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ANCILLARY JURISDICTION AND THE JURISDICTIONAL AMOUNT REQUIREMENT

I. Introduction

Federal district courts may exercise jurisdiction only to the extent prescribed by Congress and commensurate with the Constitution. The general jurisdictional statutes require that either the cause of action involve a federal question or the parties be citizens of different states and that the matter in controversy exceed a minimum dollar amount.[1] Yet despite these specific legislative restrictions, courts nevertheless adjudicate claims which lack these jurisdictional requisites. Specifically, if a federal court has properly exercised jurisdiction over a suit, it may also adjudicate a claim ancillary to the main suit even though the ancillary claim has no independent jurisdictional basis.

Ancillary jurisdiction reflects a general attitude that once a federal court has jurisdiction over a claim, it should resolve all matters closely related to that claim. Unfortunately, the concept of ancillary jurisdiction represents little more than a collection of discrete situations in which courts have found it necessary and proper to adjudicate additional claims. No significant unifying principle connects the various applications of this concept. In spite of this vague development, however, courts have not been hesitant to formulate general rules as to ancillary jurisdicton. For example, while most courts have held that an ancillary claim in a federal diversity suit needs no independent jurisdictional basis, this general rule has developed primarily in situations where inclusion of additional parties would otherwise destroy diversity of citizenship. There is no corresponding significant case development, though, obviating the other jurisdictional requirement: jurisdictional amount. Thus while courts have held that the qualifying ancillary claim need meet neither the diversity nor jurisdictional amount requirements, the basis for this assumption is questionable as to the jurisdictional amount requirement.

The Federal Rules of Civil Procedure were adopted to liberalize and simplify procedure in the federal courts. Rules as to impleader, interpleader, intervention, cross-claims, and counterclaims define circumstances in which multiple claims can be litigated together. However, claims which might qualify under such rules do not necessarily meet the statutory jurisdictional requirements. Accordingly, the developing concept of ancillary jurisdiction supplied the necessary jurisdictional basis for those multiple claims possessing no independent jurisdictional bases but sufficiently related to those claims over which the court did have jurisdiction. Therefore, while the concept of ancillary jurisdiction apparently did not expand federal court jurisdiction beyond the statutory limits, it did expand the situations in which it could be exercised.

While it may seem preferable to make ancillary claims independent of jurisdictional requirements, recent Supreme Court decisions cast doubt on the validity of a court dispensing with the jurisdictional amount requirement. In

1 28 U.S.C. §§ 1331-1332 (1970).

class actions under Rule 23(b)(3) involving separate and distinct claims of multiple parties, the Supreme Court has held that all parties must meet the jurisdictional amount requirement.[2] This requirement applies even where the federal district court has jurisdiction over some of the multiple claimants.

This note will examine the potential impact of the Supreme Court's emphasis on the jurisdictional amount requirement in Rule 23(b)(3) class suits involving separate and distinct claims and will then consider the effect of that rationale on ancillary jurisdiction as used in the Federal Rules of Civil Procedure.

II. Jurisdictional Amount in Class Suits

The Supreme Court first addressed the applicability of jurisdictional amount to class actions involving separate and distinct claims in *Snyder v. Harris*.[3] The Court held that where no named plaintiff met the jurisdictional amount requirement in a diversity class action, the individual claims of class members could not be aggregated to establish the requisite jurisdictional amount. In *Zahn v. International Paper Co.*,[4] the Court imposed the additional requirement that even where some parties had claims exceeding the jurisdictional minimum, the claim of each class member had to meet the statutory jurisdictional amount in diversity cases. While this judicial development of the jurisdictional amount requirement in diversity class action suits involving separate and distinct claims may be logically sound, the ultimate conclusion rests on at least questionable premises, assumptions, and precedent cases.

A. *The Rationale of* Snyder

In *Snyder v. Harris*,[5] a shareholder brought suit on behalf of herself and other shareholders similarly situated for the excess over fair market value received by members of the board of directors on the sale of their stock. The shareholder's individual claim did not exceed the jurisdictional amount and the Court held that this defect could not be cured by aggregating the claims of all the represented shareholders.

The majority opinion rested its holding on two separate bases: the established judicial interpretation of "matter in controversy" and the burdensome case load of the federal courts.

The first basis relies on both the statutory mandate that the matter in controversy in a diversity suit meet a minimum jurisdictional amount requirement and the judicially developed aggregation doctrine. Where more than one plaintiff brings suit, the aggregation doctrine allows the claims to be considered collectively to satisfy the jurisdictional amount requirement where the claims are joint and common but not where separate and distinct.[6] The Court reasoned as

2 Zahn v. International Paper Co., 414 U.S. 291 (1973).
3 394 U.S. 332 (1969). The majority in *Snyder* felt the Court had already addressed this problem in Clark v. Paul Gray, Inc., 306 U.S. 583 (1939), and this interpretation will be considered later in the note.
4 414 U.S. 291 (1973).
5 394 U.S. 332 (1969).
6 *Id.* at 336-37.

follows: (1) the judicial interpretation of "matter in controversy" precludes the aggregation of separate and distinct claims to meet the jurisdictional amount; (2) aggregation has specifically been disallowed in spurious class actions; (3) Congress has implicitly sanctioned this judicial interpretation of "matter in controversy"; and thus (4) the Court remains powerless to reinterpret "matter in controversy" to allow aggregation of separate and distinct claims in a Rule 23(b)(3) class action.

While the logic is sound, the argument rests on questionable precedent and a tenuous assumption as to legislative intent. The Court noted that *Clark v. Paul Gray, Inc.*[7] extended the aggregation doctrine to class actions under the originally enacted Rule 23.[8] However, nothing in the *Clark* case indicates that the plaintiffs did other than join in bringing the suit. Such weak authority seriously affects the validity of the *Snyder* holding.

