir. 1970); Eagle Star Ins. Co. v. Maltes, 313 F.2d 778 (5th Cir. 1963); Niagara Fire Ins. Co. v. Dyess Furniture Co., 292 F.2d 232 (5th Cir. 1961); Hughes v. Encyclopaedia Britannica, Inc., 199 F.2d 295 (7th Cir. 1952); Lesch v. Chicago & E.I.R.R., 279 F. Supp. 908 (D. Ill. 1968); Fratto v. Northern Ins. Co., 242 F. Supp. 262 (W.D. Pa. 1965), *aff'd*, 359 F.2d 842 (3d Cir. 1966).

56. *See* Thomson v. Gaskill, 315 U.S. 442 (1942); *Ex parte* Phoenix Ins. Co., 117 U.S. 367 (1886); Aetna Ins. Co. v. Chicago, R.I. & P.R.R., 229 F.2d 584 (10th Cir. 1956); United Bonding Ins. Co. v. Parke, 293 F. Supp. 1350 (E.D. Mo. 1968).

57. 431 F.2d 917 (6th Cir. 1970); *accord*, Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1970); Hedberg v. State Farm Mut. Auto. Ins. Co., 350 F.2d 924 (8th Cir. 1965); Aetna Cas. & Sur. Co. v. Jeppeson & Co., 344 F. Supp. 1381 (D. Nev. 1972); Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967); Dixon v. Northwestern Nat'l Bank, 276 F. Supp. 96 (D. Minn. 1967).

ficient. Nevertheless, the court assumed jurisdiction over the entire litigation permitting joinder of all defendants based on ancillary jurisdiction since all claims arose from a single incident. Because the liability of each defendant was in no way solidary with the liability of the others, this disposition would be inconsistent with the non-aggregation rule as expressed in *Zahn*.[58]

The cases in the area of contract law illustrate a weakness in the non-aggregation rule which at first may not be apparent. *Zahn*'s continued adherence to traditional doctrine holds out the promise of certainty of result and ease of application,[59] the hallmarks of a well-articulated and coherent doctrine as it operates in both recurring and novel fact situations. Such promise, however, may be somewhat illusory.[60] Traditional doctrine in this instance consists of rules; but the rules are supported by no unifying purpose or rationale, necessarily creating uncertainty for the bar.[61]

The Court has divined reasons for the jurisdictional amount requirements enacted by the Congress, but these policies furnish little explanation for the judge-made definition of "matter in controversy." It is often said that a jurisdictional amount is intended to protect against the federal courts' degenerating into small claims courts[62] and to prevent them from encroaching too heavily on the concurrent jurisdiction of the state courts.[63] These, of course, are valid concerns for the Congress, although they give minimal direction to the essentially arbitrary choice made by Congress in setting a dollar amount for the "matter in controversy."[64]

They provide even less guidance in setting the definitions of "matter in controversy." Congress tries to limit the number of cases finding their way into the federal system, but does not define what it means by a case. *Zahn* certainly allows fewer *claims* into the federal system by reading "matter in controversy" narrowly to mean claim or cause of action, and thus excluding any claim below the dollar

58. *See* notes 55-56 *supra*.

59. *See* 414 U.S. at 301, echoing Snyder v. Harris, 394 U.S. 332, 341 (1969).

60. *See* WRIGHT § 36, at 123.

61. Non-aggregation first received life in *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143 (1832), which involved the amount for the Court's appellate jurisdiction. Some sixty years after *Oliver*, the Court for the first time invoked the non-aggregation rule to set the boundaries of a district court's original jurisdiction. It made no analysis of why a similar rule would be equally appropriate in gauging the extent of original jurisdiction. Walter v. Northeastern R.R., 147 U.S. 370 (1893).

62. *See, e.g.*, S. REP. No. 1830, 85th Cong., 2d Sess. 3-4 (1958).

