Notre Dame Law Review

Volume 73
Issue 4 *Federal Civil Practice and Procedure*

Article 6

6-1-1999

Right Result for the Wrong Reasons: Permitting Aggregation of Claims under 28 U.S.C. 1367 in Multi-Plaintiff Diversity Litigation

Mark C. Cawley Jr.

NOTE

THE RIGHT RESULT FOR THE WRONG REASONS: PERMITTING AGGREGATION OF CLAIMS UNDER 28 U.S.C. § 1367 IN MULTI-PLAINTIFF DIVERSITY LITIGATION

I. INTRODUCTION

Enacted as part of the Judicial Improvements Act of 1990,[1] 28 U.S.C. § 1367 codifies as "supplemental jurisdiction" the judicially developed doctrines of ancillary and pendent jurisdiction. This Note focuses specifically on § 1367's apparent abrogation of two landmark Supreme Court decisions: *Clark v. Paul Gray, Inc.*[2] and *Zahn v. International Paper Co.*[3] In each of these cases, the Supreme Court held that plaintiffs individually must satisfy the amount in controversy requirement of § 1332 in order to retain federal diversity jurisdiction.

Recently, the Fifth and Seventh Circuits ruled that § 1367 supersedes these decisions. Writing for a unanimous Seventh Circuit panel, Judge Easterbrook concluded in *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*[4] that § 1367 permits federal jurisdiction over a "permissive," Rule 20 plaintiff in spite of that plaintiff's failure to allege damages in excess of § 1332's amount in controversy. Similarly, Judge Higginbotham of the Fifth Circuit concluded in *In re Abbott Laboratories*[5] that § 1367 permits jurisdiction over class action plaintiffs who lack the required amount in controversy.

The Fifth and Seventh Circuits' analyses of § 1367's effect on *Clark* and *Zahn* rest largely on a textually bound, "plain-meaning" in-

1 Pub. L. No. 101-650, 104 Stat. 5089.
2 306 U.S. 583 (1939).
3 414 U.S. 291 (1973).
4 77 F.3d 928 (7th Cir. 1996).
5 51 F.3d 524 (5th Cir. 1995).

terpretation of § 1367. Taken literally, § 1367(a) allows federal courts to hear supplemental claims which are part of the same case or controversy under Article III as claims in the action within the original jurisdiction of the district court. This broad grant of authority is limited by § 1367(b), which provides:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure; *or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.*[6]

Since § 1367(b) fails to exclude Rule 20 and Rule 23 plaintiffs from the grant of supplemental jurisdiction in § 1367(a), the statute seems to authorize supplemental jurisdiction over these types of plaintiffs—even if their claims do not satisfy § 1332's amount in controversy.

Although this textual analysis of § 1367 produces the right result, neither court's opinion adequately addressed other non-textual arguments in favor of § 1367's abrogation of *Clark* and *Zahn*. This Note attempts to provide what the Fifth and Seventh Circuits left out of their opinions: namely, a convincing justification for the result dictated by the "plain-meaning" of § 1367. To this end, I will argue that *Clark* and *Zahn* produce inefficiencies which run counter to Congress's intentions in enacting § 1367. In fashioning § 1367, Congress intended to streamline complex litigation by promoting the resolution of complex civil actions in one trial. Notwithstanding some legislative history to the contrary, the demise of *Clark* and *Zahn* is consistent with this intent. The results dictated by both *Clark* and *Zahn* produce duplicative and possibly preclusive litigation that burdens an already vexed federal judiciary. As such, both cases are contrary to the goals of the Judicial Improvements Act of 1990.

My argument will take the following form. In Part II, I will examine in detail the inefficiencies created by *Clark* and *Zahn*. Part III will analyze the Fifth and Seventh Circuit's decisions in *Abbott Laboratories* and *Stromberg Metal Works*. Part IV will address the legislative history of § 1367 and argue that the demise of *Clark* and *Zahn* is consistent with the intentions of Congress in enacting § 1367.

---

6 28 U.S.C. § 1367(b) (1994) (emphasis added).

II. INCONSISTENCY, INEFFICIENCY, AND UNFAIRNESS: NON-AGGREGATION IN *CLARK* AND *ZAHN*

The Supreme Court's decisions regarding the calculation of the amount in controversy provide a good beginning for an analysis of *Clark* and *Zahn*. In its interpretation of the "amount in controversy" requirement, the Court has attempted to strike a balance between § 1332's limitations on diversity jurisdiction and the efficient and fair packaging of complex litigation through the exercise of ancillary and pendent jurisdiction. In *Clark* and *Zahn*, the Court upset this balance without offering a compelling reason for doing so. *Clark* and *Zahn* both require each plaintiff in a multi-plaintiff diversity action to meet the statutory amount in controversy. This "non-aggregation rule" runs counter to both precedent and policy.

A. *Background: Aggregation and the Amount in Controversy Requirement*

By statute, the diversity jurisdiction of the federal courts extends to "all civil actions where the *matter in controversy* exceeds the sum or value of $75,000, exclusive of interest and costs."[7] Congress, since the Judiciary Act of 1789, has required a minimum amount in controversy to invoke the diversity jurisdiction of the federal courts.[8] Originally, Congress established a jurisdictional amount in order to provide a federal forum for out-of-state creditors.[9] At the time of the first Judiciary Act, state courts and legislatures were widely regarded as biased against such creditors.[10] Since then, Congress has attempted to set the figure high enough to protect the federal judiciary from frivolous

---

7 28 U.S.C. § 1332 (1994) (emphasis added).

8 The Judiciary Act of 1789 initially imposed a $500 amount in controversy requirement. Congress increased that figure to $2,000 in 1887 and to $3,000 in 1911. *See* Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 552; Act of Mar. 3, 1911, ch.2, § 24, 36 Stat. 1087, 1091. It remained at that level until 1951 when Congress increased it to $10,000. *See* Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415, 415. Congress raised the amount in controversy again to $50,000 in 1988. *See* The Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201(a), 102 Stat. 4642, 4646. Congress set the current amount in controversy at $75,000 in 1996. *See* The Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205(a), 110 Stat. 3847, 3850 (codified at 28 U.S.C.A. § 1332(a) (West Supp. 1998)).

9 *See generally* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 501 (1928).

10 *See generally* John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 9 (1963) (arguing that "this was largely a gloomy anticipation of things to come rather than an experienced evil . . . .").

suits,[11] yet low enough to allow individuals with substantial claims to litigate in federal court.[12]

Congress has left to the courts the task of determining how to calculate the amount in controversy figure. Calculation is not problematic where the "matter in controversy" involves only a single plaintiff, a single defendant, and a single claim. In that case, the plaintiff must allege damages in excess of § 1332's jurisdictional figure or face dismissal.[13] These types of civil actions are the exception rather than the rule. Litigation routinely involves multiple plaintiffs with multiple claims, and some of these parties and claims may satisfy the jurisdictional amount in controversy while others may not.

In certain instances, courts have allowed plaintiffs to aggregate their claims to meet the jurisdictional amount. The Supreme Court has permitted aggregation where a plaintiff alleges multiple claims which, taken as a whole, satisfy the jurisdictional amount in controversy.[14] Also, where multiple plaintiffs sue a single defendant, they may aggregate their claims when those claims are based on a "common and undivided interest."[15] Aggregation in this instance is rarer than the language suggests. Courts have construed "common and undivided interest" narrowly, and they have held that such an interest exists only when plaintiffs are suing for a common debt or when several plaintiffs sue as joint owners of property.[16]

1. The *Pinel* Doctrine

Where none of the plaintiffs in a multi-plaintiff diversity action satisfy § 1332's jurisdictional amount in controversy, plaintiffs may not

11 *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 290 (2d ed. 1994) (suggesting that reducing the federal docket would be better served by excluding diversity cases involving claims least likely to benefit from federal jurisdiction).

12 *See* S. REP. No. 85-1830, at 51 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101 (arguing that Congress has tried to set a jurisdictional 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").

13 The Supreme Court has ruled that the plaintiff's claim of damages must be accepted unless it appears to a legal certainty that the plaintiff cannot recover in excess of § 1332's amount in controversy. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288–89 (1938). This rule saves courts from having to hold adversarial and time-consuming hearings on the amount of damages in advance of the actual litigation.

14 *See* Edwards v. Bates County, 163 U.S. 269 (1896) (permitting aggregation of plaintiff's tort and contract claims against a single defendant).

15 *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.9, at 48–49 & n.5 (2d ed. 1993).

16 *See id.*

aggregate their damages to satisfy that amount. Also known as the "*Pinel* doctrine,"[17] non-aggregation in this instance husbands scarce judicial resources by keeping relatively petty claims out of federal court.[18] The Supreme Court developed the doctrine to reduce the burgeoning federal docket following the Court's decision in *Swift v. Tyson*, which allowed federal courts to fashion federal common law in the absence of state statutory or constitutional provisions.[19]

The *Pinel* doctrine strikes a sensible balance between fairness to litigants and the conservation of scarce judicial resources. Where none of the plaintiffs has satisfied the amount in controversy, not a single plaintiff has an independent basis for federal diversity jurisdiction. Since none of the plaintiffs could file independent suits in federal court, the entire action must be dismissed from federal court. Thus, forbidding aggregation of claims in a *Pinel* scenario presents little danger of duplicative federal and state litigation while preventing the over-use of the federal forum.