The Court also failed to justify its impotence to alter its own "separate and distinct" interpretation of "matter in controversy." This latter defect arises from the Court's assumption as to legislative intent: Since Congress on occasion has amended the jurisdictional dollar amount and yet failed to enact any interpretation of "matter in controversy" contrary to the traditional judicial interpretation, the aggregation doctrine is less judge-made law and more implicit legislation.[9] The dissent notes that silence can also indicate an intention to abstain from interfering with a developing concept.[10] Even if silence did have some significance, Congress' failure to object to the 1966 amendments to Rule 23 at least suggests support for abolishing the "separate and distinct" doctrine as to class actions. The Court emphasized that the jurisdictional amount requirement for separate and distinct claims controls over *any* procedural rules and indeed any rule attempting to change the stated definition of "matter in controversy" would be an expansion of federal jurisdictional boundaries forbidden by Rule 82.[11]

The Court's second basis for its holding was that any change in the aggregation doctrine would defeat the congressional intent to lessen the federal case load.[12] The Court expressed concern that an interpretation of "matter in controversy" allowing this class action would increase the already heavy case load of the federal courts.[13] However, the more probable effect will be to increase the burden on federal as well as state courts since failure to recognize a class action here would cause redundant litigation. Parties dismissed from federal court may bring essentially identical actions in state court; even if a state class action were initiated first, qualifying class members may instead opt to sue in federal court.

Congress has sought to alleviate this case-load burden by periodically increasing the jurisdictional amount requirement. While this tactic affects all

7 306 U.S. 583 (1939).
8 394 U.S. at 336-37.
9 *Id.* at 339.
10 *Id.* at 348.
11 *Id.* at 337-38.
12 *Id.* at 339-40.
13 *Id.*

diversity actions, it is questionable whether it has succeeded.[14] Since this sweeping solution has been ineffective, it is even more questionable whether a jurisdictional amount limitation on the much smaller category of class actions will produce any significant reduction in the federal case load. In 1972, class actions constituted only three percent of the actions pending in federal district courts.[15] Of these, approximately 75 percent were civil rights, antitrust, or securities, commodities and exchange suits.[16] Since most of these were probably based on federal question jurisdiction, it would be reasonable to estimate that less than one percent of pending suits were diversity class actions. While this percentage would increase if aggregation were allowed in diversity class actions, concern over the federal case load would be better served by more comprehensive solutions than restricting diversity class actions.

B. *The Rationale of* Zahn

In *Zahn v. International Paper Co.*,[17] the Court considered the next inevitable situation: a class action involving separate and distinct claims where some but not all claims exceed the jurisdictional amount requirement. The Court, however, considered this additional factor irrelevant and held that in a Rule 23(b)(3) class action, each plaintiff must meet the jurisdictional amount requirement or be dismissed.[18]

The Court first set forth the mandatory legislative framework: diversity cases can be maintained only if the matter in controversy meets the requisite jurisdictional amount. The Court then developed the aggregation doctrine and reiterated two corollaries: (1) where none of the parties satisfy the jurisdictional amount, the claims cannot be aggregated to meet the amount and (2) any party who fails to satisfy the jurisdictional amount requirement must be dismissed, irrespective of whether any other party has met it.

Examining these rules in relation to class actions, the Court noted that most Courts of Appeals had held that in spurious class actions under the original Rule 23, separate and distinct claims could not be aggregated to meet the jurisdictional amount requirement.[19] The Court retreated from its position in *Snyder* by not relying on *Clark v. Paul Gray, Inc.*[20] as the precedential basis for applying the aggregation doctrine to class actions involving separate and distinct claims, only some of which satisfied the jurisdictional amount.[21]

The Court did, however, rely heavily on *Snyder* as to "matter in controversy" and the effect of procedural rules in jurisdictional determinations. It is this reaffirmance of the primary importance of the jurisdictional amount require-

14 *See* address delivered by Honorable Earl Warren, Chief Justice of the United States at the annual meeting of the American Law Institute, 25 F.R.D. 213 (1960).
15 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES, at 187-88 (1972).
16 *Id.*
17 414 U.S. 291 (1973).
18 *Id.* at 301.
19 *Id.* 296-98.
20 306 U.S. 583 (1939).
21 The Court cites the *Clark* case only in support of the aggregation doctrine as to separate and distinct claims and not as an expansion of the doctrine into class actions.

ment that may have the most far-reaching effects. The Court implied that no Supreme Court precedent exists for the situation where some class members asserting separate and distinct claims do and others do not meet the jurisdictional amount. Consequently, it reconstructs "matter in controversy" and its aggregation doctrine, fully endorses the *Snyder* development of these concepts, and most importantly denies the relevance of procedural rules in jurisdictional determinations.

Arguably, the *Zahn* holding will not greatly decrease the federal case load since, as in the *Zahn* case itself, those parties satisfying the jurisdictional amount requirement may choose to remain in federal court. The only benefit would be somewhat less complicated litigation.

The Court seems to suggest more than that the amendment to Rule 23 does not change the aggregation doctrine as to separate and distinct claims in class actions. It additionally notes that the aggregation doctrine does not rely on any rule of procedure, despite the fact that procedural rules have often defined the context in which jurisdiction would be applicable.

Zahn factually presents a Rule 23(b)(3) class action. Since the Court so easily dismisses the relevance of this procedural categorization, however, it suggests that other multiparty procedural devices that unite separate and distinct claims may be subject to re-examination.