63. See Snyder v. Harris, 394 U.S. 332, 339-40 (1969); Healy v. Ratta, 292 U.S. 263, 270 (1934).

64. *See generally* Zahn v. International Paper Co., 414 U.S. 291, 294n.3 (1973).

amount fixed by Congress. However, a test which results in fewer claims gaining entrance to the federal courts promotes the goals behind a jurisdictional amount requirement only if "claim" has the same meaning as "matter in controversy." The only approval the Court's circular reasoning can command is the fictional approval of Congress found in its re-enactment of the statute with nothing more than a change in dollar amount.[65]

This deficiency of reasoning becomes readily apparent when one confronts the well-established rule that a single plaintiff may aggregate against a single defendant multiple claims that are totally unrelated either factually or legally.[66] That these multiple unrelated claims are held by one person, not many, may be an entirely fortuitous circumstance. Yet, when asserted by one person, the unrelated claims are presumably less of an inconvenience to the court and drain on its resources; moreover, they presumably represent no siphoning off of responsibility best left with the state judiciary. It is difficult to justify this difference in treatment. If the federal court does not want to try many small, unrelated claims, it should not draw any distinction when one plaintiff presents it with the same claims it would refuse to try if asserted by numerous parties. Likewise, if the independence of state government would be diminished were parties to join claims, it is equally diminished when one party aggregates unrelated claims.

Uncertainty of purpose leads to questionable results when, for example, one plaintiff with an adequate claim unites with another plaintiff who claims a common and undivided interest, but only in a jurisdictionally insufficient amount. In *Sterling Construction Co. v. Humboldt National Bank*,[67] plaintiff bank sued for a sum in excess of $10,000, allegedly its due under an assignment of payments for

65. *See* notes 19-21, 39-41 *supra* and accompanying text.

66. *See* Snyder v. Harris, 394 U.S. 332, 335 (1969); Crawford v. Neal, 144 U.S. 585 (1892); Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836 (4th Cir. 1974); Matthew v. Swift & Co., 465 F.2d 814 (5th Cir. 1972); Litvak Meat Co. v. Baker, 446 F.2d 329 (10th Cir. 1971); Lynch v. Porter, 446 F.2d 225 (8th Cir. 1971); Siegerist v. Blaw-Knox Co., 414 F.2d 375 (8th Cir. 1969); Lemmon v. Cedar Point, Inc., 406 F.2d 94 (6th Cir. 1969); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Lloyd v. Kull, 329 F.2d 168 (7th Cir. 1964); Helgesson v. Helgesson, 295 F.2d 37 (1st Cir. 1961); Pearson v. National Soc'y of Pub. Accountants, 200 F.2d 897 (5th Cir. 1953).

67. 345 F.2d 994 (10th Cir. 1965); *accord*, Phoenix Ins. Co. v. Woosley, 287 F.2d 531 (10th Cir. 1961). To the same general effect is *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968), although the Fourth Circuit employed ancillary jurisdiction to reach its decision. To the extent that *Stone* relied on ancillary jurisdiction, its reasoning is discredited by *Zahn*. However, its result is quite in accord with the above cases, which purport to follow traditional doctrine.

construction work done for defendant by its borrower. The assignment was security for a $10,000 note signed by the borrower and a co-signer. The bank then brought suit against the defendant company which should have honored its assignment rights. The co-signer joined the suit. Since the co-signer had paid the note, he arguably held a common and undivided interest with the bank as to *only* $10,000 of the assignment rights. However, the Tenth Circuit rather facilely looked to the total amount demanded by the bank and, finding a common and undivided interest between the parties, upheld jurisdiction. The court completely overlooked the fact that the common and undivided interest between the two failed to satisfy the jurisdictional amount.

Similarly in *Manufacturers Casualty Insurance Co. v. Coker*,[68] the Fourth Circuit allowed an insurer to bring a declaratory judgment action against its alleged insured and his victims. None of the latter had a claim in excess of the jurisdictional amount, although the value of the alleged insured's policy exceeded the jurisdictional amount. Although they arose from one accident, the victims' claims were separate and distinct from each other under the traditional test. Even if each claimant might be viewed as having a common interest with the insured, the extent of that common interest, as to each, did not exceed the value of his individual claim. Although the court's decision may have conveniently disposed of what could have been a complicated tangle, it arguably violated a rule not formulated with convenience in mind.