The Supreme Court's decision in *Snyder v. Harris*[20] extended the concept underlying the *Pinel* doctrine to class actions. In *Snyder*, the Court addressed a split among the circuits regarding the viability of the non-aggregation doctrine in light of the then recently revised Rule 23. Under the old Rule 23, class actions were divided into three categories: true, hybrid, and spurious.[21] True class actions were those in which the rights of the claimants were common and undivided. In these actions, aggregation was permitted. In spurious and hybrid class

17 *See* Pinel v. Pinel, 240 U.S. 594 (1916).

18 *See also* Scott v. Frazier, 253 U.S. 243 (1920); Rogers v. Hennepin County, 239 U.S. 621 (1916); Wheless v. St. Louis, 180 U.S. 379 (1901).

19 41 U.S. (16 Pet.) 1 (1842) (holding that, in absence of state statutory or constitutional provision, federal courts could fashion federal common law), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 704 n.66 (1941) (arguing that *Swift* encouraged forum shopping by litigants hoping to benefit from favorable federal common law); *see also* Frank, *supra* note 10, at 9 (remarking that "the great error of *Swift v. Tyson* and the federal choice of law permitted the gross abuse of jurisdiction shopping") (footnote omitted). The forum shopping encouraged by *Swift* is best illustrated in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928). There, a Kentucky corporation dissolved and reincorporated in Tennessee solely for the purpose of suing a Kentucky defendant in federal court, where the federal common law produced a more favorable result for the plaintiff than Kentucky common law.

20 394 U.S. 332 (1969).

21 The Court's discussion of old Rule 23 may be found in *id.* at 335.

actions, however, aggregation was not permitted.[22] Spurious and hybrid class action plaintiffs each had to meet the requisite amount in controversy in order to gain entrance to the class.

The modern Rule 23(b)(3) resembles the old spurious class action, and litigation arose over whether the revision permitted aggregation of claims. In district court, Margaret Snyder and a class of similarly situated plaintiffs filed a stockholders derivative action against the board of directors of an insurance company.[23] Federal jurisdiction was based on diversity, but none of the plaintiffs in that suit met the amount in controversy requirement. The Eighth Circuit, in affirming the district court's dismissal of the action, held that the adoption of the revised Rule 23 did not change the congressionally enacted requirements of diversity jurisdiction.[24] That is, each plaintiff seeking to join the class had to satisfy the amount in controversy.

The Tenth Circuit came to a different conclusion in a diversity class action suit filed by customers of a gas company.[25] In that case, the plaintiffs alleged that they had been over-billed by the gas company, but none of the plaintiffs had been over-charged an amount that exceeded the statutory amount in controversy of $10,000. Added together, however, their claims would have exceeded that amount. The Tenth Circuit reasoned that, since aggregation was allowed in some class actions and since Rule 23 abolished the distinctions among the class actions, the new Rule 23 permitted aggregation in all class actions.[26]

The two cases were combined for review by the Supreme Court in *Snyder*. In siding with the Eighth Circuit, the Supreme Court asserted that "[t]he doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase 'matter in controversy.'"[27] The Court refused to extend its construction of "matter in controversy" to include the aggregation of all claims arising

22 The spurious class action was basically a form of permissive joinder in which parties with separate and distinct claims that arose out of a common question of law or fact were allowed to litigate against a single defendant. *See id.*

23 Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968).

24 *Id.* at 205.

25 *See* Gas Service Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968).

26 *Id.* at 834.

27 *Snyder*, 394 U.S. at 336. The Court reasoned that Congress impliedly adopted the judicial interpretation of "matter in controversy" by reenacting the jurisdictional amount language without changing or modifying the judicial construction of that amount. *See id.* at 339. The Court's reliance on congressional silence as ratification of this judicial practice is somewhat dubious, though. Indeed, in an earlier decision, the

from the same question of law or fact, which would have permitted class plaintiffs to aggregate their claims.[28] The Court noted that such an extension would run counter to the congressional policy of curbing the rising tide of diversity cases facing the federal courts.[29] Consequently, the Court dismissed the claims of each of the plaintiffs for lack of jurisdiction.

Non-aggregation in this type of class action is sensible. None of the plaintiffs in *Snyder* satisfied the amount in controversy requirement. Thus, the federal courts had no basis for jurisdiction over any one of the plaintiffs. Dismissal ends federal jurisdiction over the entire claim, and it requires that the claim be resolved entirely at the state level or not at all.

2. Carrying *Pinel* Too Far: *Clark* and *Zahn*

Non-aggregation, however, lacks the same justification when applied to "mixed" diversity actions.[30] Mixed diversity actions are those in which at least one plaintiff has satisfied the amount in controversy while other plaintiffs in the action have not. In these cases, at least one plaintiff's claim will remain in federal court whether or not the other plaintiffs are permitted to aggregate their claims. Non-aggregation makes no sense in this scenario. Indeed, it encourages duplicative litigation by forcing plaintiffs with jurisdictionally insufficient claims to litigate in state court. This, of course, raises the specter of preclusive judgments. More likely, though, prohibiting aggregation in these cases will force the plaintiffs with jurisdictionally inadequate claims to forgo litigation altogether. The costs of individually litigating their claims normally will outweigh the economic harm suffered by each potential litigant. In these "mixed" diversity cases, then, non-aggregation is neither efficient nor fair. Nonetheless, that is exactly what the Supreme Court mandated in both *Clark* and *Zahn*.

Court counseled against reliance on congressional silence in such circumstances. *See* Girouard v. United States, 328 U.S. 61 (1946).

28 *Snyder*, 394 U.S. at 338. The plaintiffs argued in favor of extending the scope of "matter in controversy" by claiming that the determination of whether claims are separate and distinct breeds litigation and that the inability to aggregate small claims prevents certain plaintiffs from litigating otherwise significant issues. *Id.*

29 *Id.* at 339–40; *see also id.* at 341 ("There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already overloaded federal court system.").

30 *See generally* Afshin Ashourzadeh, Comment, *Supplemental Jurisdiction in Class Action Lawsuits: Recovering Supplemental Jurisdiction from the Jaws of Aggregation*, 26 Sw. U. L. Rev. 89, 127–29 (1996).

In *Clark v. Paul Gray, Inc.*,[31] several plaintiffs sued the California Director of Motor Vehicles to enjoin the enforcement of the California Caravan Act, which imposed a license fee on automobiles driven into the state for sale.[32] Of the plaintiffs in *Clark*, only one independently satisfied the jurisdictional amount. The Court ruled that the district court properly exercised jurisdiction over this plaintiff, but not over the other plaintiffs in the action—even though each plaintiff's complaint arose from the same underlying issue: namely, the alleged constitutional infirmities of the Caravan Act.[33]

Although the rule in *Clark* reduces the federal caseload, it does so at the expense of fairness and efficiency. In cases like *Clark*, all the claims arise from the same legal issue. Each claim shares essentially the same facts. In Judge Easterbrook's words, to decide one plaintiff's claim is to decide them all.[34] Thus, neither private interests nor judicial economy are served by dismissing plaintiffs with jurisdictionally insufficient claims in *Clark*-type scenarios.

Zahn v. International Paper Co.[35] presented the same problem as *Clark*, except the plaintiffs in *Zahn* were members of a Rule 23(b)(3) class action. The *named* plaintiffs in *Zahn* satisfied the amount in controversy requirement, but the *unnamed* plaintiffs did not. All of the plaintiffs in *Zahn*, though, shared the same complaint. Each owned or leased land on Lake Champlain in Vermont. Each alleged that the International Paper Company had fouled the shores of the lake by releasing wood pulp from its New York paper mill into a tributary of the lake.

The district court found that each of the four named plaintiffs satisfied the then applicable $10,000 amount in controversy, but the court was convinced to a legal certainty that all of the unnamed plaintiffs failed to state damages in excess of $10,000.[36] The district court dismissed the jurisdictionally insufficient claims of the unnamed plaintiffs and refused to certify a class composed of the remaining four plaintiffs.[37] The Second Circuit affirmed,[38] and the Supreme Court upheld the Second Circuit.

---

31 306 U.S. 583 (1939).

32 *Id.* at 585–86. The plaintiffs argued that the license tax imposed an unconstitutional burden on interstate commerce and infringed upon the Due Process and Equal Protection Clauses of the Constitution.

33 *Id.* at 590.

34 *See* Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 932 (7th Cir. 1996).

35 414 U.S. 291 (1973).

36 Zahn v. International Paper Co., 53 F.R.D. 430, 431 (D. Vt. 1971).

37 *Id.* at 434.

a. Precedent Does Not Compel the Result in *Zahn*

The precedent relied upon by the Supreme Court in *Zahn* does not support the Court's extension of § 1332's amount in controversy requirement to each unnamed plaintiff. The majority inappropriately relied on *Snyder* for the proposition that "class actions involving plaintiffs with separate and distinct claims [are] subject to the usual rule that a federal district court can assume jurisdiction over only those plaintiffs presenting claims exceeding the [amount in controversy]."[39] The facts in *Snyder* were distinguishable from those in *Zahn*. None of the plaintiffs in *Snyder* satisfied the amount in controversy requirement, and, consequently, the entire action failed for want of jurisdiction. *Zahn*, however, involved a "mixed" diversity class action. The district court already had jurisdiction over the named plaintiffs, whose claims satisfied the amount in controversy, but not over the jurisdictionally insufficient claims of the unnamed plaintiffs. On its facts, then, *Snyder* does not compel the conclusion that unnamed plaintiffs must individually satisfy the jurisdictional amount when the class's named representatives have met that amount.