III. Ancillary Jurisdiction Consequences

The majority opinion in *Zahn* conspicuously refrained from any reference to ancillary jurisdiction, despite strong dissent in the Court of Appeals and by Justice Brennan supporting its application. The omission follows from the Court's reliance on a traditionally strict interpretation of "matter in controversy" and its sensitive awareness of the jurisdictional restrictions imposed by Rule 82: Neither Rule 23 nor any other procedural rule can extend federal court jurisdiction by circumventing the "matter in controversy" requirement. The application of ancillary jurisdiction would arguably contradict the Rule 82 mandate and thus present a problem which the majority apparently was not prepared to discuss.

Ancillary jurisdiction rests on the theory that a court assumes jurisdiction over the facts which constitute the plaintiff's claim and that the court therefore has jurisdiction over any additional claims springing from those facts.[22] Despite its conceptual appeal, however, this theory fails to establish the limits to a court's exercise of ancillary jurisdiction. As the core of facts grows, so does the concept of ancillary jurisdiction. Ultimately, the continued growth of ancillary jurisdiction would encroach upon express statutory restrictions on federal court jurisdiction. Perhaps *Zahn* is most important as an indication of the Supreme Court's concern that a growing concept of ancillary jurisdiction would conflict with specific statutory limitations on federal court jurisdiction.

Counterpoised, then, are the general statements that no independent

22 Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

jurisdictional grounds are required for a claim ancillary to a suit over which the court has jurisdiction and the jurisdictional requirement that separate and distinct claims must individually satisfy the jurisdictional amount requirement. The *Zahn* rationale suggests that the latter succeed over the former.

It should be noted that where applicable, the diversity of citizenship requirement arises from the Constitution itself.[23] Consequently, since it can be neither avoided nor easily changed, courts have given a broad interpretation to the diversity requirement. However, the jurisdictional amount requirement has been imposed by Congress to regulate the workload of the federal courts. Consequently, the courts have tended to read this part of the total jurisdictional requirement more narrowly. Indeed, the Court in *Zahn* suggests that the irrelevance of independent jurisdictional grounds once ancillary jurisdiction has been established applies only to the diversity requirement and that the "matter in controversy" restriction still requires that separate and distinct claims must meet the requisite jurisdictional amount. Even where the court has jurisdiction over some of the claims, if the claims are separate and distinct within the meaning of *Zahn,* proper jurisdiction demands satisfaction of the "matter in controversy" requirements irrespective of any procedural rules.[24]

If the jurisdictional amount requirement overrides any procedural rule, it necessarily overrides the jurisdictional justification for these rules: ancillary jurisdiction. In situations where ancillary jurisdiction would otherwise appear to apply, it may now be tempered by the jurisdictional amount requirement. While ancillary jurisdiction may obviate the necessity for diversity of citizenship, the matter in controversy requirement has been reaffirmed as an independent and apparently indispensable requirement.

Logical consistency would require that the Supreme Court's rationale in *Zahn* be applied to analogous situations in which ancillary jurisdiction is used to alleviate the jurisdictional amount requirement. This note will consider the possible extension of the *Zahn* rationale to five of the Federal Rules of Civil Procedure: (1) Intervention (Rule 24), (2) Impleader (Rule 14(a)), (3) Cross-Claims (Rule 13(g)), (4) Compulsory Counterclaims (Rule 13(a)), and (5) Interpleader (Rule 22).

A. *Intervention*

Intervention allows one to become party to a suit which had not originally included him. Rule 24(a)(2) gives an applicant the "right" to intervene where he has both an inadequately represented interest in the action and the possibility that disposition of the action will, as a practical matter, impair or impede his ability to protect that interest. Rule 24(b)(2) allows "permissive" intervention where the applicant's claim or defense and the main action have a common question of law or fact.

Traditionally, the necessary jurisdictional basis depended on whether the intervention was permissive or of right.[25] Most courts hold that since permissive

23 U.S. CONST. art. III, § 2.
24 414 U.S. at 299-300.
25 C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 75, at 327 (2d ed. 1970).

intervention has merely a common question of law or fact to link it with the main action, it must be supported by independent jurisdictional grounds.[26] A few courts, however, have required no independent jurisdictional grounds for permissive intervention.[27] Since permissive intervention, like Rule 23(b)(3) class actions, rests on only common questions of law or fact, the claims would by nature almost always be separate and distinct, requiring that the intervenor independently meet the jurisdictional amount requirement.

Ancillary jurisdiction has supported intervention of right primarily in situations involving the destruction of diversity by an intervenor.[28] Thus while little attention centered on the jurisdictional amount requirement, generalizations arose that once an intervenor's claim qualified as ancillary to the main action, no other independent jurisdictional grounds were required. These two procedural devices differ in that a class action allows representative parties to bring suit on behalf of numerous parties with appropriately related claims, whereas intervention of right allows certain claimants to become party to a suit not already including them. For analysis purposes, however, the common denominator between a Rule 23(b)(3) class action and intervention of right under Rule 24(a)(2) will be a multiparty suit involving separate and distinct claims, some of which come within the jurisdiction of the court and some of which fail to meet the jurisdictional amount requirement.

While no clear line of cases has specifically addressed the jurisdictional amount requirement for intervention of right under amended Rule 24(a)(2), independent jurisdictional grounds were not required for pre-amendment intervention of right.[29] Intervention of right was deemed to come within the ancillary jurisdiction of the court since by its nature it involved a claim or defense clearly related to the main claim. However, since the Court in *Zahn* felt so strongly bound by Rule 82 forbidding procedural expansion of jurisdiction and myopically focused on joint and common as compared to separate and distinct claims in a multiparty litigation, an applicant qualifying for the right to intervene may also have to establish the requisite jurisdictional amount.

