ZAHN—THE FREEZE ON FEDERAL JURISDICTION

In *Zahn v. International Paper Co.*,[1] the Supreme Court held that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case."[2] The decision clearly will reduce the number of class actions brought under Rule 23(b)(3).[3] The true significance of the case, however, lies in its impact on the law of federal jurisdiction in general.

This Note will examine that impact. Specifically, it will analyze the effect of *Zahn* on the law of federal jurisdiction in cases involving general federal questions, multiple claims, ancillary claims, and cases involving removal from state to federal court.

I. BACKGROUND TO *Zahn*

To bring an action in federal court, the statutory prerequisites to federal jurisdiction must be satisfied.[4] If jurisdiction is based on a general federal question[5] or diversity of citizenship,[6] the jurisdictional statutes

1. 414 U.S. 291 (1973). Petitioners alleged that International Paper Company had polluted Lake Champlain, and sought damages on behalf of themselves and other named and unnamed lakefront property owners. Petitioners' motion for certification of the action as a Rule 23(b)(3) class action was denied, 53 F.R.D. 430 (D. Vt. 1971), and on interlocutory appeal the denial was affirmed by a divided court of appeals. Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972). The Supreme Court affirmed. 414 U.S. 291 (1973).

2. 414 U.S. at 301.

3. FED. R. CIV. P. 23 is quoted in note 12 *infra*. A second recent Supreme Court decision, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), will also reduce the number of Rule 23(b)(3) class actions. In *Eisen*, the Court held that plaintiffs were required to bear the cost of giving " 'individual notice to all class members who can be identified through reasonable effort.' " *Id.* at 173, *quoting* FED. R. CIV. P. 23(c)(2). This cost, as a practical matter, may prevent many plaintiffs from maintaining a class action.

4. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 15 (2d ed. 1970) [hereinafter cited as WRIGHT]:

> [T]he rule is well stated that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of such a court . . . .
>
> . . . [T]he parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress.

See notes 65 & 66 *infra*; *cf.* Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867).

5. 28 U.S.C. § 1331 (1970) states:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, ex-

require that the "matter in controversary"[7] exceed $10,000. Traditionally, multiple parties presenting related claims have been permitted to aggregate the amounts of their claims to meet the jurisdictional amount requirement only when the claims involved interests that were "common and undivided" rather than "separate and distinct."[8]

Given federal subject matter jurisdiction, Rule 23, as a rule of procedure, can do no more than define the factual circumstances in which a class action may be maintained.[9] The Rule was formerly thought to distinguish between true, hybrid, and spurious class actions.[10] Ag-

---

clusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

6. 28 U.S.C. § 1332 (1970) states:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

7. Both the federal question jurisdictional statute, 28 U.S.C. § 1331 (1970), and the diversity jurisdictional statute, 28 U.S.C. § 1332 (1970), use the statutory language "matter in controversy." *See* statutes quoted in notes 5 & 6 *supra.*

8. *See, e.g.*, Thomson v. Gaskill, 315 U.S. 442, 447 (1942); Clark v. Paul Gray, Inc., 306 U.S. 583, 589 (1939); Pinel v. Pinel, 240 U.S. 594, 596 (1916); Troy v. G.A. Whitehead & Co., 222 U.S. 39, 40-41 (1911); Woodside v. Beckman, 216 U.S. 117, 120-21 (1910); Waite v. Santa Cruz, 184 U.S. 302, 328 (1902); Wheless v. St. Louis, 180 U.S. 379, 382 (1901); Clay v. Field, 138 U.S. 464, 479-80 (1891); Bernards Township v. Stebbins, 109 U.S. 341, 356 (1883); *Ex parte* Baltimore & O.R.R., 106 U.S. 5, 6 (1882); Russell v. Stansell, 105 U.S. 303, 304 (1881); Shields v. Thomas, 58 U.S. (17 How.) 5-6 (1854). *But see* Grosjean v. American Press Co., 297 U.S. 233, 241-42 (1936).

9. *See* FED. R. CIV. P. 82: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

10. FED. R. CIV. P. 23, 308 U.S. 689 (1939):

(a) Representation. If persons constiuting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) the prosecution of separate actions by or against individual members of primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

The categories became known as "true," "hybrid," and "spurious" after being so labeled by Professor Moore. J. MOORE & J. FRIEDMAN, 2 MOORE'S FEDERAL PRACTICE §

gregation of claims was permitted only in true class actions. Because hybrid and spurious class actions were held not to involve "common and undivided interests," aggregation was not permitted.[11]

Although Rule 23 was completely rewritten in 1966,[12] the Supreme

2304 (1938). (Pursuant to the Act of June 19, 1934, Ch. 651, § 2, 48 Stat. 1064, the Federal Rules took effect upon the close of the 75th Cong., 3d Sess., on June 30, 1938.)

11. *See* Clark v. Paul Gray, Inc. 306 U.S. 583, 589 (1939); Steele v. Guaranty Trust, 164 F.2d 387, 388 (2d Cir. 1947).

12. FED. R. CIV. P. 23 provides in part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The Advisory Committee gave several reasons for the revision of the 1938 version of the rule, quoted in note 10 *supra*. Proposed Rules of Civil Procedure, Advisory Committee's Note, 39 F.R.D. 69, 98-107 (1966). First, the categories of the old rule proved "obscure and uncertain." *Id.* at 98. Second, the old rule did not "provide an adequate guide to the proper extent of the judgments in class actions." *Id.* Third, the advantages initially sought by means of the "spurious" class action were not always obtained. *Id.* Furthermore, "the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to insure procedural fairness." *Id.* at 99.

For analysis of Rule 23, as amended, see 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1753 (1972) [hereinafter cited as WRIGHT & MILLER]; Cohen, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1213-28 (1966);

Court, in *Snyder v. Harris*,[13] found the "common and undivided" and "separate and distinct" standards still controlling for class actions. None of the *Snyder* class members, named or unnamed, who had separate and distinct claims, individually satisfied the jurisdictional amount requirement. Reasoning that the aggregation rule was derived from the statutory phrase "matter in controversy," and that changes in the Federal Rules of Civil Procedure could not modify the jurisdictional statute,[14] the Court concluded that the federal courts lacked jurisdiction over the case.

II. THE *Zahn* DECISION

In *Zahn*, plaintiffs brought a Rule 23(b)(3) class action alleging damage to their land as a result of defendant's water pollution. Federal jurisdiction was based on diversity of citizenship, and all of the named class members presented individual claims in excess of $10,000. The district court found, "to a legal certainty," however, that some of the unnamed class members' damages could not exceed $10,000,[15] and also determined that no appropriate class could be identified.[16] Relying on this determination and the *Snyder* holding, the district court ordered the class action allegation stricken. A divided court of appeals upheld the district court's order.[17]

The Supreme Court affirmed, relying exclusively on *Snyder* and the traditional standard governing aggregation. The Court found that the aggregation standard for multiple plaintiffs asserting separate and distinct claims

---

Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 375-400 (1967).

13. 394 U.S. 332 (1969).

14. *Id.* at 336-37. The Court refused to overrule its previous interpretation of "matter in controversy." The Court reasoned that when the jurisdictional statutes were amended in 1958, Congress intended to acquiesce to the judicial interpretation of "matter in controversy" and, therefore, the aggregation rule was not merely judge-made, but statutory. *Id.* at 338-39. Moreover, the Court concluded that to change the aggregation rule would run counter to the congressional intent to reduce the federal courts' caseload, particularly with regard to diversity jurisdiction, which Congress had expressed in 1958 by increasing the jurisdictional amount from $3,000 to $10,000, Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415, *as amended* 28 U.S.C. § 1331 (1970). Snyder v. Harris, 394 U.S. 332, 339-40 (1969).

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

16. *Id.* at 433.

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

> mandates not only . . . that the entire case must be dismissed where none of the plaintiffs claims are more than $10,000 but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.[18]

Citing the *Snyder* holding that the rewriting of Rule 23 had not changed the standards for aggregation, the Court approved the district court's order dismissing from the case those plaintiffs unable to satisfy the jurisdictional amount requirement.

Justice Brennan, dissenting, argued that ancillary jurisdiction provided a basis for federal jurisdiction over the dismissed plaintiffs' claims.[19] He reasoned that ancillary jurisdiction was appropriate for class actions under Rule 23(b)(3) because, although extending jurisdiction would cause some increase in the workload of the federal courts, "a denial of ancillary jurisdiction [would] impose a much larger burden on the state and federal judiciary as a whole"[20] and would create numerous practical difficulties.[21] In light of this dissent[22] and the therebefore apparent availability of ancillary jurisdiction,[23] the Court's opinion may be regarded as implicitly holding that ancillary

---

18. Zahn v. International Paper Co., 414 U.S. 291, 300 (1973). Since the plaintiffs' claims were separate and distinct, aggregation of their individual claims was not permitted. As a result, many of the unnamed plaintiffs did not have claims in excess of $10,000 and therefore were not parties to any claim that satisfied the statutory requirements. Thus, the federal court had no jurisdiction over these plaintiffs and dismissal was required. As recognized by the *Zahn* dissent, implicit in this analysis was a rejection of the applicability of the ancillary jurisdiction doctrine.

19. *Id.* at 305-07.

20. *Id.* at 308.

21. *Id.* at 311-12. Justice Brennan noted that the district court would have to identify the class members whose claims exceeded $10,000 and reasoned that "few, if any Rule 23(b)(3) classes will lend themselves to a determination, on the basis of the pleadings, that each proposed member meets that [jurisdictional amount] requirement." *Id.* at 312. In the future, it may be necessary for unnamed plaintiffs to intervene in order to show that they meet the jurisdictional amount requirement.