That these cases present questionable results becomes apparent if one compares *Coker* with *Motorists Mutual Insurance Co. v. Simpson*,[69] in which an insurer brought an action against two judgment creditors of its alleged insured for a declaration of non-coverage. One defendant had recovered a substantial judgment for the death of her husband; the other, for property damage done to the truck driven by its employee, the decedent. The policy in question provided a limit of $10,000 for personal injury and $5,000 for property damage. Although both potential claims arose from the same collision and depended upon an interpretation of the same contract, the court observed that the interests of the defendants were separate and distinct. Their non-aggregability could not be avoided through a declaratory judgment action in which plaintiff asserted a possible liability of $15,000.[70] This decision apparently conforms with *Zahn* except one

68. 219 F.2d 631 (4th Cir. 1955).

69. 404 F.2d 511 (7th Cir. 1968). *See also* Lauf v. Nelson, 246 F. Supp. 307 (D. Mont. 1965).

70. *See generally* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

cannot help but wonder if joinder of the alleged insured might have produced a different result, as in *Coker*. In fact, the alleged insured had assigned his rights against the insurer for its bad faith refusal to settle to the wife of the decedent, who asserted them as a compulsory counterclaim. Yet the Seventh Circuit, closing its eyes to the value of the counterclaim, found jurisdictional amount lacking.[71] It is hard to see why this type of case would have plunged the federal court into trifling affairs and sapped the local judiciary of its independence, when a case fitting the *Coker* pattern does not.[72]

Nonetheless, the technicalities of the non-aggregation rule in its day-to-day applications are well enough understood that one can expect a rather transparent attempt to circumvent it completely by resort to a "defendant's viewpoint" standard for determining jurisdictional amount. It is often said that the jurisdictional amount is determined from the "plaintiff's viewpoint"—the benefit to him of what he seeks, not the detriment to the defendant.[73] Although there are cases in which the Court seemed to value the matter in controversy from the defendant's standpoint,[74] the Court's present view toward aggregation makes unlikely a resort to a defendant's viewpoint standard in a multi-party case where the non-aggregation rule results in a finding that no plaintiff or only some plaintiffs have a satisfactory amount in controversy. In *Zahn* itself, the defendant's total exposure to liability would have been well over $10,000, had the class action been allowed to proceed. Non-aggregation is squarely at odds with a "defendant's viewpoint" standard, and so the lower courts have held.[75]

Cases in which plaintiffs have sought recovery for a "common

71. *Contra*, Liberty Mut. Ins. Co. v. Horton, 275 F.2d 148 (5th Cir. 1960), *aff'd on other grounds*, 367 U.S. 348 (1961). In *Simpson*, the widow later asserted her claim in another federal district court and recovered a substantial judgment against the insurer. Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850 (7th Cir. 1974).

72. Perhaps the case was not one appropriate for declaratory relief. *See* Cunningham Bros. Inc. v. Bail, 407 F.2d 1165 (7th Cir. 1969).

73. For a classic statement of the traditional "plaintiff's view" doctrine, see Dobie, *Jurisdictional Amount in the United States District Court*, 38 HARV. L. REV. 733, 734 (1925).

74. *E.g.*, Mississippi & M.R.R. v. Ward, 67 U.S. (2 Black) 485 (1862). *See also* The "Mamie," 105 U.S. 773 (1881); Market Co. v. Hoffman, 101 U.S. 112 (1879); Shields v. Thomas, 58 U.S. (17 How.) 3 (1854), where the Court allowed aggregation of plaintiffs' claims.

75. Massachusetts Pharmaceutical Ass'n v. Federal Prescription Serv. Inc., 431 F.2d 130 (8th Cir. 1970); Lonnquist v. J.C. Penney Co., 421 F.2d 597 (10th Cir. 1970); Comment, 68 NW. U. L. REV. 1011, 1015-20 (1964). *But see generally* Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969).

fund"[76] do not support resort to a defendant's viewpoint standard. Only if the parties' substantive rights are such that one may demand payment for all and payment to him would extinguish the rights of all, may the aggregate of the claim, the "common fund," be regarded as jurisdictionally sufficient.[77] "Common fund," a technical term consistent with the non-aggregation rule's plaintiff viewpoint standard, is equal to the defendant's total exposure to liability. But it is erroneous to equate the defendant's exposure to liability, without regard to the nature of the plaintiff's rights, to a "common fund" permitting aggregation.