The conflict will arise whenever the requirements for intervention of right vary from those for determining whether claims are joint and common rather than separate and distinct. Even though an intervenor may have a claim separate and distinct from the main action, he may still have a sufficient "interest" in the transaction to qualify for the first requirement of intervention of right. Additionally, the second requirement that the disposition of the matter may impair or impede the applicant's ability to protect the interest has been held to include even

26 *See, e.g.*, Hunt Tool Co. v. Moore, Inc., 212 F.2d 685 (5th Cir. 1954).
27 *See* Northeast Clackamas County Electric Co-operative, Inc. v. Continental Casualty Co., 221 F.2d 329 (9th Cir. 1955) (where the court noted that while intervention of right had been established, permissive intervention would also have been appropriate); United States v. Local 638, Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning and General Pipefitters, 347 F. Supp. 164 (S.D.N.Y. 1972) (noting that the Supreme Court has not yet decided when permissive intervention may be allowed in the absence of independent jurisdictional basis).
28 *See, e.g.*, Black v. Texas Employers Insurance Ass'n, 326 F.2d 603 (10th Cir. 1964).
29 *See, e.g.*, Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960).

stare decisis effect;[30] a judgment could easily have this effect on a common question of law or fact in a separate and distinct claim.

Assuming, then, that the applicant's interest is not adequately represented, an applicant with a claim separate and distinct from the main action might qualify for intervention of right. For example, intervention of right has been acknowledged in a class suit initiated for the fraudulent sale of short-term commercial paper by a broker where additional parties representing holders of short term senior paper and long-term debt of the issuer sought to intervene in the class.[31] While the court refused to allow intervention into the existing class since their interests were conflicting, it noted that the additional parties could intervene of right as a separate class under Rule 24(a)(2).[32] More simply, in a suit against a broker on the sale of commercial paper, holders of debts and other commercial paper of the issuer were recognized as having the right to intervene even though their actions were based on separate instruments and transactions, representing separate and distinct claims. Assuming additionally, then, that none of the intervenors' claims exceeded the required jurisdictional amount, the same procedural questions that faced the Court in *Zahn* may typically occur in the context of intervention of right: separate and distinct claims, only some of which meet the requisite jurisdictional amount.

Following the *Zahn* rationale, if parties cannot participate in a class action of separate and distinct claims unless they meet the jurisdictional amount requirement, there seems little reason to allow parties to intervene with separate and distinct claims unless they too satisfy the minimum jurisdictional amount.[33] Just as the practical categorizations of amended Rule 23 now have no jurisdictionally determinative force where the claims are separate and distinct, the right or permissive classification as to intervention would seem equally unimportant as to such claims. Consequently, the right/permissive distinction, while the very structural basis of Rule 24, may be meaningful only as to the diversity of citizenship requirement. Rather than the law evolving to mitre procedural and jurisdictional categorizations, the consequence of *Zahn* may be to further attenuate any meaningful relation between the two.

B. *Impleader*

Impleader, or third party practice as it is called in Rule 14, permits a defendant to bring in as a third party defendant one he claims is liable to him for all or part of the plaintiff's claim against him.[34] Additionally, Rule 14 allows a

30 *See, e.g.*, Dudley v. Southeastern Factor & Finance Corp., 57 F.R.D. 177 (N.D. Ga. 1972).

31 Sanders v. John Nuveen & Co., Inc., 463 F.2d 1075 (7th Cir. 1972).

32 *Id.* at 1082.

33 The dissent in *Zahn* noted that ". . . the practical reasons for permitting adjudication of the claims of the entire class are certainly as strong as those supporting ancillary jurisdiction over . . . parties that are entitled to intervene as of right." Zahn v. International Paper Co., 414 U.S. 291, at 307 (1973). If there is any merit to this contention, it could also be asked whether individual jurisdictional amount requirements imposed on an entire class would also be a requirement in determining ancillary jurisdiction over intervention of right.

34 FED. R. CIV. P. 14 provides in part:

> '(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons

plaintiff to implead in response to a counterclaim and an impleaded party to implead another in response to the third party claim.

Jurisdiction over the impleaded party and over the new claims generated by the addition of the new party has consistently been based on ancillary jurisdiction, usually without inquiry as to whether independent jurisdictional bases would support the addition of the new party.[35] The inclusion of a third party defendant may well entail the joinder of new claims. Not only does Rule 14 provide that each party is entitled to assert claims against the impleaded party, but also that the impleaded party may assert claims against the third party plaintiff, the original plaintiff, and any other impleaded party.

Whether the *Zahn* rationale should be extended to this particular third party practice must be considered with respect to each type of claim which may arise from the impleader procedure: (1) the third party plaintiff's claim against the third party defendant; (2) the plaintiff's claims against the third party defendant; (3) the third party defendant's claims against the plaintiff; and (4) joinder of claims by the third party plaintiff against the third party defendant.

1. Third Party Plaintiff's Claims Against Third Party Defendant

The third party plaintiff's claim against the third party defendant in the impleader procedure clearly relies on ancillary jurisdiction as a jurisdictional basis.[36] In *Zahn,* where the claims were separate and distinct, the Court required that each of the claimants satisfy the statutorily determined amount in controversy, regardless of ancillary jurisdiction. Whether the *Zahn* rationale could be said to apply to the claim of a third party plaintiff against a third party defendant depends on the interpretation of "separate and distinct" as used by the Supreme Court.

There are several ways in which a third party plaintiff's claim against a third party defendant might be considered separate and distinct from the plaintiff's original claim. Rule 14 does not require the assertion of a third party claim in the same suit, but allows the defendant to assert his claim against the third party defendant in a separate action, if he prefers.[37] In fact, the court has

> and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. . . . A third party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third party defendant. . . .
>
> (b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

35 *See, e.g.,* Sheppard v. Atlantic States Gas Co., 167 F.2d 841 (3d Cir. 1948); Williams v. Keyes, 125 F.2d 208 (5th Cir. 1942); Lankford v. Ryder Truck System, Inc., 41 F.R.D. 430 (D.S.C. 1967); Berkey v. Rockwell Spring & Axle Company, 162 F. Supp. 493 (W.D. Pa. 1958).