22. The dissenting opinion in the court of appeals decision also argued that ancillary jurisdiction provided a basis for hearing the claims that lacked the jurisdictional amount. Zahn v. International Paper Co., 469 F.2d 1033, 1036-40 (2d Cir. 1972) (Timbers, J., dissenting).

23. The ancillary jurisdiction issue was briefed and argued before the Court, 42 U.S.L.W. 3234 (U.S. Oct. 23, 1973). *Snyder* had previously held that the aggregation standard still controlled for class actions, and the articulated *Zahn* holding was no more than a corollary to that ruling. The Court's reluctance to discuss the ancillary jurisdiction question was more surprising than the explicit holding of the case.

jurisdiction did not extend to the claims of the unnamed plaintiffs in the *Zahn* case.[24]

The *Zahn* decision creates no conceptual problems in determining federal jurisdiction in Rule 23(b)(3) class actions brought under diversity jurisdiction. While federal courts may encounter procedural problems in following the *Zahn* requirement,[25] the standard for deter-

24. The majority opinion never directly discussed ancillary jurisdiction. Its sole comment on the issue was a quotation from the court of appeals decision: "[O]ne plaintiff may not ride in on another's coattails." 414 U.S. at 301, *quoting* Zahn v. International Paper Co., 469 F.2d 1033, 1035 (2d Cir. 1972). While this may keep the rejection of ancillary jurisdiction from being a sub silentio holding, the statement presents only a conclusion that ancillary jurisdiction is not available, without providing any reasons for that conclusion.

25. Procedural problems arise in determining which class members have federally cognizable claims and whether the class action may be maintained. Prior to making these decisions, a trial judge can and should presume that the class action is proper. Cox v. Babcock & Wilcox Co., 471 F.2d 13 (4th Cir. 1972); City of Inglewood v. City of Los Angeles, 451 F.2d 948, 951 (9th Cir. 1971); Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022, 1026 (E.D. Pa. 1970); *cf.* Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972) (discovery permitted before final class action determination made); Wolfson v. Solomon, 54 F.R.D. 584, 590 (S.D.N.Y. 1972) (preliminary hearing to determine class action status not required to permit discovery prior to final class action determination); Weight Watchers v. Weight Watchers Int'l, 53 F.R.D. 647, 651 (E.D.N.Y. 1971) ("For the purpose of preventing and correcting abuses, once an action is filed as a class action it should be so presumed even prior to a formal determination that it is a class action"); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364 (E.D. Pa. 1970), *modified and aff'd on other grounds sub nom.*, Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971) (final class action determination unnecessary before settlement negotiations are undertaken).

Once class action status is presumed, the trial judge must determine whether the claims of the class members are "separate and distinct" or "common and undivided." *See* note 51 *infra*. If the claims are found to be "common and undivided," then *Zahn* will not apply and aggregation will be permitted. If the claims are found to be "separate and distinct," however, then the amount in controversy for each and every class member's claim must be determined.

Regardless of whether aggregation is permitted, the amount in controversy is measured at the time the complaint is filed. WRIGHT 111.

The plaintiff is required to allege a claim that satisfies the jurisdictional amount requirement, and, if challenged, has the burden of proving the amount of the claim. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); *cf.* Rossin v. Southern Union Gas Co., 472 F.2d 707, 712 (10th Cir. 1973); Poindexter v. Teubert, 462 F.2d 1096, 1097 (4th Cir. 1972) (plaintiff has burden of proof to show class action is maintainable and meets prerequisites of Rule 23). It has been stated, however, that, ". . . the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). While these tests have been treated as a single requirement, Jones v. Landry, 387 F.2d 102, 104 (5th Cir. 1967), that analysis may be

mining federal jurisdiction is now quite clear—each and every class member, named or unnamed, must present a claim in excess of $10,000 unless the claims are "common and undivided." Difficulties arise, however, when the *Zahn* decision is applied to cases having different procedural postures.

---

inaccurate. For class actions, two requirements exist. They are functions of the two problems that arise in evaluating the jurisdictional amount allegation for such actions.

First, representative plaintiffs must allege an amount in controversy for other individuals, raising the question of what effort representative plaintiffs must make to determine in good faith the amount of unnamed class members' claims. While the imposition of a substantive standard would seem undesirable because it would focus on the representative plaintiffs' efforts rather than the amounts involved, the rejection of a substantive standard raises the second problem.

Trial judges must assess the claims of individuals not actively involved in the litigation. This raises the question of what action may be required of unnamed class members by trial judges assessing the amount of unnamed class members' claims. Rule 23(c)(2) requires only that unnamed class members reply to the notice of the action if they desire to be excluded from the class; no affirmative response is required to remain part of the class. Some courts, however, have ordered that affirmative responses or "proof of claims" be made by unnamed class members who received notice if they wish to remain in the class. *See, e.g.*, Arey v. Providence Hosp., 55 F.R.D. 62, 71-72 (D.D.C. 1972); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 267, 271 (S.D.N.Y. 1971); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403 (S.D. Iowa 1968), *aff'd on other grounds*, 408 F.2d 1171 (8th Cir. 1969); Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968); Harris v. Jones, 41 F.R.D. 70, 74-75 (D. Utah 1966) (authority found in Rule 23(d)); *cf.* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). *Contra*, Wainwright v. Kraftco Corp., 54 F.R.D. 532, 535 unnumbered note (N.D. Ga. 1972). Because a simple affirmative response may not be sufficient to provide the information needed by the trial judge, a preliminary hearing could become necessary. *See* Zahn v. International Paper Co., 414 U.S. 291, 312 (1973) (Brennan, J., dissenting) ("Intervention, at least for the purpose of establishing jurisdiction, may be necessary . . . ."). While trial judges may have authority under Rule 23(d)(2) to hold a preliminary hearing, requiring all class members to participate in the hearing would defeat one major purpose of class actions, the representation of absent claimants.

If it is determined that some of the class members satisfy the jurisdictional amount requirement, the trial judge is faced with an additional problem. Though not mentioned in Rule 23, one of the prerequisites to the maintenance of a class action is the definition of an ascertainable class. *See* Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); DeBremaecher v. Short, 433 F.2d 733, 734 (5th Cir. 1970); Eisman v. Pan Am. World Airlines, 336 F. Supp. 543, 547 (E.D. Pa. 1971); Chaffee v. Johnson, 229 F. Supp. 445, 448 (S.D. Miss. 1964), *aff'd on other grounds*, 352 F.2d 514 (5th Cir. 1965); Arneson v. Raymond Lee Org., 59 F.R.D. 145, 147 (C.D. Cal. 1973); Thomas v. Clark, 54 F.R.D. 245, 248 (D. Minn. 1971). *But cf.* Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972) (23(b)(2) class action; declaratory and injunctive relief sought). With the exception of an action involving liquidated damages, defining the class in terms of damages recoverable would be impractical. *See* Zahn v. International Paper Co., 53 F.R.D. 430, 433 (D. Vt. 1971). This does not mean, however, that an ascertainable, definite class, with all members satisfying the jurisdictional requirements, could not exist. City of Inglewood v. City of Los Angeles, 451 F.2d 948, 953 (9th Cir. 1971). Courts could look to each claim

III. Actions Brought Under 28 U.S.C. § 1331, General Federal Question Jurisdiction

As the opinions in both cases indicate, *Snyder* and *Zahn* apply with equal force to actions in which jurisdiction is based on the presence of a general federal question or diversity of citizenship.[26] This conclusion is obvious, for it would be illogical to construe the identical statutory phrase "matter in controversy" differently in the two statutes.[27] Noting the numerous statutory exceptions granting *specific* federal question jurisdiction without imposing a jurisdictional amount requirement,[28] both opinions discounted any significant effect of the aggregation requirement on federal question jurisdiction.

No attempt has been made to determine the number of federal question cases in which federal jurisdiction is based solely on section 1331.[29] In light of the number and scope of the statutes that do not require a jurisdictional amount,[30] it is clear that a large majority of

---

to determine whether it meets the jurisdictional requirements. That step, however, would eliminate any advantage of the class action procedure over mere joinder. This advantage is a prerequisite to the maintenance of a class action required by Rule 23(a). Zahn v. International Paper Co., 53 F.R.D. 430, 433 (D. Vt. 1971). Instead, the court or representative plaintiffs could devise a "measure" to define the class. This measure would have to be a factor accurately determinable for every class member and directly related to the measure of damages for each. It would have to refer to conditions existing at the time the alleged injury was done, but be determinable after the litigation had commenced.

For example, a "measure" in the *Zahn* case could have been the lakefront footage of the property owned by each class member. It may reasonably be assumed that as the lakefront footage increased, the amount of damages increased. Plaintiffs would have had to demonstrate only that the damages were directly related to the lakefront footage and that some specified amount of footage corresponded to damages in excess of $10,000. The class could then have been defined in terms of property owners having a specified minimum lakefront footage.

26. Zahn v. International Paper Co., 414 U.S. 291, 302 n.11 (1973); Snyder v. Harris, 394 U.S. 332, 341 (1969).

27. This conclusion is further supported by the observation that the two statutes were amended, Act of July 25, 1958, Pub. L. No. 85-554, § 1, 72 Stat. 415, and reenacted, Act of October 10, 1966, Pub. L. No. 89-635, § 2, 80 Stat. 880, by a single act.