The majority in *Zahn* also found *Clark* instructive; yet, the plaintiffs in *Clark* were not part of a class action,[40] and, consequently, there were no unnamed plaintiffs in *Clark*. At best, *Clark* could be read as requiring only the *named* plaintiffs in a class action to meet the amount in controversy requirement. *Clark*, however, does not compel a similar result for *unnamed* plaintiffs in a class action scenario.[41]

Zahn's requirement that unnamed plaintiffs satisfy the jurisdictional amount also seems inconsistent with the Court's decision in *Supreme Tribe of Ben-Hur v. Cauble*.[42] In *Ben-Hur*, the Court held that, for purposes of determining diversity of citizenship in a class action, only the citizenship of the *named* class representatives was relevant.

38 Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972).

39 *Zahn*, 414 U.S. at 299.

40 Although the Supreme Court speaks of the plaintiffs in *Clark* as a class, Chief Judge Leddy, the author of the district court opinion in *Zahn*, remarked that "[w]e confess that we can find nothing in the official report of *Clark* clearly indicating that it was, in fact, a class action." *Zahn*, 53 F.R.D. at 431. *See also* Lubomyr Carpiac, Note, *The Tower of* Zahn *Stands in Loose Sand:* Zahn v. International Paper Co., 7 LOY. L.A. L. REV. 593, 602–03 (1974).

41 *See generally* Edward S. Ginsburg, Note, *Unnamed Plaintiffs in Federal Class Actions:* Zahn v. International Paper Co. *Further Restricts the Availability of the Class Suit*, 35 OHIO ST. L.J. 191, 203 (1974).

42 255 U.S. 356 (1921). *See generally* Brian Mattis & James S. Mitchell, *The Trouble with* Zahn: *Progeny of* Snyder v. Harris *Further Cripples Class Actions*, 53 NEB. L. REV. 137, 191–94 (1974).

The rule in *Ben-Hur* is sensible. Without it, the complete diversity requirement would exclude many non-diverse plaintiffs in multi-state class actions from the jurisdiction of the federal courts.[43] A similar rationale supports the relaxation of the amount in controversy requirement in diversity class actions. Many potential class action plaintiffs may not have damages in excess of the amount in controversy, but refusing to exercise jurisdiction over them may prevent the plaintiffs from forming a class at all.

Nonetheless, the Supreme Court in *Zahn* ignored *Ben-Hur* and imposed the burden of meeting the amount in controversy on each and every diversity plaintiff. The Court offered no justification for relaxing the burdens of diversity in *Ben-Hur* while adhering so rigidly to them in *Zahn*. Indeed, the Court never attempted to distinguish *Ben-Hur* from *Zahn*.[44]

b. *Zahn* Is Inconsistent with Rule 23

Requiring unnamed plaintiffs to satisfy § 1332's amount in controversy also thwarts some of the chief functions of the class action device. Among other things, the class action was designed to "reduce units of litigation by bringing under one umbrella what might otherwise be many separate, but duplicating actions . . . [and] to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[45] *Zahn* hinders this two-fold goal by forbidding district courts from exercising jurisdiction over unnamed plaintiffs with jurisdictionally insufficient claims.[46]

---

43 In fact, the district court in *Zahn* relied on *Ben-Hur* in rejecting International Paper's attempt to have the plaintiffs residing in New York dismissed as non-diverse. *See Zahn*, 53 F.R.D. at 430–31.

44 The two cases could be distinguished on the grounds that *Ben-Hur* involved a true class action. Traditionally aggregation of claims was permitted for true class actions, while aggregation in spurious class actions, like *Zahn*, was never permitted. The rule of *Ben-Hur*, however, has never been restricted to true class actions. *See* Mattis & Mitchell, *supra* note 42, at 193 n.235.

45 Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497 (1969). Professor Kaplan was the Reporter to the Advisory Committee on Civil Rules during the revision of the class action device.

46 The rule in *Zahn* is arguably consistent with Rule 82's prohibition of using the Federal Rules of Civil Procedure (including Rule 23) to "extend or limit the jurisdiction of the United States district courts or the venue of actions therein." FED. R. CIV. P. 82. Some have argued, though, that Rule 82 ought to be read in light of Rule 1, which articulates the interpretive framework for the Federal Rules. Rule 1 states that the Federal Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. Viewed in light of Rule

The rule in *Zahn* thus presents three unsavory options for the unnamed class action plaintiff with a jurisdictionally insufficient claim. One option is to file an individual action in state court. The fact that the unnamed plaintiff has failed to satisfy the amount in controversy requirement, though, suggests that the plaintiff's legal bills would more than outweigh his or her monetary damages. This is especially true where the defendant is a large corporation which can afford drawn-out litigation and expensive expert testimony. The second option (if one can call it that) is to drop the suit altogether. This implicitly encourages mass "nickel-and-dime" theft—especially from consumers who have little economic incentive to pursue civil remedies.[47] As a third option, the entire class could refile in state court. This, however, is not likely to occur where the class action could proceed in federal court without the unnamed plaintiffs. Some states also require class action plaintiffs to have minimum contacts with the state,[48] and where the injury suffered by the plaintiffs occurs in multiple states, this requirement erects a substantial barrier to maintaining multi-state class actions in state court.

The rule in *Zahn* also poses inconsistencies for class plaintiffs seeking equitable relief in the form of injunctions or declaratory judgments. In these instances, determining the amount in controversy becomes problematic. The Supreme Court has never addressed this issue in the context of class actions, but in *Hunt v. Washington Apple Advertising Commission*,[49] the Court ruled that, in suits seeking declaratory or injunctive relief, "the amount in controversy is measured by the value of the object of the litigation."[50] The Court did not specify to whom the value of the equitable relief should be attributed, but most courts have concluded that it should be attributed to either the plaintiff or the defendant for purposes of determining the amount in controversy.[51] Therefore, in class actions seeking injunctive relief, the value of the injunction to the defendant would be adequate to secure jurisdiction.

1, Rule 82 prohibits using the Federal Rules to expand jurisdiction only when the expansion serves no efficiency-producing procedural purpose. Expanding jurisdiction to allow aggregation in class actions where the court already has jurisdiction over the case furthers the goals of Rule 1 and, hence, does not violate Rule 82. *See generally* Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 441–43 (1976); Patricia M. Noonan, Note, *State Personal Jurisdictional Requirements and the Non-Aggregation Rule in Class Actions*, 1987 U. ILL. L. REV. 445, 454.

47 *See* Ashourzadeh, *supra* note 30, at 127–28.

48 *See* Noonan, *supra* note 46, at 458–60.

49 432 U.S. 333 (1977).

50 *Id.* at 347–48.

51 *See* CHEMERINSKY, *supra* note 11, § 5.3.4, at 291–92.

So, if a group of plaintiffs with jurisdictionally insufficient claims seeks injunctive relief under Rule 23(b)(1) or (b)(2), *Zahn* seems to require each plaintiff to state a jurisdictionally sufficient interest in the equitable relief. That is, the plaintiffs cannot aggregate their individual interest in equitable relief to meet the amount in controversy. Strangely, though, *Hunt* permits jurisdiction over the very same plaintiffs when the defendant's interest in the equitable relief exceeds the amount in controversy. *Hunt* seems to trump *Zahn*'s non-aggregation rule with respect to class actions seeking equitable relief.[52] This, though, begs another question. If aggregation is allowable for class action plaintiffs seeking equitable relief, why should it also not be permitted for Rule 23(b)(3) class actions?

3. Weighing the Virtues and Vices of *Clark* and *Zahn*

Notwithstanding the shortcomings of *Clark* and *Zahn*, the non-aggregation rule is not entirely without justification. Non-aggregation does reduce the managerial burdens placed upon federal courts by multi-plaintiff litigation and by large diversity class actions. These burdens are often quite significant. Judicial economy is not served, however, by merely shifting the administrative burdens of multi-plaintiff litigation from federal courts to already crowded state courts.[53]

Relying on the rule in *Zahn* to solve the managerial problems of "mixed" diversity class actions is inappropriate for another reason. Federal courts already have the option under Rule 23 to dismiss a class action if maintaining the action would impose inordinate managerial burdens on the court.[54] Denying class treatment pursuant to the stan-

52 *Hunt* trumps *Zahn* if the jurisdictional amount is calculated based on the value of the injunction to the defendant. For example, an injunction ordering the defendant to cease polluting may only be worth several thousand dollars to any one plaintiff, but it may be worth millions to the defendant. For this reason, *Hunt* may not supersede *Zahn* if the jurisdictional amount is calculated by determining the value of the injunction to the plaintiff. Another alternative is possible. A court could ascertain the jurisdictional amount by determining the worth of the injunction to the party invoking federal jurisdiction. *See* CHEMERINSKY, *supra* note 11, § 5.3.4, at 291–92 (citing McCarty v. Amoco Pipeline Co., 595 F.2d 389, 393 (7th Cir. 1979); Thomas v. General Elec. Co., 207 F. Supp. 792 (D. Ky. 1962)). Under this alternative, *Hunt* would trump *Zahn* only when the defendant invokes federal jurisdiction by removing a case from state court.

53 *See generally* John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 405 (1979) (arguing that "there is no profit in transferring cases from one logjam to another").

54 *See* FED. R. CIV. P. 23(b)(3)(D) (stating that, in determining whether to certify a class, courts should consider "the difficulties likely to be encountered in the management of a class action").

dards provided by Rule 23 is more principled than dismissing class members for failing to meet the *Zahn* Court's questionable formulation of § 1332's amount in controversy requirement.