This rigorous approach was distorted in *Bass v. Rockefeller*,[78] where welfare recipients brought a class action to prevent the termination of benefits. The court found a "common fund" by viewing the fund as one held by the defendant. It is true, as the court pointed out, that the defendant administrator's total exposure to liability exceeded $10,000; but this hardly makes for a common fund in the legally technical sense. If defendant held a fund, it was as a party adverse to the plaintiffs' rights. He was trying to defeat their claims, not assert them. It is undisputed that the recipients' rights were such that no one of them could have demanded payment for the group and discharged the defendant from his responsibilities to each and every member of the group, because their interests were separate and distinct.

The court's desire to take jurisdiction over this case is commendable. Plaintiffs were asserting a federal right based on narrow grounds that would not have embroiled the court in numerous determinations of fact peculiar to each member of the class.[79] But the traditional rule allows aggregation only if plaintiff's rights are common and undivided. Examination of the defendant's total exposure to liability, as in *Bass*, renders the non-aggregation rule meaningless. The *Zahn* opinion gives no indication that the Court would favor such an obvious effort to frustrate its rule.

Torts

Tort litigation has provided even more instances of departure

76. *E.g.*, Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947); Gibbs v. Buck, 307 U.S. 66 (1939); Bullard v. City of Cisco, 290 U.S. 179 (1933).

77. Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969).

78. 331 F. Supp. 945 (S.D.N.Y. 1971), *vacated as moot*, 464 F.2d 1300 (2d Cir. 1971); *accord*, United Low Income, Inc. v. Fisher, 470 F.2d 1074 (1st Cir. 1972); Harmony Nursing Home, Inc., v. Anderson, 341 F. Supp. 957 (D. Minn. 1972). *See also* Stamps v. State Farm Mut. Auto. Ins. Co., 300 F. Supp. 545 (W.D. Ark. 1969).

79. *See* text at note 45 *supra*.

from and misapplication of the traditional rules. Shortly before *Zahn* some lower courts began to employ ancillary jurisdiction over small claims factually related to claims of sufficient jurisdictional amount.[80] Often when a person suffers injury, a parent, spouse or child may also claim damages for loss of support, loss of consortium, or medical expenses. A number of courts, sympathetic to the convenience of trying these related claims together, have assumed jurisdiction over all claims, even those lacking jurisdictional amount.[81] To the extent that these cases relied on the considerations found in *Gibbs*, they are no longer good law; that the plaintiffs' injuries arose from the same incident in no way makes for a common and undivided interest.[82]

The traditional doctrine is not always consistently applied in cases in which various members of the same family seek to recover damages resulting from injury to one member. In Louisiana a husband's claim for lost wages of his wife cannot be aggregated with her personal claims for pain and suffering. Because the claim for lost wages belongs to the community, of which the husband is head and master, it is considered separate from the wife's personal claim for aggregation purposes, even though the wife has the procedural capacity to assert the claim.[83]

On the other hand, the Fifth Circuit has ruled that beneficiaries of an action for wrongful death and survival damages may aggregate their claims. In *Kelly v. Hartford Accident and Indemnity Co.*,[84] five

80. *E.g.*, Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Jacobson v. Atlantic City Hosp. 392 F.2d 149 (3d Cir. 1968).

81. *E.g.*, Greene v. Basti, 391 F.2d 892 (3d Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966); Langsam v. Minitz, 346 F. Supp. 1340 (E.D. Pa. 1972); Townsend v. Quality Court Motels, Inc., 338 F. Supp. 1140 (D. Del. 1972); Wiggs v. City of Tullahoma, 261 F. Supp. 821 (E.D. Tenn. 1966); Morris v. Gimbel Bros., Inc., 246 F. Supp. 984 (E.D. Pa. 1965); Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960). *See generally* Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969). The American Law Institute has proposed that a federal court take jurisdiction over a claim by one member of a family that may be insufficient in amount, so long as it is joined with another claim arising out of the same incident which is sufficiently large and pressed by another member of the same family. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1301(e) (1969).

82. Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); Arnold v. Troccoli, 344 F.2d 842 (2d Cir. 1965); Muse v. United States Cas. Co., 306 F.2d 30 (5th Cir. 1962); Payne v. State Farm Mut. Auto. Ins. Co., 266 F.2d 63 (5th Cir. 1959); Redden v. Cincinnati, Inc., 347 F. Supp. 1229 (N.D. Ga. 1972); Del Sesto v. Trans World Airlines, Inc., 201 F. Supp. 879 (D.R.I. 1962).

83. Muse v. United States Cas. Co., 306 F.2d 30 (5th Cir. 1962); *accord*, Starks v. Louisville & N.R.R., 468 F.2d 896 (5th Cir. 1972).

84. 294 F.2d 400 (5th Cir. 1961).

beneficiaries brought suit under article 2315[85] in state court for $50,000. The defendant removed the action. To defeat plaintiffs' argument that the court lacked removal jurisdiction, the court held that there was a common and undivided interest in $50,000, not five separate, jurisdictionally insufficient claims of $10,000 each.

Although, under the jurisprudence surrounding article 2315, all parties must join to assert their claims,[86] it is inaccurate to say that their rights are common and undivided for purposes of the non-aggregation rule. There is no suggestion in the case law that settlement with and release by one beneficiary would settle and release his co-beneficiaries' claims. If the injured party can settle and release his claim for personal injuries without compromising his ultimate beneficiaries' claims for wrongful death,[87] there is no reason to believe that their rights are such that any one of them may assert or release the rights of the group. Their compulsory joinder under state law is a procedural rule which does not affect the nature of the interest asserted by each one.[88] Their rights are "common" only in the sense that each relies on a single incident to recover; "undivided," only in the sense that they must compulsorily join under state procedure.[89] A state procedural rule requiring their joinder does not make the nature of their interest common and undivided for federal jurisdictional purposes.[90]

It is somewhat disconcerting to note, however, that a United

85. LA. CIV. CODE art. 2315 gives both a survival action and a wrongful death action to certain named beneficiaries.

86. Reed v. Warren, 172 La. 1082, 136 So. 59 (1931).

87. *See* Johnson v. Sundberry, 150 So. 299 (La. App. 1st Cir. 1933).

88. *See* Oliver v. Alexander, 31 U.S. (6 Pet.) 143 (1832) (Compulsory joinder of plaintiffs; no common and undivided interest). If anything, *Reed v. Warren* seems to say that its rule of compulsory joinder is based, at least in part, on considerations of convenience to the defendant, not the nature of the interest asserted by the plaintiffs. Reed v. Warren, 172 La. 1082, 1092-93, 136 So. 59, 63 (1931).

89. *Shields v. Thomas*, 58 U.S. (17 How.) 3 (1854), an appellate jurisdiction case, could be used to argue that the beneficiaries' interest in the survival action is common and undivided. Even so, each beneficiary could sue only if his wrongful death claim, plus the amount of the survival action, exceeded $10,000. It cannot be argued that the beneficiaries' claims are common and undivided with respect to the wrongful death action. Each beneficiary receives compensation based on a number of factors so numerous and so sensitive that recovery could vary widely from one beneficiary to another, even though their respective losses resulted from the same death. More importantly, *Shields* seems to rest on a "defendant's viewpoint" of jurisdictional amount. To that extent, it should not be considered good law. *See* notes 73-75 *supra* and accompanying text.

90. *Cf.* Morrison v. New Orleans Publ. Serv., Inc., 415 F.2d 419 (5th Cir. 1969) (FED. R. CIV. P. 19, not state law found in *Reed v. Warren*, establishes the criteria for compulsory joinder of parties).

States Supreme Court decision seems to support the result in *Kelly*. In *Texas & Pacific Railway v. Gentry*,[91] the Court found appellate jurisdiction to exist in an action for death damages prosecuted by the relatives of a deceased. Although one relative recovered less than the jurisdictional amount, her recovery was aggregable with the total recovery of her group to determine appellate jurisdiction.