28. *See* note 30 *infra.*

29. A quantitative determination of the cases that can be brought in federal court only under section 1331 may be impossible. In cases where the amount in controversy unquestionably exceeds $10,000, plaintiffs often allege section 1331 and disregard any other possible grounds for jurisdiction. Thus, determining the number of cases that need section 1331 to acquire federal jurisdiction would entail an independent examination of each case in which section 1331 has been alleged as the jurisdictional base. *See, e.g.,* text accompanying notes 36-43 *infra.*

30. Statutes that establish federal jurisdiction without requiring a jurisdictional

federal question cases do not need a jurisdictional amount to be heard in federal court. Nevertheless, the existence of a general federal question statute indicates that some kinds of action must proceed pursuant to section 1331.[31] Among these are actions under the Jones Act,[32] actions challenging the constitutionality of state statutes,[33] actions against federal officers or challenging the constitutionality of federal statutes,[34] and actions based on federal common law.[35]

Professor Wright has questioned the proposition that actions brought under the Jones Act[36] must rely upon section 1331 to establish federal jurisdiction.[37] Another jurisdictional statute, section 1337, grants

amount include: 28 U.S.C. § 1333 (1970) (admiralty and maritime); *id.* § 1334 (bankruptcy); *id.* § 1336 (Interstate Commerce Commission orders); *id.* § 1337 (commerce and antitrust regulations); *id.* § 1338 (patents, plant variety protection, copyrights, trademarks and unfair competition); *id.* § 1339 (postal matters); *id.* § 1340 (internal revenue-customs duties); *id.* § 1343 (civil rights and elective franchise); *id.* § 1344 (election disputes); *id.* § 1345 (United States as plaintiff); *id.* § 1346 (United States as defendant); *id.* § 1347 (partition action where United States is joint tenant); *id.* § 1348 (national banking association as party in suit commenced by United States or officer thereof); *id.* § 1350 (alien's action for tort committed in violation of treaty); *id.* § 1351 (consuls and vice-consuls as defendants); *id.* § 1352 (bonds executed under federal law); *id.* § 1353 (Indian allotments); *id.* § 1354 (land grants from different states); *id.* § 1355 (fine, penalty, or forfeiture incurred under act of Congress); *id.* § 1356 (seizures not within admiralty or maritime jurisdiction); *id.* § 1358 (eminent domain); *id.* § 1361 (action to compel an officer of the United States to perform his duty). *See generally* WRIGHT 108 nn.12-27.

31. If no federal question actions require § 1331, then it may be assumed that Congress, when amending the jurisdictional amount provisions in 1958, would have eliminated the jurisdictional amount requirement rather than raising it to $10,000. *See* note 14 *supra.*

32. "[T]he only significant categories of 'Federal question' cases subject to the jurisdictional amount are suits under the Jones Act [46 U.S.C. § 688 (1970)] and suits contesting the constitutionality of State statutes." WRIGHT 108, *quoting* Sen. Rep. No. 1830, 85th Cong., 2d Sess. 6, 15, 22 (1958); 1958 U.S. Code Cong. & Ad. News 3103, 3112-13, 3122; *see, e.g.*, Wade v. Rogala, 270 F.2d 280, 283 (3d Cir. 1959); Turner v. Wilson Line, 142 F. Supp. 264 (D. Mass. 1956); Rowley v. Sierra S.S. Co., 48 F. Supp. 193 (N.D. Ohio 1942). *Contra,* Ballard v. Moore-McCormack Lines, Inc., 285 F. Supp. 290 (S.D.N.Y. 1968); Richardson v. St. Charles-St. John the Baptist Bridge & Ferry Authority, 274 F. Supp. 764 (E.D. La. 1967).

33. *See* Sen. Rep. No. 1830, 85th Cong., 2d Sess. 6, 15, 22 (1958); 1958 U.S. Code Cong. & Ad. News 3103, 3112-13, 3122.

34. *See, e.g.*, District of Columbia v. Carter, 409 U.S. 418 (1973); Lynch v. Household Fin. Corp., 405 U.S. 538, 541 (1972); Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968); Wolf v. Selective Serv. Sys. Local Bd. No. 16, 372 F.2d 817, 826 (2d Cir. 1967). *See also* Snyder v. Harris, 394 U.S. 332, 342 n.2 (1969) (Fortas, J., dissenting).

35. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 98-101 (1972).

36. 46 U.S.C. § 668 (1970).

37. WRIGHT 108-09.

federal courts jurisdiction "of any civil action . . . arising under any Act of Congress regulating commerce," without regard to the amount in controversy.[38] Section 1337 has been construed to include all acts "whose constitutional basis is the commerce clause,"[39] and, in some cases, acts for which the commerce clause is a significant though not necessarily exclusive basis of congressional power.[40] The Jones Act, which concerns injury to seamen,[41] is arguably an act "regulating commerce." If so, actions under it should not be required to satisfy a jurisdictional amount requirement.[42] The absence of significant case law supporting this conclusion may be attributed to the common practice in personal injury actions of seeking damages in excess of $10,000; therefore, the question whether section 1337 provides jurisdiction is simply never presented.[43]

For actions challenging the constitutionality of state statutes, section 1331 is not always necessary. Federal jurisdiction, without an amount in controversy requirement, is granted by section 1343(3)[44] if the ac-

38. 28 U.S.C. § 1337 (1970) states:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

39. WRIGHT 109, *citing* Felter v. Southern Pac. Co., 359 U.S. 326 (1959) (Railway Labor Act, 45 U.S.C. § 151 (1970)); Capital Serv., Inc. v. NLRB, 347 U.S. 501 (1954) (National Labor Relations Act, 29 U.S.C. § 151 (1970)); Parker v. Brown, 317 U.S. 341 (1943) (antitrust acts, 15 U.S.C. §§ 1-33 (1970)); Mulford v. Smith, 307 U.S. 38 (1939) (Agricultural Adjustment Act, 7 U.S.C. § 1281 (1970)); Johnson v. Butler Bros., 162 F.2d 87 (8th Cir. 1947) (Fair Labor Standards Act, 29 U.S.C. § 201 (1970)).

40. Murphy v. Colonial Fed. Sav. & Loan Ass'n, 388 F.2d 609, 614-15 (2d Cir. 1967).

41. The Jones Act is analogous to the Federal Employers' Liability Act, 45 U.S.C. § 51 (1970), which provides for recovery for injury or death to railroad employees. Since actions under the Federal Employers' Liability Act are allowed to be brought under § 1337, Imm v. Union R.R., 289 F.2d 858 (3d Cir.), *cert. denied*, 368 U.S. 833 (1961), the same should be allowed for actions under the Jones Act. *See* WRIGHT 109; *cf.* Murphy v. Colonial Fed. Sav. & Loan Ass'n, 388 F.2d 609, 614-15 (2d Cir. 1967).

42. *See* Ballard v. Moore-McCormack Lines, Inc., 285 F. Supp. 290, 295 (S.D.N.Y. 1968); Richard v. St. Charles-St. John the Baptist Bridge & Ferry Authority, 274 F. Supp. 764, 768-69 (E.D. La. 1967).

43. In a number of cases, plaintiffs have alleged damages in excess of the jurisdictional amount, and the courts have assumed jurisdiction under section 1331 without considering section 1337. *See, e.g.*, Jordine v. Walling, 185 F.2d 662 (3d Cir. 1950); Mullen v. Fitz Simons & Connell Dredge & Dock Co., 172 F.2d 601 (7th Cir. 1948), *cert. denied*, 337 U.S. 959 (1949); Branic v. Wheeling Steel Corp., 152 F.2d 887 (3d Cir.), *cert. denied*, 327 U.S. 801 (1945).

44. 28 U.S.C. § 1343 (1970) provides in part:

> The district courts shall have original jurisdiction of any civil action author-

tion alleges a deprivation of rights, privileges, or immunities granted by the Constitution or a deprivation of equal rights provided by federal statute.[45] While section 1343(3) applies to actions alleging deprivation of either personal or property rights,[46] it is not available for actions against municipal corporations,[47] the federal government, or its officers.[48]

Therefore, the only major situations in which section 1331 is necessary for establishing federal jurisdiction are cases challenging acts of the federal government[49] or involving federal common law.[50] While there may be other isolated cases that also require section 1331, they are small in number. Thus, those federal question actions for which federal jurisdiction is based solely on section 1331, and which, therefore, are affected by the *Zahn* decision, are only a small fraction of federal question cases.

IV. AGGREGATION UNDER OTHER FEDERAL RULES OF CIVIL PROCEDURE

Nothing in the *Zahn* opinion limited application of its holding to Rule 23(b)(3) class actions, or even to class actions generally. Since the decision construed the jurisdictional statute and not a provision of

---

ized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

45. Quite frequently, 42 U.S.C. § 1983 (1970) is used as the federal statute granting the cause of action for § 1343(3) jurisdiction. Thus, the availability of federal jurisdiction under § 1343(3) often turns on the scope of the cause of action provided for in 42 U.S.C. § 1983 (1970), which states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

46. *See, e.g.*, Lynch v. Household Fin. Corp., 405 U.S. 538, 542 (1972).

47. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 187-92 (1961).

48. *See, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 420 (1973); Wheeldin v. Wheeler, 373 U.S. 647, 650 (1963). *See also* Snyder v. Harris, 394 U.S. 332, 342 n.2 (1969) (Fortas, J., dissenting).

49. *See* note 34 *supra*.

50. *See* note 35 *supra*.

the federal rules, the *Zahn* holding should be controlling, whenever applicable, without regard to any particular rule of procedure.

Zahn reaffirmed the traditional aggregation standard: Federal jurisdiction of a claim cannot be established solely by aggregating it with a "separate and distinct" claim of another party.[51] Although the exception that a single plaintiff may aggregate all claims against a single defendant[52] was neither at issue in the case nor affected by it, and although the barrier of the traditional aggregation standard may be circumvented in certain circumstances by means of the ancillary jurisdiction doctrine,[53] the aggregation requirement as applied in *Zahn* reaches beyond Rule 23(b)(3) procedures.