The non-aggregation rule in *Clark* and *Zahn* also creates other managerial headaches for courts and for litigants. Chiefly, it requires the jurisdictionally insufficient plaintiffs to litigate common issues in multiple state court suits. In addition to adding to state court congestion, this imposes upon the defendant the expensive and inconvenient burden of defending in multiple fora. Thus, the rule in *Clark* and *Zahn* creates more managerial burdens than it alleviates.

Another justification for non-aggregation is its promotion of federalism. By requiring that jurisdictionally insufficient state law claims be dismissed from federal court, the rule in *Clark* and *Zahn*, in theory, permits state courts to resolve these state law issues.[55] In reality, though, plaintiffs with jurisdictionally insufficient claims may have no economic incentive to bring individual suits in state court. Furthermore, federalism is ill-served by diverting cases to state courts which already suffer from overcrowded dockets.[56]

In sum, the non-aggregation rule articulated in *Clark* and *Zahn* produces unfairness to litigants and hinders the efficient administration of multi-plaintiff litigation. These ill-effects more than outweigh the possible benefits of *Clark*'s and *Zahn*'s application of the non-aggregation rule. An alternative exists, though, to the harsh consequences of the non-aggregation doctrine. Although the majorities in neither *Clark* nor *Zahn* acknowledged it, ancillary jurisdiction over the jurisdictionally insufficient plaintiffs was possible in each case. In his dissent in *Zahn*, Justice Brennan advocated precisely this course of action. A discussion of Justice Brennan's dissent and the history of ancillary and pendent jurisdiction follows.

B. Ancillary and Pendent Jurisdiction: Mitigating the Harsh Results of Non-Aggregation

1. Justice Brennan's Dissent in *Zahn*

Justice Brennan's dissent reflects his dissatisfaction with the majority's unthinking application of the non-aggregation doctrine. Brennan reminded the majority that "the 'aggregation' rule has been but

55 *But see* Frank, *supra* note 10, at 12 (questioning the premise that "there is such a phenomenon as a 'state case,' a kind of provincial fracas which should be kept happily local and free of federal contact").

56 *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 291 (1996).

one of several ways to establish jurisdiction over additional claims and parties."[57] Indeed, he remarked that courts have long exercised ancillary jurisdiction over related claims that do not fit within the aggregation rules.[58] Judge Timbers' dissent in the Second Circuit also called for recognition of

> the well-established principle that if a case is properly in a federal court, that court has subject matter jurisdiction over the case or controversy in its entirety and therefore can adjudicate related claims of ancillary parties who have no independent jurisdictional grounds.[59]

As Justice Brennan notes, the facts in *Zahn* particularly compelled the exercise of ancillary jurisdiction over the unnamed plaintiffs. The class was composed of over 240 members, and the issues at stake required extensive use of expert testimony and scientific evidence. Without ancillary jurisdiction, most of the unnamed plaintiffs could not afford the expense of individual suits against International Paper Company in state court. The unnamed plaintiffs' claims also arose from the same facts and legal issues as those of the jurisdictionally adequate named plaintiffs. Those of the unnamed plaintiffs who could afford litigation likely would bring duplicative suits in state court—thus creating preclusive or inconsistent judgments on the same legal event. Either result, argued Justice Brennan, "will do no judicial system credit."[60]

2. The Historical Development and Use of Ancillary and Pendent Jurisdiction

As Justice Brennan noted, courts have used ancillary and pendent jurisdiction as alternative means of gaining jurisdiction over related claims and parties.[61] Ancillary jurisdiction referred to the authority of a federal court to hear jurisdictionally inadequate claims which arose out of the same transaction or occurrence as the claims properly before the court.[62] Courts implementing ancillary jurisdiction usually employed it to cover additional parties and claims brought into the

57 Zahn v. International Paper Co., 414 U.S. 291, 305 (Brennan, J., dissenting).

58 *Id.* (citing Wichita R.R & Light Co. v. Public Utils. Comm'n, 260 U.S. 48 (1922); Phelps v. Oaks, 117 U.S. 236 (1886); Freeman v. Howe, 65 U.S. (24 How.) 450 (1861)).

59 Zahn v. International Paper Co., 469 F.2d 1033, 1036 (2d Cir. 1972) (Timbers, J., dissenting).

60 *Zahn*, 414 U.S. at 308 (Brennan, J., dissenting).

61 *See generally* Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983).

62 *See* CHEMERINSKY, *supra* note 11, § 5.4, at 312.

action under compulsory counterclaims,[63] cross-claims,[64] and impleader claims[65] against third-party defendants, even though these parties and claims would not otherwise fulfill the requirements of federal jurisdiction.[66]

Pendent jurisdiction is a subspecies of ancillary jurisdiction.[67] It refers to the exercise of federal jurisdiction over a state law claim or claims (as well as the party or parties asserting those claims) which are factually related to a jurisdictionally adequate claim already before the court. In addition to promoting judicial efficiency and fairness to the parties, pendent jurisdiction also avoided the complications arising from preclusion of claims by duplicative judgments.[68]

In exercising pendent jurisdiction over related claims, courts struggled with the question of just how factually related the claims had to be in order to justify the invocation of pendent jurisdiction. The Supreme Court first tried to resolve this question in 1933. In *Hurn v. Oursler*,[69] the Court distinguished between state and federal claims arising from a single "cause of action" and state and federal claims arising from two separate causes of action. In the former situation, the Court said that district courts could exercise jurisdiction over both federal and state claims, but in the latter situation, where the federal and state claims arose from "separate causes of action," the court had jurisdiction only over the federal claim.[70] Courts found this test difficult to apply, primarily because the test's crucial term, "cause of action," lacked substance and was difficult to define.[71]

a. *United Mine Workers of America v. Gibbs*[72]

In *Gibbs*, the Supreme Court reformulated and clarified the *Hurn* test. The plaintiff in *Gibbs* sued the United Mine Workers in federal court alleging violations of the Labor Management Relations Act.[73]

63 *See* FED. R. CIV. P. 13(a).

64 *See* FED. R. CIV. P. 13(g).

65 *See* FED. R. CIV. P. 14(a).

66 *See* CHEMERINSKY, *supra* note 11, § 5.4, at 312–13; FRIEDENTHAL ET AL., *supra* note 15, § 2.12, at 66.

67 *See* CHEMERINSKY, *supra* note 11, § 5.4, at 313.

68 *But see* Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247 (arguing that pendent and ancillary jurisdiction unconstitutionally usurp state power).

69 289 U.S. 238 (1933).

70 *Id.* at 246.

71 *See* FRIEDENTHAL ET AL., *supra* note 15, § 2.12, at 70.

72 383 U.S. 715 (1966).

73 *Gibbs* arose out of a dispute between the United Mine Workers and the Southern Labor Union. The two unions clashed at a mine which Gibbs supervised. Due to

To this federal cause of action, Gibbs added a state-law tortious interference with contracts claim. The Supreme Court upheld the exercise of pendent jurisdiction over both claims. Justice Brennan, writing for the Court, stated that courts have the power to exercise pendent jurisdiction whenever the relationship between the state law claim and the federal claim "permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"[74] In other words, pendent jurisdiction exists when the court has jurisdiction over the case (either under § 1331 or § 1332) and the state-law claim "derive[s] from a common nucleus of operative fact" such that both claims are amenable to trial in one judicial proceeding.[75]

Justice Brennan also noted that a court's power to exercise pendent jurisdiction was discretionary. He invited district courts to consider whether the exercise of pendent jurisdiction was justified in light of judicial economy, fairness to the litigants, and principles of federalism.[76] He advised district courts to avoid exercising jurisdiction over state law claims when the federal claims were dismissed or when state law claims predominated in the suit.[77]

b. Limits on the Exercise of Ancillary and Pendent Jurisdiction

The development of ancillary and pendent jurisdiction reflected the judiciary's desire to avoid multiple suits over claims which could be adjudicated in one action. This concern for judicial economy, however, sometimes conflicted with the limitations placed on federal jurisdiction by Congress. In two cases following *Gibbs*, the Supreme Court outlined the boundaries of ancillary and pendent jurisdiction.

In *Aldinger v. Howard*,[78] the Supreme Court upheld the district court's refusal to exercise pendent jurisdiction over a municipality in

---

the ensuing violence and disruption of work, Gibbs eventually lost his job. In his suit, Gibbs alleged that the United Mine Workers had "blackballed" him from employment at other mines in the region.

74 *Id.* at 725 (footnote omitted).

75 *Id*; *see also* FRIEDENTHAL ET AL., *supra* note 15, § 2.12, at 70 ("If adjudication of one of the claims normally would result in the application of res judicata or collateral estoppel with regard to any subsequent litigation of the other claim, then they are claims that ordinarily would be tried in one judicial proceeding.") (footnote omitted).

76 *Gibbs*, 383 U.S. at 725–26.

77 *Id.* at 726.

78 427 U.S. 1 (1976). The case began when Monica Aldinger was fired from her secretarial position with Spokane County. She subsequently brought a civil rights action under 42 U.S.C. § 1983 against Merton Howard, the Spokane County Treasurer. She later sought to append several related state claims against Spokane County itself.

a § 1983 civil rights action against an officer of that municipality. At the time, municipalities were not amenable to suit under § 1983,[79] and the Court remarked that allowing pendent jurisdiction over the municipality "would run counter to the well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress."[80] The Court indicated that jurisdiction over a pendent party, at a minimum, must be permissible under Article III of the Constitution and must not have been precluded by congressional action.[81]

The Supreme Court spoke again on the limitations of ancillary and pendent jurisdiction in *Owen Equipment & Erection Co. v. Kroger*.[82] In *Kroger*, the Court refused to allow ancillary jurisdiction over a plaintiff's claims against a non-diverse, third-party defendant impleaded under Rule 14(a) by the defendant.[83] Since the plaintiff (Kroger) would not have been permitted to sue the non-diverse, third-party defendant (Owen) originally, the Court reasoned that exercising ancillary jurisdiction over Kroger's amended complaint against the impleaded Owen would "simply flout [a] Congressional command."[84]

Because the county was neither amenable to suit under § 1983 nor a diverse party, the district court ruled that it lacked an independent basis for pendent party jurisdiction over the county and dismissed the state law claims against it.