36 *See, e.g.,* Lewis v. United Air Lines Transport Corporation, 29 F. Supp. 112 (D. Conn. 1939); Satink v. Holland Tp., 28 F. Supp. 67 (D.N.J. 1939); Tullgren v. Jasper, 27 F. Supp. 413 (D.Md. 1939).

37 *See, e.g.,* Union Paving Co. v. Thomas, 9 F.R.D. 612 (D. Pa. 1949).

the discretion not to allow the impleader of a third party, thereby requiring that it be brought in a separate action, if at all.[38] Obviously then, the impleader action may be sufficiently distinct to allow a separate trial of that claim and to compel a separate action if the possibility of prejudice outweighs the benefits of judicial economy. Morever, the third party claim may be based on a theory entirely separate from that of the original claim: for example, where contractual indemnity is sought for liability in a tort action.[39] In such a case the two claims are separate and distinct at least with regard to the theory on which recovery is sought.

In other respects, however, such claims may not be properly considered "separate and distinct." Impleader is available only against a third person "who is or may be liable" to the defendant for all or part of the plaintiff's claim against him.[40] Inasmuch as the third party plaintiff's claim against the third party defendant is based upon the anticipated liability of the third party plaintiff to the original plaintiff, the two claims may not be regarded as entirely separate and distinct. Post-*Zahn* characterization of "separate and distinct" is thus crucial in determining whether the rationale of that case should logically be applied to a third party plaintiff's claim against a third party defendant. If the impleaded claim is deemed "separate and distinct," *Zahn* would seem to indicate that such a claim must be held to the statutory requirement as to jurisdictional amount.

2. Plaintiff's Claims Against Third Party Defendant

Rule 14 also allows the plaintiff to assert any claim against the third party defendant which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff.[41] Here the question of whether the *Zahn* rationale precludes the use of ancillary jurisdiction is moot since the courts have imposed the requirement that such claims must be based on independent jurisdictional grounds.[42] The reason usually given for this is the fear of collusion between the plaintiff and third party plaintiff to allow the plaintiff to sue the third party defendant indirectly when he would not have had jurisdiction to sue him directly.[43] Thus the jurisdictional requirement as to amount in controversy is enforced for reasons distinct from the *Zahn* rationale.

3. Third Party Defendant's Claims Against Plaintiff

A third party defendant's claims against the plaintiff are similarly allowed by Rule 14 where the claims arise out of the transaction or occurrence that is the

38 *See, e.g.*, Somportex Limited v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); United States v. Acord, 209 F.2d 709 (10th Cir. 1954), *cert. denied*, 347 U.S. 975 (1954); Greene v. Kitner, 279 F. Supp. 745 (M.D. Pa. 1968).

39 *See, e.g.*, Travelers Insurance Co. v. Busy Electric Co., 294 F.2d 139 (5th Cir. 1961).

40 *See* note 34 *supra*.

41 *Id.*

42 *See, e.g.*, McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960); Schwab v. Erie Lackawanna Railroad Company, 303 F. Supp. 1398 (W.D. Pa. 1969).

43 *See, e.g.*, Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305 (E.D.N.Y. 1941).

subject matter of the plaintiff's original claim against the third party plaintiff.[44] The rule apparently characterizes these claims as ancillary to the plaintiff's original claim. Yet the courts are split as to whether a claim of this type falls within the courts' ancillary jurisdiction or whether the added claim requires an independent jurisdictional basis. Some courts have required an independent jurisdictional basis simply because the plaintiff would have to show independent grounds of jurisdiction for any claims against the third party defendant.[45] Other courts have rejected the "quasi-mutuality argument" in favor of allowing ancillary jurisdiction.[46]

The latter view is the more cogent. Assume that A sues B and B impleads C. If A would not have had subject matter jurisdiction in a suit directly against C, then A could bring a collusive action against B merely to have B implead C. Once added as a party, ancillary jurisdiction would allow A to assert his claims against C, thereby allowing A to do indirectly what he could not do directly. Thus the courts, as a protective measure, require that for every claim by A against C in an impleader action, such claim must be supported by independent jurisdictional bases.

These reasons, however, do not support a denial of ancillary jurisdiction for C's claims against A. The possibility of collusion seems remote since there is little likelihood that a third party defendant could (a) find a suit in which the would-be adversary is suing a defendant who would implead the third party defendant and (b) have a claim against the plaintiff that arises out of the same transaction or occurrence that is the subject matter of the original claim. In other words, the possibility of collusion to make such a claim is so remote that there is little reason not to utilize ancillary jurisdiction.

Where ancillary jurisdiction is held to support the third party defendant's claims against the plaintiff, however, the *Zahn* rationale should find application. Such a claim may often be regarded as separate and distinct from the plaintiff's claim against the third party plaintiff, despite the fact that it must have arisen from the same transaction or occurrence as the plaintiff's claim.[47] If such a claim by the third party defendant against the plaintiff is "separate and distinct" within the meaning of *Zahn*, then it is inconsistent with *Zahn* to allow ancillary jurisdiction to circumvent the statutory requirement as to amount in controversy.