Rule 23(b)(1) and (b)(2) class actions are not insulated from the *Zahn* holding. While aggregation will frequently be permissible in (b)(1) actions because they often involve "common and undivided interests,"[54] it would be erroneous to presume that all (b)(1) actions

51. To apply this rule, it is necessary to distinguish "separate and distinct" claims from "common and undivided interests." Despite the *Snyder* court's assurance that the "lower courts have developed largely workable standards for determining when claims are joint and common," 394 U.S. at 341, it does not appear to be such an easy task. *See* WRIGHT 123. For cases deciding this question in various factual situations, see Annot., 3 A.L.R. FED. 372 (1970); Annot., 2 A.L.R. FED. 18 (1969).

Two tests have emerged. The first is the "interest in distribution" test—interests are "common and undivided" when the opponent to the multiple claimants has no interest in how the claim is to be divided among the claimants. *See* Shields v. Thomas, 58 U.S. (17 How.) 3, 4-5 (1854); New Jersey Welfare Rights Org. v. Cahill, 483 F.2d 723, 725 n.2 (3d Cir. 1973); National Welfare Rights Org. v. Weinberger, 377 F. Supp. 861, 866 (D.D.C. 1974); Bass v. Rockefeller, 331 F. Supp. 945, 950 (S.D.N.Y. 1971), *vacated as moot*, 464 F.2d 1300 (2d Cir. 1971). Note, *Aggregation of Claims in Class Actions*, 68 COLUM. L. REV. 1554, 1559 (1968). The second is the "essential party" test—interests are "common and undivided" when none of the claimants can maintain the action without affecting the rights of other claimants. *See* Pentland v. Dravo Corp., 152 F.2d 851, 852 (3d Cir. 1945); National Welfare Rights Org. v. Weinberger, 377 F. Supp. 861, 866 (D.D.C. 1974); Bass v. Rockefeller, 331 F. Supp. 945, 950 (S.D.N.Y. 1971); Note, *supra*, at 1559. While these two tests provide a conceptual basis for determining whether interests are "common and undivided," no court has yet decided that one test is controlling or that they are alternative standards. Plaintiffs, at present, are left to examine the case law to determine whether their particular kind of claim has been evaluated previously and, if so, to rely solely on stare decisis to settle the issue.

52. *See, e.g.*, Crawford v. Neal, 144 U.S. 585, 593 (1892); Lemmon v. Cedar Point, Inc., 406 F.2d 94, 96 (6th Cir. 1969); Stone v. Stone, 405 F.2d 94, 96 (4th Cir. 1968); Cashmere Valley Bank v. Pacific Fruit & Produce Co., 33 F. Supp. 946, 949 (E.D. Wash. 1940).

53. *See* text accompanying notes 71-75 *infra*.

54. Class actions brought under Rule 23(b)(1)(B) must involve

> adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties

are "true" class actions. The (b)(1) classification, as distinguished from the categories under old Rule 23,[55] is based on functional criteria and cannot automatically be equated with any particular kinds of interests or rights.[56]

Aggregation may also frequently be permissible in Rule 23(b)(2) actions.[57] While (b)(2) actions usually arise under jurisdictional statutes that contain no jurisdictional amount requirement,[58] the (b)(2) category is not limited to litigation under these jurisdictional statutes.[59] Therefore, merely identifying a class action as a (b)(1) or a (b)(2)

---

to the adjudications or substantially impair or impede their ability to protect their interests.

FED. R. CIV. P. 23(b)(1)(B). Frequently, this requirement is met in cases "when claims are made by numerous persons against a fund insufficient to satisfy all claims." Proposed Rules of Civil Procedure, Advisory Committee's Notes, 39 F.R.D. 69, 101 (1966). Actions such as these would also satisfy either of the tests for determining the existence of "common and undivided interests." *See* note 51 *supra.*

55. *See* text quoted note 10 *supra.*

56. Rule 23(b)(1)(A) actions need not necessarily be composed of "common and undivided" interests. An example of a proper (b)(1)(A) class action was presented by the advisory committee which drafted the present Rule 23: "Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it . . . ." 39 F.R.D. at 10. Actions attacking municipal bond issues have been held to present "separate and distinct" claims. *See, e.g.*, Waite v. Santa Cruz, 184 U.S. 302, 328 (1902); Bernard's Township v. Stebbins, 109 U.S. 341, 356 (1883).

57. Any discussion of aggregation of claims for (b)(2) class action leads to an inherent difficulty: The action is available only for injunctive or corresponding declaratory relief, not for monetary damages. This puts the trial judge in the awkward position of evaluating the propriety of aggregating things that do not exist. The (b)(2) class action may be viewed as an attempt to convert the stare decisis effect of a test case into the res judicata effect of a class action. For example, in a Rule 23 (b)(2) class action challenging the conduct of a governmental agency, such as a housing authority, the class might be composed of all the tenants, and the housing authority would be bound to obey the decision as it related to each tenant. While an individual action would not have the same res judicata effect as the class action, it would probably, as a practical matter, achieve the same result. The housing authority, if acting in good faith, could be expected to follow the dictates of the decision in dealing with all similarly situated tenants, even though not bound by court order to do so.

As mentioned earlier, the *Zahn* decision construed a jurisdictional statute, not a rule of procedure. Therefore, the foregoing discussion is irrelevant to determining the applicability of the *Zahn* requirement to Rule 23(b)(2) class actions. It does, however, demonstrate the problems that can arise when the "separate and distinct" test is used.

58. *See* note 30 *supra.*

59. As the advisory committee which drafted the present Rule 23 pointed out, "[i]llustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. . . . [S]ubdivision (b)(2), [however,] is not limited to civil-rights cases." 39 F.R.D. at 102.

action does not avoid the effect of *Zahn*.[60] Courts must continue to consider the particular class action and determine whether it presents "separate and distinct" claims or "common and undivided interests."

Other provisions of the Federal Rules of Civil Procedure will also be affected by *Zahn*. While claims asserted under some of the joinder provisions may be considered ancillary to the federally-cognizable claim and therefore need no independent basis for establishing federal jurisdiction,[61] claims asserted pursuant to other joinder provisions, such as permissive counterclaims,[62] joinder of parties,[63] and permissive intervention,[64] must establish independent grounds for federal jurisdiction. In these circumstances *Zahn* requires that each claim satisfy the jurisdictional amount requirement independently. This requirement yields the following results: (1) Multiple plaintiffs joining "separate and distinct" claims under Rule 18 must each present a claim in excess of $10,000; (2) A defendant asserting a "separate and distinct" permissive counterclaim under Rule 13(g) must allege an amount in controversy in excess of $10,000, although the defendant should be able to aggregate all claims against a single plaintiff to reach the jurisdictional amount; and (3) A party wishing to intervene permissively pursuant to Rule 24(b) must have a claim in excess of $10,000 if the claim is "separate and distinct."

60. *See, e.g.*, Portero Hill Community Action Comm. v. Housing Authority, 410 F.2d 974, 976 (9th Cir. 1969); Mattingly v. Elias, 325 F. Supp. 1374, 1381 (E.D. Pa. 1971), *aff'd*, 482 F.2d 526 (3rd Cir. 1973); Opelika Nursing Home, Inc. v. Richardson, 323 F. Supp. 1206, 1210 (N.D. Ala.), *rev'd on other grounds*, 448 F.2d 658 (5th Cir. 1971).

61. For a listing of joinder provisions that employ ancillary jurisdiction, see text accompanying notes 71-75 *infra*.

62. *See* Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 714-15 (5th Cir. 1970); Chance v. County Bd. of School Trustees, 332 F.2d 971, 973 (7th Cir. 1964). *See also* cases cited 6 WRIGHT & MILLER 1411 n.26. There is a limited exception to this rule. If a permissive counterclaim is in the nature of a set-off and is used only to reduce plaintiff's judgment, independent jurisdictional grounds are not required. Fraser v. Astra S.S. Corp., 18 F.R.D. 240, 242 (E.D.N.Y. 1955); *see* Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 31-34 (1964) [hereinafter cited as Fraser].

63. *See* Olivieri v. Adams, 280 F. Supp. 428 (E.D. Pa. 1968); WRIGHT 305. *But see* cases cited notes 88 & 89 *infra*. Implicit in the decisions denying aggregation of multiple plaintiffs' claims is a rejection of ancillary jurisdiction for joinder of parties. *See* cases cited note 8 *supra*.

64. *See* Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 540 (8th Cir. 1970); Hunt Tool Co. v. Moore, Inc., 212 F.2d 658, 688 (5th Cir. 1954). *Contra*, Northeast Clackamas County Elec. Co-op v. Continental Cas. Co., 221 F.2d 329, 331-33 (9th Cir. 1954).

V. EFFECT OF *Zahn* ON ANCILLARY JURISDICTION

Federal courts, as courts of limited jurisdiction,[65] require a jurisdictional basis to hear a claim. Generally, federal jurisdiction is established by statutory grants.[66] In certain circumstances, however, federal courts will hear claims for which subject matter jurisdiction has not been provided by Congress. In these circumstances, the federal courts have jurisdiction of the claim under the ancillary jurisdiction doctrine.[67] Simply stated, the doctrine provides that when a federal court has statutory subject matter jurisdiction over a claim, that court also has jurisdiction over certain matters incidental to the federally-cognizable claim, even though those matters, if brought independently, would not satisfy the statutory requirements for federal jurisdiction. The difficulty with the doctrine lies not in defining it, but rather in determining the circumstances in which ancillary jurisdiction is available. The *Zahn* majority's virtually sub silentio rejection of ancillary jurisdiction in the circumstances of that case did not simplify the problem.