> While there was in form a separate judgment in favor of each of the persons for whose benefit the action was brought, the statute of Texas creates a single liability on the part of the defendant, and contemplates but one action for the sole and exclusive benefit [of the named beneficiaries] . . . . Such an action as this can be brought by all the parties interested, or by any one of them for the benefit of all. . . . The jury found that the damages sustained by the deceased were $10,166.66. That was the amount in dispute. The 'matter in controversy' was the liability of the defendant company in that amount by reason of the single injury complained of. If the defendant was liable in that sum . . . it was of no concern to it how that amount was divided among the parties entitled to sue on account of the single injury alleged to have been committed.[92]

If *Gentry* is to have any continuing validity we must immediately rule out the procedural capacity of one party to assert claims on behalf of another as a basis for a "single liability."[93] The procedural capacity of a class representative to press the claims of the class did not affect the rule laid down in *Zahn*. Rather, the decision in *Gentry* seems to rest on the proposition that, since only one lawsuit may be brought, that lawsuit, depending on its outcome, will bar or merge the rights of all beneficiaries, regardless of who brings it.[94] However, this rationale may also be discounted in light of *Zahn*. In that case, the claim preclusive effects that would have flowed from the use of a procedural device,[95] the class action, were considered irrelevant in the face of a jurisdictional rule.[96] *Gentry* should not detract from *Zahn's*

91. 163 U.S. 353 (1896); *accord*, Insurance Co. of North America v. Chinowith, 393 F.2d 916 (5th Cir. 1968).

92. Texas & Pac. Ry. v. Gentry, 163 U.S. 353, 360-61 (1896).

93. *See* Euge v. Trantina, 422 F.2d 1070 (8th Cir. 1970); Muse v. United States Cas. Co., 306 F.2d 30 (5th Cir. 1962).

94. It seems clear from the provisions of Texas law quoted by the Court that *only one action*, whether by all of the beneficiaries, some of them on behalf of all, or by the decedent's administrator on behalf of all, could be brought. Texas & Pac. Ry. v. Gentry, 163 U.S. 353, 355, (1896).

95. *See* WRIGHT § 72, at 311.

96. *Cf.* Healy v. Ratta, 292 U.S. 263, 267 (1934). That the Court in *Gentry* allowed

most recent formulation of the rule: the substantive nature of the plaintiffs' rights, not the procedural means to enforce them, nor the defendant's total exposure to liability, determines the aggregability of the claims.[97]

Actions under the Louisiana Direct Action Statute[98] illustrate, in a tort context, further arbitrariness and inconsistency of the non-aggregation rule. It is clear that numerous plaintiffs injured in one incident may not aggregate their joined claims against one defendant tortfeasor.[99] Nor may they do so in a direct suit against the insurer alone.[100] Their claims against one insurer arising from one incident do not generate a common and undivided interest. Further, even though multiple tortfeasors might be solidarily liable to a plaintiff,[101] suit against their insurers alone does not allow aggregation of the claims against the insurers.[102] However, suit against a tortfeasor and his insurer has been held to warrant aggregation even though the policy limit is less than the jurisdictional amount.[103] This result calls into play the same logical leap we saw earlier:[104] the existence of solidary liability obscures questions about the *extent* of liability as measured in dollars. Thus, suit against insurer alone when the policy limit is $5,000 must be brought in state court. However, joinder of the insured with a prayer against him for an amount in excess of $10,000, which he may or may not have the financial means to pay, allows suit to go forward against insurer as well as insured in federal court.[105]

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the desire for the claim preclusive effects of compulsory joinder to give content to a jurisdictional rule merely renders the *Zahn* opinion all the more suspect in its claim that its non-aggregation rule has been long-standing and unchanging.

97. To the extent that the decision also rests on a "defendant's viewpoint" standard, *Gentry* is of doubtful validity. *See* note 73-75 *supra* and accompanying text.

98. LA. R.S. 22:655 (1950), *as amended by* La. Acts 1962, No. 471 § 1.

99. *See* Eagle Star Ins. Co. v. Maltes, 313 F.2d 778 (5th Cir. 1963); Payne v. State Farm Mut. Auto. Ins. Co., 266 F.2d 63 (5th Cir. 1959); Robison v. Castello, 331 F. Supp. 667 (E.D. La. 1971); Bish v. Employer's Liability Assur. Corp., 102 F. Supp. 343 (W.D. La. 1952), *aff'd*, 202 F.2d 954 (5th Cir. 1953).