79 The district court ruled that the county was not "suable as a 'person' under § 1983." *Id.* at 5; *see* Monroe v. Pape, 365 U.S. 167 (1961) (holding that city of Chicago was not liable in civil rights action for conduct of its police officers), *overruled by* Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658 (1978).

80 *Aldinger*, 427 U.S. at 15.

81 *Id.* at 18.

82 437 U.S. 365 (1978). This case arose out of James Kroger's electrocution while standing next to a steel crane which had accidentally touched a high tension electric wire. His widow, an Iowa citizen, filed a wrongful death action in the District of Nebraska against the Omaha Public Power District (OPPD), a Nebraska corporation. Federal jurisdiction was based on diversity of citizenship and the requisite amount in controversy was met. After the filing of the complaint, OPPD impleaded the operator of the crane, Owen Equipment and Erection Company (Owen), under Rule 14(a). Kroger then amended her complaint to include Owen. Later in the case, it was discovered that Owen's principal place of business was in Iowa, thus placing Iowa citizens on both sides of the dispute and violating § 1332's requirement of complete diversity of citizenship.

83 *Id.* at 367–68. Rule 14(a) provides, in relevant part, "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." FED R. CIV. P. 14(a).

84 *Kroger*, 437 U.S. at 377 (footnote omitted); *see also id.* (stating that "neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case").

Such a result would only encourage future plaintiffs to first sue diverse parties and then wait for those parties to implead the "real" parties to the suit—the non-diverse, third-party defendants.[85]

Even after *Aldinger* and *Kroger*, the limits placed upon ancillary and pendent jurisdiction were fairly broad. Courts could exercise ancillary and pendent jurisdiction over parties and claims which arose from the "common nucleus of operative fact" of the claim properly before the federal court. Courts could not exercise ancillary and pendent jurisdiction over claims and parties when doing so would be contrary to a federal statute (as in *Aldinger*) or when it would violate the rule of complete diversity of citizenship (as in *Kroger*).

C. *Ancillary and Pendent Jurisdiction: An Efficient and Fair Alternative to Non-Aggregation*

There is, then, a tension inherent in the parallel development of ancillary and pendent jurisdiction, on the one hand, and the non-aggregation rule on the other.[86] The Supreme Court has struggled to harmonize congressional limitations on federal court jurisdiction with the exercise of ancillary and pendent jurisdiction. The Court's decisions in *Gibbs*, *Aldinger*, and *Kroger* strike a sensible balance between these competing policy goals. The Court's application of the non-aggregation doctrine in *Clark* and *Zahn*, however, erects unjustified barriers to federal jurisdiction. As such, *Clark* and *Zahn* must go, and § 1367 provides the perfect vehicle with which to wipe them from the books.[87]

---

85 Professor Richard Freer argues, though, that the Court's strict prohibition of ancillary jurisdiction over impleaded third-party defendants was unnecessary in light of 28 U.S.C. § 1359 (1994), which prohibits federal jurisdiction over parties improperly or collusively joined. Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 459, 480 (1991).

86 *See generally* William H. Theis, Zahn v. International Paper Co.: *The Non-Aggregation Rule in Jurisdictional Amount Cases*, 35 LA. L. REV. 89, 94 (1974).

87 *See generally* Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. REV. 186, 194 (1996) ("*Zahn* . . . is high on a list of candidates to be overruled, but the Supreme Court seems most unlikely to overrule the decision on the merits. Congress may have done so unintentionally in the 1990 supplemental-jurisdiction statute . . . .").

III. The Genesis and Judicial Reception of § 1367

A. Finley *and the Need for a Supplemental Jurisdiction Statute*

The Supreme Court's decision in *Finley v. United States*[88] provided the motive force behind the enactment of § 1367. The Supreme Court granted certiorari in *Finley* ostensibly to resolve a split among the circuits over whether the Federal Tort Claims Act permitted pendent jurisdiction over additional parties.[89] The Court held that it did not.[90] The result was less shocking than the overall implications that the Court's opinion posed for ancillary and pendent jurisdiction. Writing for the Court, Justice Scalia turned *Aldinger*'s and *Kroger*'s presumption in favor of ancillary and pendent jurisdiction (in the absence of congressional prohibition) on its head. Instead, Scalia asserted that the Court "will not assume that the full constitutional power [to add pendent parties] has been congressionally authorized, and [the Court] will not read jurisdictional statutes broadly."[91] Hereafter, the exercise of pendent jurisdiction would be presumed *impermissible*, unless the statute governing the federal claim expressly authorized it.[92]

---

88 490 U.S. 545 (1989). The plaintiff's husband and children were killed when their twin-engine plane clipped electric transmission lines and crashed near a San Diego airfield. She subsequently brought state tort claims against both the San Diego Gas and Electric Company, for negligent positioning and illumination of the transmission lines, and the city of San Diego, for negligent maintenance of the airfield's runway lights. Some time after initiating the state court action, Mrs. Finley, a California resident, learned that the Federal Aviation Administration (FAA) was actually the party responsible for maintaining the runway lights. She then filed a separate suit under the Federal Tort Claims Act (FTCA) against the FAA in federal district court. Nearly a year after bringing the federal suit, she sought to amend her federal complaint to include the state law claims against the original non-diverse defendants, San Diego Gas and the city of San Diego. The district court granted her motion to amend and exercised pendent jurisdiction over the parties to the original state action. The original defendants sought an interlocutory appeal of the court's ruling. The Ninth Circuit reversed the district court, stating that pendent jurisdiction was impermissible under the FTCA.

89 *Id.* at 547.

90 *Id.* at 553 (arguing that "[t]he statute here defines jurisdiction in a manner that does not reach defendants other than the United States") (footnote omitted).

91 *Id.* at 549.

92 In dicta, the Court reluctantly affirmed the use of pendent claim jurisdiction out of respect for stare decisis:

> As we noted at the outset, our cases do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred. The *Gibbs* line of cases was a departure from prior practice, and a departure that we have no intent to limit or impair. But *Aldinger* indicated

The Court's insistence on explicit congressional authorization for pendent party jurisdiction seemed to jeopardize the continued validity of ancillary jurisdiction as well. Congress, after all, never explicitly authorized this form of jurisdiction.[93] The opinion also was troublesome because it conflicted with the general policy goals of ancillary and pendent jurisdiction—namely, fairness to the litigants and judicial economy. Plaintiffs asserting federal and state claims against multiple parties would now be forced to abandon their right to litigate in a federal forum or, alternatively, endure the expense and possibly prejudicial effects of litigating some claims in state court and others in federal court.[94] Moreover, this threat to ancillary and pendent jurisdiction clashed with the underlying goals of the Federal Rules of Civil Procedure: the elimination of procedural barriers to the joinder of related claims and parties in order to effectuate the efficient resolution of all claims in a single case.[95]

Justice Scalia recognized, though, that Congress could legislatively overrule the majority's decision.[96] Congress did just that with the passage of the Judicial Improvements Act[97] little over a year after the *Finley* opinion.[98] The Act included a supplemental jurisdiction statute which "essentially restor[ed] the pre-*Finley* understandings on

---

that the *Gibbs* approach would not be extended to the pendent-party field, and we decide today to retain that line.

Id. at 556; *see also* H.R. REP. No. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874 (stating that in *Finley*, "the Supreme Court cast substantial doubt on the authority of the federal courts to hear some claims within supplemental jurisdiction").

93 Congress did authorize ancillary and pendent jurisdiction over related state unfair competition claims arising in federal patent, trademark, and copyright actions. *See* 28 U.S.C. § 1338(b) (1994).

94 Plaintiffs can always choose to litigate both the federal and state claims in state court, unless, as in *Finley*, the federal courts have exclusive jurisdiction over the federal claim.

95 *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged.") (footnote omitted).

96 Justice Scalia noted in *Finley* that, "Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress." *Finley*, 490 U.S. at 556.

97 Pub. L. No. 101-650, 104 Stat. 5089. This was an omnibus bill with provisions ranging from federal court reform to television violence. The portions of the Act relevant to the supplemental jurisdiction statute are found at Title III, § 310, 104 Stat. 5113.

98 *See* H.R. REP. No. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874 ("Legislation . . . is needed to provide the federal courts with statutory authority to hear supplemental claims. Indeed, the Supreme Court has virtually invited Congress to codify supplemental jurisdiction . . . .").

the authorization for and limits on other forms of supplemental jurisdiction."[99] According to the House Judiciary Committee's report, the supplemental jurisdiction statute was designed to prevent the Supreme Court's holding in *Finley* from ending the formerly routine exercise of pendent and ancillary jurisdiction.[100] The Committee also reported that § 1367(b) codified the result in *Kroger* by forbidding plaintiffs from evading the requirement of complete diversity by initially naming defendants who satisfy § 1332's diversity requirements and later adding claims against impleaded, non-diverse third-party defendants.[101]

Congress passed § 1367 "with admirable dispatch" in the last days of the 1990 Session.[102] On its face, the statute overrules *Clark*'s and *Zahn*'s application of the non-aggregation doctrine to multi-plaintiff diversity actions. While this is a welcome result for reasons already stated, the legislative history of § 1367 indicates that Congress may not have intended § 1367 to overrule either case. The resulting ambiguity has generated a great deal of vigorous commentary[103] as well as considerable judicial confusion.