Initially, ancillary jurisdiction extended only to those claims whose adjudication was necessary for the federal court to achieve complete adjudication of the federal claims presented. Thus, application of the doctrine was limited to cases in which the nonfederal controversy had a

65. The jurisdiction of the federal courts is limited by the Constitution to include:

> . . . Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2.

66. Article III has been interpreted not to be a self-executing grant of jurisdiction. Rather, the authority given to Congress in section 1 of article III, "to ordain and establish" lower federal courts, has been construed as establishing Congress's power to grant or withhold jurisdiction from the lower courts as it desires. Thus, if Congress has not made a statutory grant of jurisdiction, the federal courts have no jurisdiction. *See* Lockerty v. Phillips, 319 U.S. 182 (1943); Kline v. Burke Const. Co., 260 U.S. 226 (1922); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

67. For a general discussion of the ancillary jurisdiction doctrine, see WRIGHT § 9; Fraser.

direct relationship to property under the control of the federal court,[68] or to proceedings to effectuate and protect federal judgments or decrees.[69]

In 1926, the Supreme Court held in *Moore v. New York Cotton Exchange*[70] that a federal court had jurisdiction to decide a counterclaim which independently failed to satisfy the requisites for federal jurisdiction even though the federally-cognizable claim had previously been dismissed. This decision expanded ancillary jurisdiction to include matters of procedural convenience in addition to matters of necessity. While the Supreme Court has not spoken directly on the question of ancillary jurisdiction and its application to various provisions of the federal rules, lower federal courts have extended ancillary jurisdiction to compulsory counterclaims under Rule 13(a),[71] cross-claims under Rule 13(g),[72] impleader of third-party defendants under Rule 14,[73] interpleader under Rule 22,[74] and intervention as a matter of right under Rule 24(a).[75] As Professor Wright has stated, "If there is any single rationalizing principle that will explain these diverse rules, it is not easily discerned."[76]

Against this background the Supreme Court's implicit rejection of ancillary jurisdiction in *Zahn* assumes major significance. While arguably the *Zahn* result should be applied to provisions of the federal rules other than Rule 23(b)(3), the Court's silence on the issue makes diffi-

68. *E.g.*, Fulton Nat'l Bank v. Hozier, 267 U.S. 276, 280 (1925); Phelps v. Oaks, 117 U.S. 236, 240-41 (1886); Stewart v. Dunham, 115 U.S. 61, 64 (1885); Freeman v. Howe, 65 U.S. (24 How.) 450, 457 (1860); Aetna Ins. Co. v. Chicago R.I. & Pac. R.R., 229 F.2d 584, 586 (10th Cir. 1956).

69. *E.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 239 (1934); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921); Jones v. National Bank of Commerce, 157 F.2d 214, 215 (8th Cir. 1946); *see* Zahn v. International Paper Co., 469 F.2d 1033, 1036 (2d Cir. 1972) (Timbers, J., dissenting).

70. 270 U.S. 593 (1926).

71. *See* cases cited 6 WRIGHT & MILLER 1414 n.55.

72. *See* R.M. Smythe & Co. v. Chase Nat'l Bank, 291 F.2d 721, 724 (2d Cir. 1961); Childress v. Cook, 245 F.2d 798, 805 (5th Cir. 1957). *See also* 6 WRIGHT & MILLER § 1433.

73. *See* Stemler v. Burke, 344 F.2d 393, 395-96 (2d Cir. 1965); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843, 845-46 (3d Cir. 1962). *See also* 6 WRIGHT & MILLER §§ 1444, 1445 n.14.

74. *See* Walmac & Co. v. Isaacs, 220 F.2d 108, 111 (1st Cir. 1955).

75. *See* Black v. Texas Employers Ins. Ass'n, 326 F.2d 603, 604 (10th Cir. 1964); Formulabs, Inc. v. Hartley Pen Co., 318 F.2d 485, 492 (9th Cir.), *cert. denied*, 375 U.S. 945 (1963); *cf.* WRIGHT 331.

76. WRIGHT 21.

cult the task of determining the extent to which ancillary jurisdiction will still support claims brought under various joinder provisions of the federal rules. Two conclusions may immediately be rejected: (1) ancillary jurisdiction extends to any claim assertable under the federal rules provided an initial federally-cognizable claim exists; and (2) ancillary jurisdiction is available only when necessary to protect or effectuate a federal court's disposition of a federal claim. *Zahn* rejected the former, and *Moore*, the latter. The scope of ancillary jurisdiction falls somewhere between the two standards.

Determining the effect of *Zahn* requires evaluation of the procedural relationship between the potentially ancillary claim and the initial federally-cognizable claim.[77] To assess this relationship, three criteria should be considered: (1) whether the claim sought to be added would require joinder of parties in addition to joinder of claims; (2) whether the potentially ancillary claim is in the nature of an "original" or "discretionary" claim rather than a "dependent" claim;[78] and (3) whether the jurisdictional defect of the additional claim is lack of diversity, lack of a federal question, or lack of jurisdictional amount.[79]

---

77. This is not to conclude that the substantive relationship between the federally-cognizable claim and the nonfederal claim is irrelevant to determining the availability of ancillary jurisdiction. The substantive relationships must be considered to ascertain which particular joinder provision, if any, is applicable. Once it is established that a specific provision is proper, it is unnecessary to reconsider the substantive relationship of the two claims to determine if ancillary jurisdiction is also appropriate, because the limits of ancillary jurisdiction may be ascertained by examining the substantive relationship criteria listed in the federal rules for determining the applicability of the joinder provisions.

Several recent cases have noted *Zahn*'s effect of limiting the scope of ancillary jurisdiction. *See* Bersch v. Drexel Firestone, Inc., Civil Nos. 75-7031, -7038, -7055, -7057 (2d Cir. April 28, 1975) at 3174-76; Warren G. Kleban Eng'r Corp. v. Caldwell, 490 F.2d 800, 802 (5th Cir. 1974); United Pac. Reliance Ins. Cos. v. City of Lewiston, 372 F. Supp. 700, 704 (D. Idaho 1974). *See also* Note, *Ancillary Jurisdiction and the Jurisdictional Amount Requirement*, 50 NOTRE DAME LAW. 346 (1974).

78. The terms "discretionary" and "dependent" have no special significance in themselves. They are used herein to serve as labels for the classifications defined and discussed in the text accompanying notes 96-106 *infra*.

79. It should be noted that this criterion does not consider the procedural relationship between the federal and nonfederal claim. Rather, it looks solely to the jurisdictional defect of the nonfederal claim. The federal claim, however, is influential in the evaluation of this category. If the federal claim arose under federal question jurisdiction, then the nonfederal claim will be considered to have a jurisdictional defect of a lack of a federal question, even though the claim may also lack diversity. An analogous result would follow if the federal claim arose under diversity jurisdiction.

A. *Joinder of Claims v. Joinder of Parties*

The implicit rejection of ancillary jurisdiction in *Zahn* involved additional claims of additional parties. If the Court made any reference to ancillary jurisdiction, it was in the statement "one plaintiff may not ride in on another's coattails."[80] While this quotation provides little guidance, it does indicate a hesitancy to extend ancillary jurisdiction to claims whose adjudication would bring additional parties before the federal courts. Thus, *Zahn* can be read as limiting the scope of ancillary jurisdiction when joinder of parties is required, but not necessarily when additional claims are joined.

It may not be of great practical significance to conclude that the jurisdictional bar imposed by *Zahn* applies only to joinder of parties and not to joinder of claims. While ancillary jurisdiction has not been extended to include multiple claims exerted by a single plaintiff under Rule 18,[81] this extension is unnecessary since a plaintiff may aggregate all claims brought against a single defendant.[82] Consequently, such claims, although individually lacking the requisite jurisdictional amount, may still be heard by a federal court. Claims that lack a federal question may be heard under the pendent jurisdiction doctrine by a federal court, at its discretion, provided the nonfederal claim arose out of the "common nucleus of operative facts" of a federally-cognizable claim.[83] Ancillary jurisdiction has also been allowed[84] for subsequent claims that require an existing federal claim as a prerequisite to their assertion under the federal rules.[85] In light of this joinder of claims—joinder of parties distinction, *Zahn* should not be considered precedent for reversal of the prior law of joinder of claims.

The *Zahn* court's reluctance to permit additional parties to use ancillary jurisdiction is not new.[86] Traditionally, ancillary jurisdiction did not extend to claims that necessitated joinder of additional parties under Rule 20.[87] In the past few years, however, some federal courts

80. Zahn v. International Paper Co., 414 U.S. 291, 301 (1973), *quoting* 469 F.2d 1033, 1035 (2d Cir. 1972).

81. WRIGHT 343.

82. *See* cases cited note 52 *supra.*

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

84. For joinder provisions for which ancillary jurisdiction has been permitted, see cases and sources cited notes 71-75 *supra.*

85. Subsequent claims are those claims that may only be asserted under the federal rules by attachment to an existing claim.

86. Fraser 45.

87. *See* Olivieri v. Adams, 280 F. Supp. 428, 430 (E.D. Pa. 1968).

have heard claims that involved less than $10,000 and that required the joinder of additional parties, provided each additional party's claim was joined with a federally-cognizable claim. Cases have permitted joinder of either additional plaintiffs[88] or additional defendants.[89]

Logically, the *Zahn* decision should have reversed this trend. Yet there are indications that the *Zahn* restriction of ancillary jurisdiction will not be followed for joinder of parties under Rule 20.[90] The decision, however, construed a jurisdiction statute, not a rule of procedure. No rationale is readily apparent that would distinguish Rule 20 from Rule 23 for purposes of applying the standard that a party asserting a "separate and distinct" claim must independently satisfy the jurisdictional requirements.[91]

88. *See* Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966); Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967); Dixon v. Northwestern Nat'l Bank, 276 F. Supp. 96 (D. Minn. 1967) (alternate holding); Newman v. Freeman, 262 F. Supp. 106 (E.D. Pa. 1966); Wiggs v. Tullahoma, 261 F. Supp. 821 (E.D. Tenn. 1966); *cf.* Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964) (second plaintiff was nondiverse); Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960) (single plaintiff was suing in dual capacity, for himself and as administrator for wife's estate). *But see*, Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); Ciaramitaro v. Woods, 324 F. Supp. 1388 (E.D. Mich. 1971). *See generally* Note, *The Federal Jurisdictional Amount and Rule 20 Joinder of Parties: Aggregation of Claims*, 53 MINN. L. REV. 94 (1968).