4. Joinder of Claims by Third Party Plaintiff

Finally, it should be noted that Rule 18(a) allows a third party plaintiff to join as many claims as he has against a third party defendant. Courts have held that ancillary jurisdiction applies to such claims where they arise out of the same transaction or occurrence as the plaintiff's claim against the third party

44 *See* note 34 *supra.*
45 *See, e.g.,* Shverha v. Maryland Cas. Co., 110 F. Supp. 173 (E.D. Pa. 1953).
46 *See, e.g.,* Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970).
47 In the section dealing with "Counterclaims" *infra,* it is argued that two claims may be separate and distinct despite the fact that they both arise from the same transaction or occurrence.

plaintiff.[48] In other words, ancillary jurisdiction is used not only to support the third party plaintiff's claim that the third party defendant is liable to him for any damages owed to the original plaintiff, but also to support the joinder of any other claims arising out of the same transaction or occurrence. It may be argued that such claims are separate and distinct despite the fact that they arise out of the same transaction or occurrence.[49] If so, then the situation closely approximates that in *Zahn,* and would thus render each claim subject to the jurisdictional amount requirement regardless of ancillary jurisdiction.[50]

C. *Cross-Claims*

Cross-claims allow the adjudication of multiple claims in a multiparty suit. Rule 13(g) allows a party to assert against a coparty a claim which arises out of the transaction or occurrence that is the subject matter of the original claim or a counterclaim, or relates to any property that is the subject matter of the original action or of a counterclaim thereto.[51] Cross-claims which qualify under this latter provision may also be deemed separate and distinct since a cross-claim founded solely on the property involved in the action need not relate to the right asserted in either the original claim or counterclaim. Where Rule 13(g) allows the assertion of cross-claims which may be considered separate and distinct from the plaintiff's original claim within the meaning of *Zahn,* the Supreme Court's rationale in that case would once again seem to find application.

Most courts have considered cross-claims to be within their ancillary jurisdiction and thus have not required independent jurisdictional bases.[52] While most of these cases have addressed the issue with regard to the diversity requirement, ancillary jurisdiction has also been upheld where the jurisdictional amount requirement was lacking. In *Coastal Air Lines v. Dockery,*[53] Coastal had leased an aircraft from Dockery with an option to buy. The plane was insured by Rhode Island Insurance Company. When the aircraft was destroyed in a crash, Dockery agreed to settle with Coastal for the purchase price. Dockery then sued the insurance company to recover on the policy and the insurance company inter-

48 *See, e.g.,* Crompton-Richmond Co., Inc., Factors v. United States, 273 F. Supp. 219 (S.D.N.Y. 1967).

49 *See* note 47 *supra.*

50 There is, of course, a distinction. In *Zahn* the complainants sought jurisdiction over additional parties, whereas the issue here involves jurisdiction over additional claims of parties already within the court's jurisdiction. But the distinction lacks merit. In *Zahn* the Court was faced with the duty of adjudicating the rights of the class as a class, not as individuals. So the number of people to be included in the class was irrelevant. The Court's concern was not with the complexity of the suit, but with the statutory requirement as to amount in controversy. This remains a concern where ancillary jurisdiction is used to allow the joinder of claims in circumvention of statutory requirements.

51 FED. R. CIV. P. 13(g) provides:

> Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

52 *See, e.g.,* Childress v. Cook, 245 F.2d 798 (5th Cir. 1957).

53 180 F.2d 874 (8th Cir. 1950).

pleaded Dockery and Coastal. Dockery cross-claimed against Coastal for rent due under the lease. The rent claimed was well below the $10,000 requirement. Yet the Eighth Circuit found that "cross-claims permitted by the Federal Rules of Civil Procedure are regarded as ancillary to the principal claim to which they are related and need not involve the jurisdictional sum necessary in an original or independent action in District Court."[54] In other words, the cross-claim for rent, though separate and distinct from the claim on the insurance policy, was considered ancillary to the insurance claim and thus did not fail for lack of jurisdictional amount.

Apparently the pre-*Zahn* courts assumed that the jurisdictional amount requirement was eliminated by ancillary jurisdiction in Rule 13(g) cases. The rule specifies that the cross-claimant may assert that the coparty is liable for part of the claim asserted against the cross-claimant.[55] "Part" of the claim against the cross-claimant obviously might include amounts less than $10,000, yet Rule 13(g) does not mention the jurisdictional amount requirement as a qualification of the rule. In other words, Rule 13(g) seems to require the use of ancillary jurisdiction to enable a court to adjudicate cross-claims of less than $10,000. This mandate of Rule 13(g) stands in juxtaposition with the Supreme Court's decision in *Zahn* that rules of procedure may not be used to circumvent the statutorily required amount.

D. *Compulsory Counterclaims*

A compulsory counterclaim is a claim which the defendant is *required* to assert against the plaintiff.[56] If the counterclaim is not asserted in the same suit as the plaintiff's claim against the defendant, the defendant's claim is forever lost. The penalty is thus fashioned to implement the purpose of the federal rules: to avoid multiple litigation by the adjudication in a single suit of closely related claims.

A counterclaim is compulsory under the federal rules where it arises out of the transaction or occurrence which is the subject of the opposing party's claim. There has been no successful attempt to define the meaning of the words "transaction or occurrence." However, several interpretations have been suggested, the most widely accepted of which appears in the landmark case, *Moore v. New York Cotton Exchange*:[57] " 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."[58] In other words, claims may be considered to have arisen out of the same transaction or occurrence if they pass the "logical relationship" test. The words "logical rela-

54 *Id.* at 877.
55 *See* note 51 *supra.*
56 FED. R. CIV. P. 13(a) provides in part:
> Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

57 270 U.S. 593 (1926).
58 *Id.* at 610.

tionship" are as much in need of definition as is the phrase "transaction or occurrence." Again these words have received vague interpretation rather than definition. Claims are deemed to have a logical relationship if they arise "out of the same aggregate of operative facts as the original claim."[59] And so the courts continue to interpret the meaning of Rule 13(a) without ever establishing definitional limitations of the words "transaction or occurrence."