B. The District Courts

Most district courts which have addressed § 1367's application to multi-plaintiff diversity actions have done so in the context of class actions. The majority of these courts have ruled that § 1367 does not overrule *Zahn*.[104] In reaching this conclusion, many of these courts

---

99 *Id.*

100 *Id.* (noting that "[a]lready . . . some lower courts have interpreted *Finley* to prohibit the exercise of supplemental jurisdiction in formerly unquestioned circumstances") (footnote omitted).

101 *See* 28 U.S.C. § 1367(b) (1994).

102 Thomas M. Mengler et al., *Congress Accepts the Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 213 (1991).

103 *See generally* Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991); Freer, *supra* note 85; Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion about Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991).

104 *See, e.g.*, Russ v. State Farm Mut. Auto. Ins. Co., 961 F. Supp. 808, 820 (E.D. Pa. 1997); McGowan v. Cadbury Schweppes, PLC, 941 F. Supp. 344, 348 (S.D.N.Y. 1996); Bernard v. Gerber Food Prods. Co., 938 F. Supp. 218, 223–24 (S.D.N.Y. 1996); Snider v. Stimson Lumber Co., 914 F. Supp. 388, 389–92 (E.D. Cal. 1996); Benninghoff v. Tolson, No. 94-CV-2903, 1994 WL 111355 (E.D. Pa. Mar. 30, 1994); Riverside Transp., Inc. v. Bellsouth Telecomm., Inc., 847 F. Supp. 453, 455–56 (M.D. La. 1994); Bennfield v. Mocatta Metals Corp., No. 91 Civ. 8255, 1993 WL 148978 (S.D.N.Y. May 5, 1993); Mayo v. Key Fin. Servs., Inc., 812 F. Supp. 277, 278 (D. Mass. 1993); Averdick v. Republic Fin. Servs., Inc., 803 F. Supp. 37, 45–46 (E.D. Ky. 1992); Bradbury v. Robertson-Ceco Corp., No. 92-C3408, 1992 WL 178648 (N.D. Ill. July 22, 1992).

have relied on the legislative history of § 1367 to support their argument. Specifically, these courts rely on a passage in the House Judiciary Committee Report which indicates an intent to preserve *Zahn*.[105]

A minority of district courts have refused to consider the legislative history of § 1367. Those courts have narrowed their focus to the face of the statute and, consequently, have concluded that § 1367 trumps the aggregation rules in *Zahn*.[106] The two circuit courts which have ruled on this issue[107] also have refused to consult § 1367's legislative history. An analysis of the Fifth and Seventh Circuit decisions follows.

C. *In re Abbott Laboratories*[108]

In October of 1993, Robin and Renee Free and a putative class[109] of similarly situated unnamed plaintiffs filed a state antitrust class action in Louisiana state court. The complaint alleged that Abbott Laboratories, Bristol-Meyers Squib Company, and the Mead Johnson & Company had conspired to fix the price of infant formula. On the basis of diversity of citizenship, the defendants removed the action to federal court. The district court determined that each named and unnamed plaintiff in the class action alleged only $20,000 in damages—far short of the $50,000 amount in controversy required at that time to invoke the court's diversity jurisdiction. The district court found, however, that Louisiana law attributed the attorney's fees of state antitrust class action plaintiffs to the class's named representa-

105 H.R. REP. NO. 101-734, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 & n.17 (stating that § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*") (citing Zahn v. International Paper Co., 414 U.S. 291 (1973); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1929)); *see infra* discussion accompanying note 135.

106 *See, e.g.*, Booty v. Shoney's, Inc., 872 F. Supp. 1524, 1526–27 (E.D. La. 1995); Lindsay v. Kvortek, 865 F. Supp. 264, 272–76 (W.D. Pa. 1994); Patterson Enters., Inc. v. Bridgestone/ Firestone, Inc., 812 F. Supp. 1152, 1154–55 (D. Kan. 1993); Garza v. National Am. Ins. Co., 807 F. Supp. 1256, 1257–58 (M.D. La. 1992).

107 The Third Circuit noted § 1367's potential to abrogate *Zahn*, but the court did not decide the issue. *See* Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 n.9 (3d Cir. 1993). Before *Stromberg*, the Seventh Circuit also addressed this issue without deciding it. *See* Anthony v. Security Pac. Fin. Servs., Inc., 75 F.3d 311, 315–16 & n.2 (7th Cir. 1996).

108 51 F.3d 524 (5th Cir. 1995).

109 When the case reached the Fifth Circuit, the district court had not yet certified a class. Nonetheless, I will refer to the plaintiffs as classmembers, rather than "putative classmembers" for purposes of this discussion.

tives.[110] With these attorney's fees, the Free's complaint alleged damages well in excess of the $50,000 amount in controversy. The unnamed plaintiffs, however, lacked the requisite amount in controversy, and the district court refused to exercise supplemental jurisdiction over them.[111] The district court then granted the Free's motion to remand to state court.

On appeal from the remand order, Judge Higginbotham acknowledged that the rule in *Zahn* prohibits jurisdiction over unnamed plaintiffs in a diversity class action who fail to satisfy § 1332's amount in controversy. He noted, though, that on its face § 1367 appears to overrule *Zahn*. He remarked that "[s]upplemental jurisdiction over the unnamed plaintiffs' claims has been an open question since Congress passed the Judicial Improvements Act of 1990."[112] Like some district judges, Judge Higginbotham acknowledged that a portion of § 1367's legislative history suggests that Congress did not intend to overrule *Zahn*. He also noted that the omission of Rule 23 from § 1367(b)'s exceptions to supplemental jurisdiction might have been a clerical error.[113] Nonetheless, he refused to consult the legislative history to determine whether Congress intended the omission. Relying on the "plain-meaning" canon of statutory interpretation, he argued that "the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result."[114] He found the provisions of § 1367 to be clear, and he refused to second guess the wisdom of the statute.[115] He also refused to characterize the abrogation of *Zahn* as an absurd result,[116] but he did not explain why overruling *Zahn* was a sensible or, at least, an acceptable result.

After concluding this somewhat cursory textual analysis of § 1367, Judge Higginbotham, on behalf of a unanimous panel, ruled that "under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement."[117] Thus, the Fifth Circuit became the first

110 *See Abbott*, 51 F.3d at 526–27.

111 *See id.* at 527.

112 *Id.* (footnote omitted).

113 *Id.* at 528.

114 *Id.* at 529 (citing West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 99–100 (1991)). *But see* Recent Case, 109 HARV. L. REV. 858 (1996) (arguing that the textualist interpretation of § 1367 in *Abbott* thwarts clearly expressed congressional intent not to overrule *Zahn*).

115 *Abbott*, 51 F.3d at 529 (arguing that "the wisdom of the statute is not our affair beyond determining that overturning *Zahn* is not absurd").

116 *Id.*

117 *Id.*

circuit court to acknowledge *Zahn*'s demise. While this is the right result, the Fifth Circuit's opinion left much to be desired. The court's refusal to address § 1367's legislative history has prompted some to argue that the court's rigid textualism "usurps the lawmaking authority of Congress . . . to defeat a clearly expressed legislative intent."[118] Moreover, the opinion offers nothing new to the debate over *Zahn*'s viability. The case for and against a "plain-meaning" approach to § 1367 already has been thoroughly articulated in the district courts and in the law reviews.[119] No court, however, has reevaluated the merits of *Zahn* in light of § 1367. Judge Higginbotham passed up an opportunity to bolster his textualist reading of § 1367 with a substantive analysis of *Zahn*'s incompatibility with Congress's stated and unstated intentions in passing § 1367.

D. Stromberg Metal Works, Inc. v. Press Mechanical, Inc.[120]

Stromberg presented the Seventh Circuit with virtually the same question, but in a slightly different format. The plaintiffs in *Stromberg* were not members of a putative class; rather, they were joint plaintiffs in a suit against a common defendant. The plaintiffs, Stromberg Metal Works, Inc. and Comfort Control, Inc., were Maryland subcontractors who were hired by Press Mechanical (an Illinois contractor) to install heating and air-conditioning at Maryland's Calvert Cliffs nuclear power station.[121] Bechtel Power Corporation (the contracting agent for the power plant) agreed to reimburse Press for work done by the subcontractors, but only after Press had certified that it had paid them.[122] Press falsely certified to Bechtel that it had paid Stromberg and Comfort Control when, in fact, Press had pocketed the money. After Stromberg and Comfort Control had completed the work, Press became insolvent. As a result, neither Stromberg nor

118 *See* Recent Case, *supra* note 114, at 858.

119 *See supra* notes 104 & 106. *See generally* Laura L. Hirschfeld, *The $50,000 Question: Does Supplemental Jurisdiction Extend to Claims Between Diverse Parties Which Do Not Meet § 1332's Amount-in-Controversy Requirement?*, 68 TEMP. L. REV. 107, 117–21 (1995); Heather McDaniel, Comment, *Plugging the Gaping Hole: The Effect of 28 U.S.C. § 1367 on the Complete Diversity Requirement of 28 U.S.C. § 1332*, 49 BAYLOR L. REV. 1069 (1997); Christopher P. Simkins, Note, *Class Actions and Supplemental Jurisdiction: Will* Zahn v. International Paper Co. *Remain Viable?*, 1996 BYU L. REV. 707; Joel E. Tasca, Comment, *Judicial Interpretation of the Effect of the Supplemental Jurisdiction Statute on the Complete Amount in Controversy Rule: A Case for Plain Meaning Statutory Construction*, 46 EMORY L.J. 435 (1997).