89. *See* F. C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917 (6th Cir. 1970); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968). *But see* Jewell v. Grain Dealers Mut. Ins. Co., 290 F.2d 11 (5th Cir. 1961).

90. In Moor v. County Alameda, 411 U.S. 693 (1973), decided prior to *Zahn*, the Supreme Court indicated some support for the trend in the lower courts to exercise jurisdiction over additional, nonfederally cognizable claims involving joinder of parties. The Court, however, refused to decide this question. It found that jurisdiction had been asserted under the pendent jurisdiction doctrine and that the district court had properly exercised its discretion not to hear the nonfederal claim. *Id.* at 716-17. For a discussion of pendent jurisdiction, see note 91 *infra*. Two district court cases decided subsequent to *Zahn* have disagreed on whether *Moor* or *Zahn* controlled. One court held it had jurisdiction to hear a claim against a pendent defendant, distinguishing *Zahn* as having involved class actions and pendent plaintiffs. Princess Cruises Corp. v. Bayly, Martin & Fay, Inc., 373 F. Supp. 762, 765 n.1 (N.D. Cal. 1974). The second case found that *Moor* had avoided the question of jurisdiction and that *Zahn* controlled:

> A reading and rereading of *Zahn* and its forebears leads this court to the conclusion that no district court discretion is involved in this particular context. It is simply a "power" or jurisdiction situation and there can be no pendent or ancillary jurisdiction. Perhaps this is making too much out of silence [in the *Zahn* opinion], but the conclusion seems logical and compelling.

United Pac. Reliance Ins. Co. v. Lewiston, 372 F. Supp. 700, 704 (D. Idaho 1974); *see* Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 495 F.2d 213 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974) (dictum recognized that *Zahn* applies to Rule 20).

91. In addition to *Moor*, several of the opinions cited in notes 88 and 89 *supra* relied

There are several situations, other than those involving Rule 20, in which ancillary jurisdiction has been extended to claims requiring additional parties. New parties may be brought in by means of compulsory counterclaims,[92] crossclaims,[93] and third-party claims[94] without the statutory jurisdictional requirements being independently satisfied. Additionally, a party who intervenes as a matter of right may do so without establishing independent federal jurisdiction.[95] Whether *Zahn* will reverse the law in these circumstances cannot be determined solely by considering the joinder of parties-joinder of claims distinction. Rather, it is necessary to consider the second criterion previously mentioned: whether the claim is a "discretionary" or "dependent" claim.

B. *"Discretionary" Claims v. "Dependent" Claims*

The joinder provisions of the federal rules may be divided into two

---

on pendent jurisdiction to provide jurisdiction over the nonfederal claim if the claim was sufficiently factually related to the federal claim with which it was joined. Pendent jurisdiction differs from ancillary in that it is exercised in the discretion of the trial judge and its applicability is limited to those claims having the necessary factual relationship. The availability of ancillary jurisdiction is more likely to be limited by the procedural relationship between the two claims. *See* note 78 *supra.*

Some difficulty exists in concluding that pendent jurisdiction permits a federal court to hear a nonfederal claim requiring joinder of parties. First, the principal case defining pendent jurisdiction, United Mine Workers v. Gibbs, 383 U.S. 715 (1966), did not involve joinder of parties, but rather joinder of claims. *See* Hymer v. Chai, 407 F.2d 136, 137 (9th Cir. 1969). Second, the facts of the *Zahn* case would have permitted the use of pendent jurisdiction if it had been available. The damages of all the class members were caused by a single wrong, the alleged pollution of the lake. Thus, all the claims arose out of a "common nucleus of operative facts," yet federal jurisdiction was not extended to plaintiffs with claims of less than $10,000. While pendent jurisdiction may seem an attractive device to balance the strictures that federal jurisdictional requirements place on the joinder provisions of the federal rules, its use to join additional parties is questionable in light of *Zahn.*

92. *See, e.g.,* H. L. Peterson Co. v. Applewhite, 383 F.2d 430, 433 (5th Cir. 1967); United Artists Corp. v. Masterpiece Prod., 221 F.2d 213, 217 (2d Cir. 1955); Fraser 34-36.

93. *See* WRIGHT 353, Fraser 38.

94. *See, e.g.,* Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843, 845 (3d Cir. 1962); Smith v. Whitmore, 270 F.2d 741, 745 (3d Cir. 1959); Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959); 6 WRIGHT & MILLER, 1444; Note, *Rule 14 Claims and Ancillary Jurisdiction,* 57 VA. L. REV. 265 (1971). Authorities disagree whether a claim by a third-party defendant against an original plaintiff arising out of the same transaction or occurrence is covered by ancillary jurisdiction. Some cases have held that a claim by an original plaintiff against a third-party defendant must independently satisfy the jurisdictional requirements. *See* Fraser 38-43.

95. *See* cases and source cited note 75 *supra.*

classes, distinguished by whether they deal with "discretionary" or "dependent" claims. This classification, although not established by the federal rules or readily apparent on their face, becomes evident upon examination of the rationale underlying each of the various procedural provisions and the legal consequences that flow from their use.

The "discretionary" class is composed of those provisions that provide a procedure for the assertion of "original" claims. A claim is "original" if failure to assert the claim in the existing litigation would cause no burden or prejudice to either plaintiff or defendant other than increased legal expenses necessitated by multiple litigations. The claim may be asserted at the discretion of plaintiff, either by an original plaintiff against an additional defendant, or by an additional plaintiff against an original defendant. This classification includes permissive joinder of claims,[96] permissive counterclaims,[97] permissive intervention,[98] and class actions.[99]

The "dependent" class is composed of those procedural provisions whose use is dependent upon an existing federal claim. If the plaintiff, defendant, or a third party to the federal claim would suffer prejudice

96. Rule 18, which governs joinder of claims, presents no substantive requirements: "A party . . . may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party." FED. R. CIV. P. 18(a). Rule 18 permits, but does not require, joinder of claims. *See* Ross v. T. C. Bateson Const. Co., 270 F.2d 796, 799-800 (5th Cir. 1959); Velsicol Corp. v. Hyman, 103 F. Supp. 363, 367 (D. Colo. 1952). If plaintiff fails to join a claim, he is not barred from later asserting that claim in a separate action in state court.

97. A defendant may assert " . . . as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claims." FED. R. CIV. P. 13(b). If the defendant fails to assert a counterclaim under Rule 13(b) he is not barred from presenting it in a subsequent action in state or federal court. *See* Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 671 (1944); Fowler v. Sponge Prod. Corp., 246 F.2d 223, 227 (1st Cir. 1957).

98. Permissive intervention is allowed at the court's discretion, " . . . when an applicant's claim or defense and the main action have a question of law or fact in common." FED. R. CIV. P. 24(b). "Permissive intervention may be allowed where the intervenor has an economic interest in the outcome of the suit, although not a direct or legal interest." WRIGHT 330. If a party has a direct or legal interest such that, "disposition of that action may as a practical matter impair or impede his ability to protect that interest," FED. R. CIV. P. 24(a), intervention becomes a matter or right.

99. Rule 23(c)(3) provides that the judgment of a class action, except a (b)(3) action, shall extend to all persons "whom the court finds to be members of the class." In a Rule 23(b)(3) action, individuals may choose to "opt out" of the class, and the judgment will not apply to them. Class members in (b)(1) and (b)(2) class actions may not "opt out."

if not allowed to attach another claim to the existing litigation, the claim is "dependent."[100] The potential prejudice need not be certain; all that is necessary is the possibility that if this claim is not joined, the party seeking to exert it may be put at a disadvantage.[101] Included in this class are compulsory counterclaims,[102] crossclaims,[103] intervention as a matter of right,[104] and third-party claims.[105]

---

100. The prejudice considered here is prejudice resulting from a legal effect, not from practical effects. If a party is not permitted to assert a claim initially, and later is barred from asserting that claim, he has suffered legal prejudice. On the other hand, if a party who is not permitted to assert his claim initially may sue later, but is then unable to satisfy his judgment due to the defendant's lack of funds, that party has suffered practical prejudice.

101. To consider whether prejudice would occur, it is desirable to look to the joinder provision employed rather than the specific claim asserted. Otherwise, the decision could turn on the merits of the claim rather than the possibility of prejudice.

102. A compulsory counterclaim is one that

> . . . 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.

FED. R. CIV. P. 13(a). A party who fails to assert a compulsory counterclaim is barred from bringing a later action on the claim. *E.g.*, Tolson v. Hodge, 411 F.2d 123, 127 (4th Cir. 1969); Mesker Bros. Iron Co. v. Donata Corp., 401 F.2d 275, 279 (4th Cir. 1968); *see* 6 WRIGHT & MILLER § 1417. If a party were to be legally prevented from asserting a compulsory counterclaim, then he would never be able to recover on that claim, and prejudice would result.

103. A cross-claim may be asserted

> . . . by one party against a co-party out of the transaction or occurrence that is the subject matter either of the original transaction or of a counterclaim therein or relating to any property that is the subject matter of the original action.