There is universal agreement that ancillary jurisdiction applies to compulsory counterclaims.[60] This unanimity results from an acknowledgment that ancillary jurisdiction applies to the very circumstance which makes a counterclaim compulsory:

> The issue of the existence of ancillary jurisdiction and the issue as to whether a counterclaim is compulsory are to be answered by the same test. It is not a coincidence that the same considerations that determine whether a counterclaim is compulsory decide also whether the court has ancillary jurisdiction to adjudicate it. The tests are the same because Rule 13(a) and the doctrine of ancillary jurisdiction are designed to abolish the same evil, viz., piecemeal litigation in the federal courts.[61]

More simply, the purpose of ancillary jurisdiction is to allow a court in a single action to adjudicate claims which arise from the same "transaction or occurrence." Since a counterclaim is compulsory when it arises from the same transaction or occurrence as the original claim, ancillary jurisdiction finds perfect application to compulsory counterclaims. Ancillary jurisdiction thus enables Rule 13(a) to compel counterclaims without regard to whether the statutory requirements for jurisdiction have been met.

Since ancillary jurisdiction is applied to claims arising out of a given transaction or occurrence, a more liberal interpretation of "transaction or occurrence" results in the inclusion of more claims and a corresponding growth in the concept of ancillary jurisdiction. In other words, as the meaning of "transaction or occurrence" is expanded, so is the application of ancillary jurisdiction. To the extent that no definitional limitations have been put on the logical relationship test, neither have the limitations of ancillary jurisdiction been established. The concept has thus been appropriately labelled "amorphous."[62]

Despite the fact that the plaintiff's claim and a compulsory counterclaim arise out of the same transaction or occurrence, in some respects they may be separate and distinct. The two claims may be based on separate theories of recovery and require different elements of proof. For example, in *United States v. Rogers & Rogers*[63] the plaintiff sued the defendant to recover the purchase price of concrete. The defendant counterclaimed that the concrete was used negligently. The district court found the counterclaim to be compulsory, despite

59 Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970).

60 *See, e.g.*, United States v. Heyward-Robinson Co., Inc., 430 F.2d 1077 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

61 Great Lakes Rubber Corporation v. Herbert Cooper Co., 286 F.2d 631, 633-34 (3d Cir. 1961).

62 53 HARV. L. REV. 449, 458 (1940).

63 161 F. Supp. 132 (S.D.Cal. 1958).

the fact that the counterclaim was founded on negligence and the original claim was grounded in contract. The two claims thus presented separate and distinct legal theories of recovery although they arose from common facts.

One might object that it is contradictory to assert, first, that two claims share a common origin and, second, that they are also separate and distinct from each other. Yet this anomalous result necessarily flows from the *Zahn* decision. In *Zahn,* the claims sought to be asserted were adjudged separate and distinct even though they arose out of the same transaction or series of transactions[64] and bore a logical relation to one another. It follows, then, that in other situations claims might be found to be separate and distinct within the meaning of *Zahn* even though they arise out of the same transaction or occurrence. If the result is anomalous, the Supreme Court has authored the anomaly.

If counterclaims are determined to be separate and distinct from the original claim in Rule 13(a) cases, *Zahn* would indicate that each of these counterclaims must meet the jurisdictional amount requirement. If the Supreme Court's refusal in *Zahn* to use ancillary jurisdiction is to be regarded the rule, then ancillary jurisdiction may not always be used to circumvent the jurisdictional amount requirement as to compulsory counterclaims. The federal courts may in some situations lack power to exercise jurisdiction over counterclaims unless the amount in controversy as to each counterclaim exceeds $10,000.

E. *Interpleader*

Interpleader is the procedure which allows a plaintiff to join as defendants two or more persons having claims which must be satisfied out of a fund held by the plaintiff.[65] Interpleader requires that the claimants litigate among themselves in order to determine the manner in which the fund is to be distributed.

The purpose of interpleader was originally to protect the stakeholder from multiple liability beyond the amount of the fund. It has since been acknowledged that the interpleader device protects the claimants as well:

> Were an insurance company required to await reduction of claims to judgment, the first claimant to obtain such a judgment or to negotiate a settlement might appropriate all or a disproportionate slice of the fund before his fellow claimants were able to establish their claims. The difficulties such a race to judgment pose for the insurer, and the unfairness which may result to some claimants, were among the principal evils the interpleader device was intended to remedy.[66]

64 "Transaction" has been held to include a series of transactions. G & M Tire Co. v. Dunlop Tire & Rubber Corp., 36 F.R.D. 440, 441 (N.D. Miss. 1964).

65 FED. R. CIV. P. 22(1) provides:

> Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

66 State Farm Fire & Cas. Company v. Tashire, 386 U.S. 523, 533 (1967).

Interpleader is available under either of two provisions: 28 U.S.C. § 1335 or Rule 22 of the Federal Rules of Civil Procedure.[67] Rule 22 interpleader is subject to the same statutory requirements for jurisdiction as are the other federal rules.[68]

Though ancillary jurisdiction has been applied to Rule 22 interpleader in lieu of the diversity requirement,[69] it has never been used to circumvent the requirement as to amount in controversy. Ancillary jurisdiction has not been needed to handle the situation in which one of the claimants is claiming less than the amount specified by statute since the amount in controversy is deemed to be the entire fund rather than each individual claim: "In interpleader actions under Rule 22, the matter in controversy is measured by the fund to be distributed as stated by the plaintiff."[70]

It would seem logical in an interpleader action that the amount in controversy should be the total fund to be distributed among the claimants. However, the *Zahn* rationale seems to require that the amount in controversy be determined as to each claimant, necessitating the dismissal of any claim which failed to meet the requisite jurisdictional amount. Such a requirement would not only be impractical but would also defeat the purpose of Rule 22.