100. *See* Eagle Star Ins. Co. v. Maltes, 313 F.2d 778 (5th Cir. 1963).

101. *See* Sovereign Camp Woodmen of the World v. O'Neill, 266 U.S. 292 (1924); McDaniel v. Traylor, 196 U.S. 415 (1905); Michie v. Great Lakes Steel Div. 495 F.2d 213 (6th Cir. 1974).

102. Dendinger v. Mutual Cas. Co., 302 F.2d 850 (5th Cir. 1962).

103. Fulton v. White Cab Co., 305 F. Supp. 1333 (E.D. La. 1969).

104. *See* text at notes 67-68 *supra*.

105. Robison v. Costello, 331 F. Supp. 667 (E.D. La. 1971) goes so far as to allow aggregation of the claim against the plaintiff's driver's insurer under an uninsured motorist provision with the claim against the defendant uninsured motorist. It is not apparent how *Robison* differs from *Jewell v. Grain Dealers Mut. Ins. Co*, 290 F.2d 11 (5th Cir. 1961), where plaintiff could not aggregate his claim against his insurer with his claim against the other driver and the latter's insurer.

SOME OBSERVATIONS ABOUT NON-AGGREGATION AND IMPLEADER UNDER RULE 14

Until now, discussion has focused on the non-aggregation rule in joinder and class action cases. Remarkably enough, the rule does not seem to have reared its head in other procedural contexts, for example, third-party actions under Federal Rule of Civil Procedure 14. Only a handful of cases have considered whether a third-party demand must meet the jurisdictional amount, assuming that the main claim is sufficient. Resorting to ancillary jurisdiction,[106] the courts have concluded that jurisdictional amount in the third-party demand may be dispensed with so long as the original claim presents the court with sufficient subject matter jurisdiction.[107]

Although impleader under Rule 14 is a convenient tool, non-aggregation logically should be applied in these cases just as rigorously as it is in class action or joinder cases. Consider a simple example. *A* sues *B* for injuries amounting to $15,000. *B* then files a third-party demand against his alleged co-tortfeasor *C* for contribution in the sum of $7,500. Although *A* could have sued both *B* and *C in solido*, the fact is that he did not. Consideration of *A*'s common and undivided right to recovery against *B* and *C* seems amiss. Rather one must compare for commonality the rights of *A* versus *B* and the rights of *B* versus *C*. Although these rights arise from a common nucleus of operative fact, they are hardly common and undivided. As a legal matter, *A* is completely indifferent to whether *B* recovers from *C*; their respective rights are separate and distinct. If one plaintiff may not drag another plaintiff into court "on his coattails"[108] through the use of a class action, one defendant can hardly "turn plaintiff" and bring another defendant into court on his coattails.

CONCLUSION

For reasons not entirely satisfactory, the Court has refused to temper the non-aggregation rule by use of the ancillary jurisdiction doctrine. The task of the lower courts, then, is to proceed in strict

106. *See* 3 J. MOORE, FEDERAL PRACTICE 14.26, at 14-530 (2d ed. 1974): "If the concept of ancillary jurisdiction is applicable to cases where diversity of citizenship is lacking, *a fortiori*, it should apply where the question is merely one of jurisdictional amount."

107. King v. State Farm Mut. Ins. Co., 274 F. Supp. 824 (W.D. Ark. 1967); Schinella v. Iron Workers Local 361, 149 F. Supp. 5 (E.D.N.Y. 1957); Schram v. Roney, 30 F. Supp. 458 (E.D. Mich. 1939).

108. Zahn v. International Paper Co., 414 U.S. 291, 301 (1973), quoting from the Second Circuit's opinion, 469 F.2d 1033, 1035 (1972).

conformity with the rule. Although this course may produce inconvenient and anomalous results, that seems the intent of the Court, which viewed neither inconvenience nor anomaly as cause to abrogate its rule. Perhaps a strict adherence to the rule might more quickly bring the legislative change invited by the Court.