FED. R. CIV. P. 13(g). A cross-claim is discretionary, and failure to assert it will not bar subsequent litigation. American Sur. Co. v. Fazel, 20 F.R.D. 110, 111 (D. Iowa 1956). However, preventing a party from asserting a cross-claim may prejudice him. "A 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." FED. R. CIV. P. 13(g). If the cross-claimant is not permitted to present a cross-claim, he may incur a debt resulting from an adverse judgment on the claim asserted against him. Even though the cross-claimant could eventually recover from the party against whom the cross-claim would have been filed, the potential cross-claimant would still owe that debt for some period of time.

104. FED. R. CIV. P. 24(a) permits intervention as a matter of right

> . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest . . . .

Thus, it is obvious that denying the intervenor the opportunity to enter the litigation would prejudice him.

105. A third-party claim may be made by the defendant (or plaintiff upon a counterclaim) against " . . . a person not a party to the action who is or may be liable

Given this division of the joinder provisions of the federal rules, a general rule of ancillary jurisdiction may be hypothesized: Ancillary jurisdiction is available for "dependent" claims, but not for "discretionary" claims. Fully stated, the hypothesis is: Given a particular joinder provision, if the refusal to hear a claim asserted under that provision would cause legal prejudice to the party seeking to exert the claim, ancillary jurisdiction is allowed. If no legal prejudice would be suffered, ancillary jurisdiction is not available.

No contention is made that the above rule accurately represents the existing case law.[106] The hypothesis, however, is compatible with the *Zahn* result. The excluded plaintiffs in *Zahn* were not prejudiced by their expulsion from the litigation. Their opportunity to sue and to recover damages in state court remained, undiminished by their exclusion. Although in certain circumstances the denial of class action status will, as a practical matter, prevent certain class members from recovering damages because legal expenses would exceed potential recovery, that prejudice results from the legal system itself, not from the specific litigation of the action from which they were excluded.

Thus, *Zahn* should not be considered authority barring ancillary jurisdiction over compulsory counterclaims, cross-claims, third-party claims, and intervention as a matter of right. *Zahn* may be considered authority barring ancillary jurisdiction over claims asserted under joinder provisions belonging to the "discretionary" class. Such claims, however, were generally not granted ancillary jurisdiction prior to the *Zahn* decision.

C. *Jurisdictional Defect*

Apparently the jurisdictional defect of the excluded class members' claims in *Zahn* was the lack of jurisdictional amount.[107] If the purposes of ancillary jurisdiction are to prevent prejudice to the parties and to

to him for all or part of the plaintiff's claim [or defendant's counterclaim] against him." FED. R. CIV. P. 14. The prejudice suffered by the denial of a third-party claim is the same as that suffered as a result of a denied cross-claim. *See* note 103 *supra.*

106. As stated earlier, ancillary jurisdiction is difficult to explain in simple conceptual terms. There are many cases decided by lower federal courts on an issue-by-issue basis, but the Supreme Court has never provided a complete conceptual elucidation of ancillary jurisdiction, and there is no indication that an explanation will be forthcoming.

107. Some of the class members also may have been nondiverse. However, unnamed, nondiverse class members do not destroy the diversity between the class and the adverse parties, see notes 110 and 111 *infra* and accompanying text.

promote judicial economy,[108] the particular jurisdictional defect of the potentially ancillary claim should not affect the grant of ancillary jurisdiction. If particular jurisdictional defects are, however, distinguished for purposes of barring ancillary jurisdiction, it might be expected that lack of a federal question or lack of diversity would be of greater consequence than the lack of jurisdictional amount since the first two requirements have constitutional origins.[109] While *Zahn* may appear to undercut this expectation, a distinction among jurisdictional defects may be seen by comparing that case with *Supreme Tribe of Ben Hur v. Cauble.*[110] In *Ben Hur*, the Supreme Court held that, in a class action based on diversity jurisdiction, unnamed nondiverse class members could be included in the class. A comparison of *Zahn* and *Ben Hur* clearly indicates that, while unnamed class members failing to satisfy the diversity requirement can have their claims heard, class members failing to satisfy the jurisdictional amount requirement will be excluded. Assuming that *Ben Hur* was not overruled by implication by *Zahn*, the only explanation for this discrepancy is that the availability of ancillary jurisdiction hinges on the particular defect of the jurisdictionally deficient claim.[111]

There are limited situations in which this difference based on jurisdictional defect may have an effect. Compulsory counterclaims, crossclaims, and intervention as a matter of right are readily granted ancillary jurisdiction, making the jurisdictional defect distinction irrelevant.[112] The only procedure other than class actions likely to be affected by this

108. *See* sources cited note 67 *supra.*

109. U.S. CONST. art. III, § 2.

110. 255 U.S. 356 (1921).

111. It is noteworthy that all of the named class members in *Zahn* had claims in excess of $10,000, which nullifies any argument that the *Zahn-Ben Hur* distinction can be explained by a standard that determines federal jurisdiction by looking only to the parties actually before the court.

The anomaly that results from a comparison of *Zahn* and *Ben Hur* raises the question whether *Ben Hur* is still good law. While the policies that influenced the Court in *Zahn* might have been furthered by reversing *Ben Hur*, it is improper to conclude that *Zahn* overruled *Ben Hur* sub silentio. First, the *Ben Hur* rule is long established. This strong precedent should not be considered overruled unless the Supreme Court expressly does so. Second, the Court in *Snyder* relied in part on the *Ben Hur* rule in reaching its decision. The majority accepted the *Ben Hur* rule, and found that

> [t]o allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusive questions of state law.

394 U.S. at 340. The Court then concluded that this result would run counter to the purpose expressed by Congress when it raised the jurisdictional amount.

112. *See* notes 92-95 *supra.*

distinction is the permissive joinder of parties. Thus, applying the *Zahn-Ben Hur* distinction, Rule 20 claims by nondiverse additional plaintiffs or against nondiverse additional defendants will be heard in federal court, while Rule 20 claims for less than $10,000 will have to be heard in state court.

The *Zahn-Ben Hur* dichotomy provides no guidance about how nonfederal claims requiring joinder of parties, but lacking a federal question should be treated. The "pendent" jurisdiction doctrine, however, may demand a result analogous to the *Zahn-Ben Hur* distinction.[113] If the federally-cognizable claim arose under federal question jurisdiction and the additional claim did not, a federal court may be willing to hear the claim as "pendent," even though the nonfederal claim requires joinder of additional parties. On the other hand, if the jurisdictional defect of the nonfederal claim is lack of jurisdictional amount, a federal court may refuse to hear the claim by asserting that the "pendent" jurisdiction doctrine is limited to claims arising under state law that are joined with claims arising under federal law. While this distinction may seem undesirable, it is no more undesirable than the *Zahn-Ben Hur* distinction.

D. *Conclusion*

The implicit rejection of ancillary jurisdiction in *Zahn* will be influential in defining the contours of the ancillary jurisdiction concept. *Zahn* did not present a major reversal of the law, but rather created a deterrent to future expansion of ancillary jurisdiction. The *Zahn* result tends to reinforce the law of ancillary jurisdiction. The effect of *Zahn*, however, will be limited. Only in certain circumstances will it hinder the extension of jurisdiction: where the additional claim necessitates joinder of parties, where the additional claim is in the nature of an original or "discretionary" claim, and, possibly, only where the jurisdictional defect is lack of jurisdictional amount.

VI. Removal Jurisdiction

The *Zahn* decision will require many plaintiffs in *Zahn*-type class actions to resort to state courts if they intend to maintain their class action.[114] Once these actions are filed in state courts, defendants may

113. There is one difference, however, in that pendent jurisdiction is exercised in the discretion of the trial court. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In the *Ben Hur*-type case, if diversity exists on the face of the complaint, the trial court has no discretion to exclude unnamed class members who are nondiverse.

114. Plaintiffs may have a problem in going into state courts. Not all states provide a

desire to remove the action to federal court. It is difficult to determine the circumstances in which defendants will be permitted to do so. *Zahn* will have some effect on the law concerning removal, but, more significantly, the decision created a new difficulty with removal jurisdiction.

Removal from state court to federal court is permitted by section 1441 of Title 28.[115] Subsection (a) provides for the removal of any action over which the federal court could have had original jurisdiction.[116] If a "separate and independent" claim or cause of action, which would be removable if presented alone, is joined with a nonremovable claim, the entire action may be removed under subsection (c).[117] For class actions in which some, but not all, of the class members meet the jurisdictional amount requirement, removal is possible only under subsection (c). The *Zahn* holding, that the entire class does not acquire federal jurisdiction, would prevent removal under section 1441(a).[118]

---

procedure for class actions. Additionally, many states have class action procedures that differ significantly from the federal rules. Generally, the different procedures either follow the Field Code or old Rule 23. Once plaintiffs are dismissed from federal court, they may be unable to bring the same kind of action in state court. For a thorough discussion of class-action procedures in state courts, see Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971).

115. 28 U.S.C. § 1441 (1970).

116. 28 U.S.C. § 1441(a) (1970):

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

117. 28 U.S.C. § 1441(c) (1970):

> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

118. A defendant in *Zahn*-type class actions could contend that removal under § 1441(a) is proper by reasoning: First, since original jurisdiction was sought by plaintiffs in *Zahn* and *Snyder*, the Court applied only the plaintiff-viewpoint rule (plaintiff's allegation of damages determines whether the jurisdictional amount requirement is satisfied). Those plaintiffs who failed to satisfy the requirement acquired no federal jurisdiction. Second, the correct rule in determining the amount in controversy for removal jurisdiction is not the plaintiff-viewpoint rule. Attention should instead be focused on the party seeking to invoke federal jurisdiction. *See* WRIGHT § 34. To ascertain removal jurisdiction, the court should determine the amount in controversy from the defendant's viewpoint. Third, the defendant in a *Zahn*-type class action would be facing claims for more than $10,000 and therefore the jurisdictional amount requirement would be satisfied.