For example, assume that the fund is $15,000. If one claimant seeks damages of $15,000 whereas the other claimants have been injured only to the amount of $9,000 apiece, then *Zahn* would require that the federal court accept only the single claim for $15,000. If the full amount were awarded to the single claimant, there would be manifest injustice to other claimants having valid claims to portions of the fund, but who could not get into federal court for lack of jurisdiction. The result would be multiple litigation and disproportionate distribution of the fund, the very evil Rule 22 is designed to remedy.[71]

Rule 22 allows the joinder of claimants though their claims do not have a "common origin" and even though the claims are "independent of one another."[72] In other words, Rule 22 specifically recognizes separate and distinct claims. A strict application of the *Zahn* rationale to Rule 22 would result in the conclusion that each of the claimants in an action for interpleader must claim more than $10,000 before a federal court will have jurisdiction over the claim. Thus, where there are numerous small claims to a limited fund in excess of $10,000, *Zahn* would deny Rule 22 interpleader on jurisdictional grounds.

Perhaps it is not a valid objection that the *Zahn* rationale would defeat the purpose of Rule 22. It would have seemed that Rule 23 class action procedure contemplates that the amount in controversy should be determined to be the damage done to the class. Yet the Supreme Court required that each claimant meet the jurisdictional amount requirement as to each individual claim.

67 *See* note 65 *supra.*

68 *See, e.g.,* Underwriters at Lloyd's v. Nichols, 363 F.2d 357 (8th Cir. 1966).

69 Where a disinterested stakeholder brought an interpleader action against two alien claimants under Rule 22 and the diversity statute, ancillary jurisdiction was granted over the dispute between the aliens when the stakeholder deposited the fund and was discharged. Republic of China v. American Express Co., 195 F.2d 230 (2d Cir. 1951).

70 United Benefit Life Insurance Company v. Leech, 326 F. Supp. 598, 600 (E.D. Pa. 1971).

71 *See* note 66 *supra.*

72 *See* note 65 *supra.*

Both Rule 22 and Rule 23 would appear to be designed to reduce multiple and vexatious litigation. Yet the Supreme Court in *Zahn* left the defendant exposed to multiple liability from members of the class who were damaged but whose claims were not large enough to merit cognizance in federal court. If the Supreme Court remained unswayed by the possibility of multiple litigation in Rule 23 procedures, there seems little reason to believe that this argument would be persuasive in a Rule 22 procedure.

But strict logic here operates to achieve a most unacceptable result. Rule 22 interpleader, a procedure which seeks to achieve a commendable result, could conceivably be bound by a narrow interpretation of amount in controversy. In effect, the logical extension of *Zahn* could cripple Rule 22 interpleader.

IV. Conclusion

Ancillary jurisdiction allows a court to adjudicate in a single action all closely related parties and claims.[73] In allowing or compelling claims which arise from a common origin or the same transaction or occurrence, the federal rules address the same situation which ancillary jurisdiction is designed to support.[74] Practical considerations of judicial efficiency require that a court adjudicate all closely related claims at the same time. Commonsense considerations require the use of ancillary jurisdiction to effect these objectives where jurisdictional requirements would otherwise pose a barrier.

The federal rules have stimulated the liberal use of ancillary jurisdiction.[75] This trend toward ancillary jurisdiction has continued since the adoption of the federal rules in 1938. Absent specific limitations, the words "transaction or occurrence" have received an increasingly broad interpretation. The concept of ancillary jurisdiction, therefore, has grown to facilitate the increasingly liberal interpretations of the federal rules. If the concept is indeed amorphous, it is so of necessity.

The Supreme Court in *Zahn* may well have recognized the likelihood of a collision between ancillary jurisdiction and a congressional decree designed to limit jurisdiction. The majority opinion in *Zahn* did not directly deal with the problem of ancillary jurisdiction, despite the dissents by Justice Brennan and Judge Timbers in the Court of Appeals' decision, both of which recommended its application. The majority opinion did, however, deal with the concept at least indirectly in its refusal to use ancillary jurisdiction in what appeared to be a traditionally appropriate situation. Furthermore, in insisting that rules of procedure could not be used to obviate the statutory requirement as to amount in controversy, the Court implicitly limited the jurisdictional basis for these procedural rules.

Zahn leaves us with a problem as to other procedural devices which are subject to the jurisdictional amount statutes. The federal rules described above recognize claims to which the *Zahn* rationale might be applied. Logical con-

73 C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 76, at 336 (2d ed. 1970).
74 *See* note 61 *supra*.
75 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 23, at 95 (Rules Ed. 1960).

sistency would require the extension of the reasoning in *Zahn* to analogous situations. However, such an extension, though logically consistent with the rationale used in *Zahn,* should not and probably will not be realized.

The rationale of *Zahn* may well undercut the concept of ancillary jurisdiction and thus severely limit the use of those federal procedural rules dependent upon ancillary jurisdiction. This inevitably results from the conflict between the statutory jurisdictional amount requirement which limits jurisdiction and the concept of ancillary jurisdiction which supports a more expansive interpretation of jurisdiction. The Supreme Court has bowed to the legislative mandate. Consequently, any solution to this problem must come from Congress.[76] Additionally, a legislative reappraisal of "matter in controversy" would allow courts to continue the development of the necessary yet amorphous concept of ancillary jurisdiction.

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76 It should be noted that a bill was proposed in the House of Representatives on July 29, 1974, which would amend Title 28 of the United States Code to permit the cumulation of amounts in controversy as between members of a class for the purposes of United States district court jurisdiction in class actions. The proposed bill is currently under scrutiny by the Committee on the Judiciary. *See* H.R. 16152, 93d Cong., 2d Sess. (1974).

If the consequences of the *Zahn* decision are sought to be overturned by congressional decree. it seems unlikely that the rationale of that case would be willingly extended to other procedural devices.