120 77 F.3d 928 (7th Cir. 1996).

121 *Id.* at 929.

122 *Id.* at 930.

Comfort Control received any compensation from Press. Bechtel also refused to pay Stromberg and Comfort Control since it had already paid Press for their work.[123]

Stromberg and Comfort Control subsequently filed a diversity action in the Northern District of Illinois to pierce the corporate veil and recover compensation from the controllers of the defunct Press Mechanical.[124] Stromberg's claim against the corporate controllers exceeded the $50,000 amount in controversy, but Comfort Control's claim did not.[125] Consequently, the district court refused to exercise jurisdiction over Comfort Control.[126]

On appeal, Judge Easterbrook framed the issue as whether "the supplemental jurisdiction [statute] permit[s] a court to hear a claim by a party whose loss does not meet the jurisdictional minimum[.]"[127] In dicta, Judge Easterbrook agreed with the Fifth Circuit's conclusion that § 1367 overrules *Zahn*.[128] Easterbrook acknowledged that portions of § 1367's legislative history militate against this conclusion, but, relying on a plain-meaning interpretation of the statute, Easterbrook concluded that "when text and legislative history disagree, the text controls."[129]

The rationale of *Abbott Laboratories*, however, did not compel a similar outcome in *Stromberg* because the *Stromberg* plaintiffs were not members of a class. They were Rule 20 co-plaintiffs. On this basis, the Seventh Circuit was asked to distinguish the Fifth Circuit's holding in *Abbott Laboratories*.[130] Judge Easterbrook refused, acknowledging that § 1367 does not exclude Rule 20 plaintiffs from the statute's grant of supplemental jurisdiction in § 1367(a). Consequently, he argued, § 1367 permits supplemental jurisdiction over Rule 20 permissive plaintiffs even when they do not satisfy the amount in controversy. As a result, § 1367 also abrogates the Supreme Court's ruling in *Clark*.[131] Recognizing this, Easterbrook remarked that "[s]ection 1367(a) has

123 *Id.*

124 *Id.*

125 *See* Stromberg Metal Works, Inc. v. Press Mechanical, Inc., No. 94-C6753, 1995 WL 387812, at * 1 (N.D. Ill. June 28, 1995).

126 *Id.* The district court exercised jurisdiction over Stromberg's action, but dismissed it for failure to state a claim. *Id.* at *4.

127 *Stromberg*, 77 F.3d at 930.

128 *Id.*

129 *Id.* at 931 (citation omitted). For a more detailed articulation of Judge Easterbrook's theory of statutory interpretation, see Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

130 *Stromberg*, 77 F.3d at 931.

131 *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939).

changed the basic rule by authorizing pendent-party jurisdiction, and that change affects *Clark* and *Zahn* equally."[132]

Judge Easterbrook's opinion rests squarely on a "plain-meaning" interpretation of § 1367. In dicta, though, Easterbrook hinted that judicial economy also supports the exercise of supplemental jurisdiction over the jurisdictionally insufficient claim of Comfort Control. He noted that

> [t]his strikes us as exactly the sort of case in which pendent-party jurisdiction is appropriate. It is two for the price of one: to decide either plaintiff's claim is to decide both, and neither private interests nor judicial economy would be promoted by resolving Stromberg's claim in federal court while trundling Comfort Control off to state court to get a second opinion.[133]

Unfortunately, he offered textualism, rather than economy and fairness, as the primary justification for the abrogation of *Clark* and *Zahn*. Something more than a canon of statutory interpretation is needed to justify this result.

IV. JUSTIFYING THE RESULT IN *ABBOTT LABORATORIES* AND *STROMBERG METAL WORKS*

A. *The Right Result, For the Wrong Reasons*

Plain-meaning provides merely the occasion for overruling *Clark* and *Zahn*. It does not provide a compelling justification for that result—especially in light of legislative history indicating an intent to preserve *Zahn*. Policy and precedent, however, do provide substantial support for § 1367's abrogation of *Clark* and *Zahn*. As an initial matter, § 1367 endorses the Supreme Court's attempts to facilitate the efficient packaging of related claims through the exercise of ancillary and pendent jurisdiction. Indeed, the statute elevates efficiency over the Court's formalistic articulations of the amount in controversy requirement in *Clark* and *Zahn*. This is a welcome result. The statute grants courts the discretion to resolve claims (including those of Rule 20 and Rule 23 plaintiffs) which otherwise would have to be dismissed for failing to meet an essentially arbitrary jurisdictional amount. In doing so, § 1367 allows the federal judiciary to efficiently and fairly resolve complex, multi-party lawsuits.

By liberalizing supplemental jurisdiction over Rule 20 and Rule 23 plaintiffs, § 1367 reduces the likelihood of concurrent litigation in federal and state courts over the same legal issues. Courts can now

132 *Stromberg*, 77 F.3d at 931.
133 *Id.* at 932.

bundle related claims for trial in one suit, thereby reducing the danger of duplicative and contradictory judgments in state court. This also has the effect of allowing plaintiffs, who have significant injuries but jurisdictionally insufficient damages, to aggregate their claims and sue as a group. This enables plaintiffs, especially injured consumers, to redress penny-ante mass theft. Defendants also will welcome § 1367's abrogation of *Clark* and *Zahn*. Because the statute furthers the resolution of multiple claims in one suit, it permits a party to mount a defense in a single federal forum rather than in multiple state and federal trial courts which may be governed by disparate laws and procedures.

For these same reasons, § 1367's abrogation of *Zahn* furthers the formation and resolution of federal class actions under Rule 23. Additionally, the statute is consistent with the rationale in *Ben-Hur*.[134] By eliminating *Zahn*'s requirement that unnamed plaintiffs individually satisfy the amount in controversy requirement, § 1367 places the burden of meeting the jurisdictional amount only on the named plaintiffs.

In addition to policy and precedent, the outcome of *Abbott Laboratories* and *Stromberg Metal Works* is justified also because it is consistent with congressional intent. This is a novel argument. Courts and commentators who have examined § 1367's legislative history have concluded that Congress never intended to overrule *Zahn*, much less *Clark*. Their conclusions rest primarily on a footnote in the House Judiciary Committee's report on the proposed supplemental jurisdiction statute. Citing *Zahn*, the Committee asserted that § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*."[135] Relying on this footnote as indicative of congressional intent, however, is a mistake. Ignoring it (as the Fifth and Seventh Circuits did) solely because it conflicts with the "plain-meaning" canon of statutory interpretation is equally foolish. There is considerable evidence in the legislative history which minimizes the persuasiveness of the Judiciary Committee's footnote. Had Judges Higginbotham and Easterbrook addressed this legislative history, they would have discovered that Congress could not rationally have intended to preserve *Zahn* or *Clark*.

---

134 *See supra* text accompanying notes 42 & 43.

135 H.R. REP. No. 101-734, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 & n.17 (citing Zahn v. International Paper Co., 414 U.S. 291 (1973); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1929)).

In order to understand why the Committee's footnote is anomalous, it is necessary to examine the context in which § 1367 was drafted. A careful contextual study of § 1367's history reveals that the Judiciary Committee may not have carefully considered the ill-effects of *Zahn*. Moreover, the context of § 1367's development suggests that Congress intended to eradicate the very problems created by *Clark* and *Zahn*.

B. The Federal Courts Study Committee Report

The parameters of the supplemental jurisdiction statute were first proposed by the Federal Courts Study Committee (FCSC).[136] Congress established the FCSC to conduct an "institutional" study of the problems facing the federal judiciary and to recommend solutions to these problems by April 2, 1990.[137] Congress specifically charged the FCSC to address the increase in federal court congestion that has "result[ed] in a concomitant decline in access to justice in both our civil and criminal courts."[138] After its 15 month study of the problems facing the federal judiciary, the FCSC issued a report containing a broad range of suggestions to eliminate federal court congestion, delay, and expense. One of these suggestions was the enactment of a supplemental jurisdiction statute which would codify the pre-*Finley* boundaries of ancillary and pendent jurisdiction. Significantly, the FCSC recommended that the statute overrule *Zahn*.[139]

Unfortunately, the Report's anti-diversity slant clouds its proposals for the codification of supplemental jurisdiction. The Report's recommendation to statutorily overrule *Zahn* was overshadowed by its more radical proposal to abolish diversity jurisdiction altogether.[140]

---

136 FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter FCSC REPORT].

137 *See* The Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 102(b)(1)–(3), 105 (1)–(4), 102 Stat. 4642, 4644, 4645 (1988) (charging the FCSC to "examine the problems and issues currently facing the courts of the United States" and to "develop a long-range plan for the future of the Federal judiciary").

138 H.R. REP. No. 101-734, at 16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6861–62.

139 *See infra* text accompanying note 155.

140 FCSC REPORT, *supra* note 136, pt. I, at 14–15, pt. II, 38–42 (the FCSC made exceptions for interpleader suits, suits by and against citizens of foreign countries, and for multi-state complex litigation). For an explanation of why the FCSC may have made an exception for complex multi-state litigation, see Hirschfeld, *supra* note 119, at 129 (noting that federal jurisdiction eliminates difficulties posed by *in personam* jurisdiction to large class actions, reduces repetitive litigation, and encourages uniform rulings).