The above argument ignores one important fact. The plaintiff-viewpoint rule is employed only in cases in which "the benefit to plaintiff will have a different value than

The issue presented is whether the claim of one class member is "separate and independent" from other claims of the class. If not, the class action would not meet the requirements for removal under subsection (c), and the action would have to remain in state court.

Defining "separate and independent claim or cause of action" is no simple task. The leading Supreme Court case, *American Fire & Casualty Co. v. Finn*,[119] held:

> [W]here there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c).[120]

Finn involved an action by a single plaintiff against several defendants who were liable only in the alternative. Any *Zahn*-type class action would involve multiple plaintiffs seeking independent recoveries and thus would be factually distinguishable from *Finn*. As two leading commentators have stated,

> Where, because of a common question of law or fact, several plaintiffs join in one action to sue a defendant on their various individual claims, these claims are separate and independent within the meaning of section 1441(c).[121]

Some cases have followed the above approach,[122] but contrary case law[123] and commentary[124] exist. The argument against permitting re-

---

the loss to defendant if the relief is granted," such as suits for an injunction or to abate a nuisance. WRIGHT 117. When multiple causes of action are presented, the traditional rules of aggregation apply, and the defendant is not allowed to aggregate the amounts in controversy for multiple plaintiffs in order to reach the jurisdictional amount required for removal. *See* Title Guar. & Sur. Co. v. Allen, 240 U.S. 136, 140 (1916); Robbins v. Western Auto. Ins. Co., 4 F.2d 249 (7th Cir.), *cert. denied*, 268 U.S. 698 (1925). The *Zahn* decision made it clear that, for jurisdictional purposes, some class actions involve individual causes of action. Because *Zahn* limited aggregation when original jurisdiction was sought, the decision is strong authority for the proposition that aggregation will be limited when removal jurisdiction is sought.

119. 341 U.S. 6 (1951).

120. *Id.* at 14.

121. Moore & Van Dercreek, *Multi-party, Multi-claim Removal Problem: The Separate and Independent Claim Under Section 1441(c)*, 46 IOWA L. REV. 489, 494-95 (1961).

122. *See* Alexander v. Lash, 311 F. Supp. 524 (D. Hawaii 1970); Biechele v. Norfolk & W. Ry., 309 F. Supp. 354 (N.D. Ohio 1969); Herrmann v. Braniff Airways, Inc., 308 F. Supp. 1094 (S.D.N.Y. 1969); Orn v. Universal Auto. Ass'n, 198 F. Supp. 377 (E.D. Wis. 1961).

123. *See* Jett v. Zink, 362 F.2d 723 (5th Cir.), *cert. denied*, 385 U.S. 987 (1966); Fugard v. Thierry, 265 F. Supp. 743 (N.D. Ill. 1967).

124. *See* 1 BARRON & HOLZOFF, FEDERAL PRACTICE AND PROCEDURE, 491-92 (Wright ed. 1960).

moval under section 1441(c) is that the "independent" claim or cause of action requirement mandates that there not be a close factual relationship between the removable and nonremovable claims—that if the same issues of law and fact are involved in both claims, the claims are not independent. Were this approach to be followed, removal of any class actions under section 1441(c) would be impossible, because one requirement for class actions is the existence of common questions of law and fact.[125]

The preceding discussion has treated the class action as if it were simply a joinder device that authorized multiple plaintiffs to join their claims in a single litigation. Class actions are more than mere joinder provisions, however, and this fact could represent another hurdle for the defendant who attempts to remove to federal court. The problem the defendant may face is whether the plaintiffs, by asserting their claims as a class action, have changed the cause of action so that claims that would be "separate and independent" if brought under a joinder of claims provision no longer may be viewed as "separate." Plaintiffs opposing removal could argue that a class action represents only a single cause of action providing for multiple recoveries.

The logic behind *Zahn* and *Snyder*, however, may provide support for the removing defendant. Both cases considered the claims of the individual class members, rather than the claim of the entire class, to determine federal jurisdiction. Had the Court in either case done otherwise, results opposite to those obtained would be expected. Thus, there appears firm authority for the proposition that the use of a class action procedure does not change the nature of the cause of action, at least for the purpose of determining federal jurisdiction.

An additional problem arises if class actions are removed to federal court. Several states' procedures for class actions differ from the federal rules; in some states the procedure is analogous to old Rule 23.[126] Upon removal, class actions brought in state court as "spurious" class actions would be governed by the federal rules.[127] Thus, by means of removal, the judgement effect of a "spurious" class action would be expanded.[128]

125. FED. R. CIV. P. 23(a)(2). *See* note 12 *supra*.

126. *See* Homburger, *supra* note 114, at n.94.

127. FED. R. CIV. P. 81(c): "These rules apply to civil actions removed to the United States District Courts from the state courts and govern procedure after removal."

128. Few defendants would desire to expand the judgment effect of an action against themselves. The real problem is whether it is proper to burden the defendant by expanding the judgment effect of the litigation if the defendant exercises his option to remove from state to federal court.

This result is incompatible with the concept that a federal court's jurisdiction upon removal is derived from the state court's jurisdiction.[129] Admittedly, after removal, the federal judge has the discretion to remand any claims that are not independently federally-cognizable and thereby prevent this result.[130] Since the remanding is discretionary, however, the potential for removal petition to bring, in effect, additional claims into the litigation still exists.

A second problem emanates from the federal judge's discretion to remand. If the federal judge were to remand the claims that failed to satisfy the requirements for original federal jurisdiction, it would then be possible for removal to cause part of the class action to be severed. If the claims remanded were those of unnamed class members, then there would be no participating plaintiffs left to continue the litigation in the state court. The remanding would become, in reality, a dismissal of the remanded claims.

The *Zahn* decision has created difficulties for federal judges facing petitioners who seek to remove class actions from state to federal court. Whether removal of *Zahn*-type class actions is permissible under section 1441(c) is, at present, an unanswered question. Even if it is determined that removal is proper, trial judges may face unpleasant decisions when exercising their discretion to remand nonfederal claims. In certain circumstances, failure to remand will place an additional burden on defendant. In other circumstances, remanding will mean, in effect, the dismissal of some of the class members' claims.

VII. CONCLUSION

This Note has focused upon the legal rather than the practical effects of the *Zahn* decision on federal jurisdiction. Readily apparent is the conclusion that *Zahn* will be influential in a wide variety of circumstances, extending beyond Rule 23(b)(3) class actions brought under diversity jurisdiction. What is also apparent is that *Zahn* placed a freeze on federal jurisdiction. The decision reaffirmed the prevailing law, and access to federal courts remains as it was prior to *Zahn*.

This Note has not considered the desirability of the *Zahn* result. To do so would require evaluation of competing policy considerations, in-

129. If the state court did not have jurisdiction, the federal court cannot have jurisdiction upon removal. *See* Venner v. Michigan Cent. R.R., 271 U.S. 127, 131 (1926); Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377, 382 (1922).

130. *See* text quoted note 117 *supra*.

cluding the heavy workload of the federal courts and the need to litigate certain claims in federal courts. In light of the complicated conceptualization of the law of federal jurisdiction and the similarity of language between the jurisdictional statutes, any changes in federal jurisdiction will have wide repercussions and deserve serious analysis.

Perhaps the time has come to reject heavy reliance on the existing concepts and legal tests in the law of federal jurisdiction. If the Congress feels compelled to reverse the *Zahn* result, it may best be advised to do so by empowering the persons who have to deal with the problems of federal jurisdiction, the federal judiciary, to make the decisions for themselves. This could be done by granting the federal district courts discretionary jurisdiction to hear claims that would be rejected under the *Zahn* requirement. To this end, a proposed amendment to sections 1331 and 1332 is presented:

> (c) The district court, may in its discretion, in the interests of judicial efficiency[131] and fairness to litigants,[132] acquire original jurisdiction of a claim or cause of action wherein the matter in controversy does not exceed the sum or value of $10,000, but otherwise satisfies the requirements of this statute, provided that claim or cause of action is properly joined under the rules of procedure[133] presently in force for the United States district courts to a claim or cause of action that satisfies subdivision (a) of this statute.[134]

131. Logic dictates that the courts should consider overall judicial efficiency, including the effect upon the state courts. *See* text accompanying note 20 *supra.*

132. The phrase "fairness to litigants" is included so that trial judges will be required to consider the potential unfairness to the party *against* whom the additional claims are asserted. While it does not seem to be unfair to require a party to defend, in federal court, against an additional claim which could later be brought in state court, in some situations the additional claims could so complicate the litigation or so burden the defendant that the federal court would be justified in exercising its discretion and declining to hear the case.

133. This requirement does not change the Federal Rules of Civil Procedure into grants of federal jurisdiction. Jurisdiction would be granted by the proposed statutory amendment; the federal rules would do no more than define the procedural circumstances in which the jurisdictional grant could be employed. The requirement, "property joined under the rules of procedure," should be viewed as a condition precedent to the exercise of the jurisdictional grant.

134. The approach employed in this proposed amendment is also suitable if the jurisdictional defect is lack of jurisdictional amount. If the defect were lack of diversity or lack of federal question, analogous statutes would be unsatisfactory because constitutional limitations would arise. It appears necessary that there be an additional requirement that the nonfederal claim arise out of "the common nucleus of operative fact" of a federally cognizable claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). The result, however, would be merely a statutory recognition of the pendent jurisdiction concept.