Indeed, the FCSC branded diversity jurisdiction as one of the chief causes of federal court congestion.

The FCSC's animosity toward diversity stems from the inordinate burdens placed upon federal courts by plaintiffs invoking diversity jurisdiction. According to the Report, diversity cases accounted for almost one of every four cases in district court, one of every two civil trials, and one of every ten appeals.[141] This, it argued, prevented the speedy adjudication of rights and limited the amount of time judges could devote to individual cases. The FCSC also suggested that many of the policy justifications originally supporting the existence of diversity jurisdiction no longer exist.[142]

Although the FCSC regarded the abolition of diversity jurisdiction as the best way to reduce federal court congestion, it realized that Congress would balk at taking such a radical step.[143] Contrary to the FCSC Report, there are still significant policy justifications for diversity jurisdiction. Chief among them is the fact that in certain cases (as in *Clark* or *Zahn*-type scenarios) diversity jurisdiction furthers, rather than hinders, judicial economy.[144] Diversity jurisdiction also provides a "social service" by granting a federal forum to litigants who would otherwise have to endure litigation in more congested state courts.[145] Furthermore, diversity "evens the playing field" by providing a uniform set of procedural rules for in-state and out-of-state attorneys.[146]

Because of likely congressional reticence, the FCSC proposed a "back-up" plan.[147] This secondary option contained four proposals. First, Congress should prohibit plaintiffs from invoking diversity jurisdiction in their home states.[148] Second, Congress should deem corporations citizens of every state in which they are licensed to do business.[149] Currently, corporations, for purposes of jurisdiction, are deemed citizens of the state of their incorporation and of the state (or

141 FCSC REPORT, *supra* note 136, pt. II, at 38–39.

142 *Id.*, pt. II, at 39 (stating that "no other class of cases has a weaker claim on federal judicial resources").

143 Three previous efforts to abolish diversity jurisdiction foundered in Congress. *See* H.R. 9622, 95th Cong. (1978); H.R. 130, 2202, 96th Cong. (1979).

144 *See generally* Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197 (1982).

145 *See* Frank, *supra* note 53, at 406 (referring to diversity jurisdiction as "the oldest single federal social service").

146 *See* David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and Proposal*, 91 HARV. L. REV. 317, 329 (1977).

147 FCSC REPORT, *supra* note 136, pt. II, at 42.

148 *See id.*

149 *See id.*

states) of their principal place of business.[150] The same rationale for prohibiting in-state plaintiffs from invoking diversity applies here: multi-state corporations, which employ the local populace, can hardly complain of a particularly local bias when they are sued in state court.

The FCSC's last two proposals erect obstacles to invoking diversity jurisdiction by making it more difficult for plaintiffs to reach the jurisdictional amount in controversy. The Report recommended that Congress exclude non-economic damages, punitive damages, and attorneys' fees from the calculation of the jurisdictional amount.[151] Thus, only actual damages would count toward satisfying the jurisdiction amount. Finally, the FCSC suggested that Congress raise the amount in controversy requirement from $50,000 to $75,000.[152]

Taken as a whole, the FCSC's findings and proposals reveal two indisputable facts about its assessment of the problems besetting the federal judiciary. First, thanks to diversity jurisdiction, the federal courts are overly congested with state law causes of action. Second, federal judicial resources are being used inefficiently. This second assessment of the state of the federal judiciary best explains the FCSC's proposal to codify the doctrines of ancillary and pendent jurisdiction. The FCSC realized that adjudicating multiple claims in one suit is far preferable to multiplying litigation by hampering the judiciary's ability to exercise ancillary and pendent jurisdiction. Accordingly, the FCSC recommended that Congress overrule *Finley* and codify the doctrines of ancillary and pendent jurisdiction in a supplemental jurisdiction statute.[153]

The FCSC acknowledged that eliminating ancillary and pendent jurisdiction might further its goal of reducing the number of claims in federal court. Nonetheless, it found that the benefits of pendent and ancillary jurisdiction more than compensated for the burden that supplemental claims impose upon the federal courts. The FCSC advocated a rule which would restore the law as it existed before *Finley*. In other words, the FCSC urged Congress to adopt a statute which permitted the joinder of additional parties and which codified the *Gibbs* "common nucleus of operative fact" standard as the basis for federal jurisdiction over related claims and parties.[154]

---

150 *See* 28 U.S.C. § 1332(c)(1) (1994).

151 FCSC REPORT, *supra* note 136, pt. II, at 42.

152 *Id.*

153 *Id.*, pt. II, at 47; *see also id.*, pt. III, at 547 ("By undermining these doctrines the Supreme Court has impeded the efficient use of judicial resources and made the federal courts a less attractive forum in which to bring federal claims.").

154 *Id.*, pt. II, at 47.

Moreover, the FCSC recommended that the supplemental jurisdiction statute overrule the non-aggregation doctrine in *Zahn*. The Report stated that

> [o]ur proposal would overrule the Supreme Court's decision in *Zahn v. International Paper Co.*, which held that each plaintiff in a diversity action must meet the amount in controversy requirement. Although *Zahn* did not discuss pendent jurisdiction, the lower courts have correctly understood it to preclude the joinder of claims for less than the requisite amount in controversy to a claim that satisfies the requirement. . . . From a policy standpoint this decision makes little sense and we recommend that Congress overrule it.[155]

One commentator has suggested that this statement is anomalous and that it was meant to apply only if Congress abolished diversity jurisdiction entirely.[156] The FCSC, though, had good reason to advocate *Zahn*'s demise whether Congress abolished diversity jurisdiction or not. By forcing each plaintiff in a class action (or in a multi-plaintiff suit) to meet the amount in controversy requirement, *Zahn* splinters a single action into countless fragments—creating multiple suits, preclusion problems, and injustice to diversity plaintiffs with valid but jurisdictionally insufficient claims.

After the FCSC issued its Report, Representative Robert Kastenmeier introduced House Bill 5381, which implemented many of the FCSC's proposals. Representative Kastenmeier, who had previously introduced legislation to abolish diversity jurisdiction, also conducted a public hearing on the FCSC's proposals.[157] The anti-diversity tenor of the FCSC Report, as well as Representative Kastenmeier's well-documented anti-diversity bias, may have clouded the Judiciary Committee's views on *Zahn*. The Committee (as well as the Congress as a whole) also may not have had time to carefully consider the implications of retaining *Zahn*. The supplemental jurisdiction statute (which was drafted by three law professors)[158] was hurried

155 *Id.*, pt. III, at 561 n.33.

156 *See* Hirschfeld, *supra* note 119, at 132–33 (arguing that if diversity jurisdiction were eliminated, requiring each plaintiff in a multi-plaintiff action to meet the amount in controversy requirement would be "overkill" since the number of diversity plaintiffs in federal court already would have been reduced to a trickle).

157 *See* H.R. 2202, 96th Cong. (1978). House Bill 2202 was sponsored by Representative Robert Kastenmeier (D-Wisc.) who, as chair of the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, conducted public hearings on the FCSC Report. *See* H.R. REP. No. 101-734, at 15–16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6861.

158 *See* H.R. REP. No. 101-734, at 27 n.13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6873 (thanking "Professors Thomas Mengler, Thomas Rowe, [and] Stephen Burbank" for their assistance).

through Congress in the last days of the 1989-90 Session and never debated in either chamber.[159]

These facts suggest, then, that an anti-diversity bias combined with a busy legislative calendar prevented Congress from carefully considering the unfairness and inefficiencies produced by *Zahn* and so may have led to the Committee's now infamous footnote. It is clear, though, that Congress intended to codify supplemental jurisdiction in order "to deal *economically*—in single rather than multiple litigation—with related matters . . . arising from the same transaction, occurrence, or series of transactions or occurrences."[160] This intent to further judicial economy is simply inconsistent with the Judiciary Committee's purported desire to preserve *Zahn*.

C. Conclusion

In failing to address § 1367's legislative history, as well as the policy and precedent which support the demise *Clark* and *Zahn*, the Fifth and Seventh Circuit opinions offer an inadequate justification for § 1367's abrogation of *Clark* and *Zahn*. The Fifth and Seventh Circuit decisions rise and fall on the textualism of Judges Higginbotham and Easterbrook. Lower courts and other Circuit Courts of Appeals who disagree with the "plain-meaning" canon of statutory interpretation have no compelling reason to accept the holdings of *Abbott Laboratories* and *Stromberg Metal Works*.

This is unfortunate. Congress may not have thought carefully about § 1367's effect on *Clark* and *Zahn*, but, if it had, it might well have advocated the abrogation of those decisions. *Clark* and *Zahn* both produce inefficiencies that clutter the federal and state courts with duplicative litigation. Moreover, both cases hamper the efficient resolution of complex lawsuits. As such, *Clark* and *Zahn* are inconsistent with Congress's laudable desire to reduce court congestion and improve access to federal jurisdiction. A stray footnote to the contrary should not cast doubt on the incompatibility of *Clark* and *Zahn* with that desire.

*Mark C. Cawley**

159 *See* Freer, *supra* note 85, at 470–71 (noting that § 1367 "came to a vote in the last days of the 1990 session, when [Congress] was waging the very public battle of the budget") (footnote omitted).

160 H.R. REP. No. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874 (emphasis added).

* Candidate for Juris Doctor, Notre Dame Law School, 1998; B.A. *cum laude*, University of Notre Dame, 1994. Special thanks are due to Professors Jay Tidmarsh and John H. Robinson for their instruction and advice. This Note is dedicated to my father, for his inspiration, and to my mother, for her unfailing support.