ZAHN v. INTERNATIONAL PAPER: TAKING THE ACTION OUT OF CLASS ACTION, OR CAN *ZAHN* BE AVOIDED?

INTRODUCTION

The Supreme Court's decision last term in *Zahn v. International Paper Co.*[1] was greeted in the news media with prophecies of doom for class actions brought in federal court.[2] Though the media's concern was earnest, upon closer inspection, *Zahn* does not nearly have such a virulent effect. There is little doubt, however, that *Zahn* will be a serious hurdle to many class action litigants in federal court.

In *Zahn* four owners of property fronting on Lake Champlain in Orwell, Vermont, brought a diversity action in federal district court seeking 40 million dollars in compensatory and punitive damages on behalf of themselves and 200 other similarly situated landowners and lessees. Defendant was a New York corporation, operating a pulp and paper-making plant in New York state which allegedly allowed discharges from that plant to enter the lake's waters. The district court,[3] in reliance upon the Supreme Court's earlier decision in *Snyder v. Harris*,[4] declined to permit the action to proceed as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure.[5]

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1. 414 U.S. 291 (1973).
2. Los Angeles Times, Dec. 18, 1973, § 1, at 1, col. 3; Wall Street Journal, Dec. 18, 1973, at 12, col. 2.
3. Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971).
4. 394 U.S. 332 (1969).
5. Rule 23 provides in pertinent part:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (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
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> (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 sub-

The *Snyder* decision prohibited the named parties to a class action from aggregating their claims to meet the 10,000 dollar amount in controversy requirement of 28 U.S.C. § 1332(a)[6] except where the parties were exercising a joint or common right.[7] The district court reluctantly concluded that the *Snyder* rationale must also apply to non-named parties and after finding that some of the class members' claims would amount to less than 10,000 dollars, dismissed all save the named parties, each of whom met the jurisdictional amount requirement. Upon interlocutory appeal, a divided Second Circuit Court of Appeals affirmed.[8] On certiorari to the Supreme Court, the decision was affirmed 6 to 3.

It is quite likely that *Zahn* will not be greeted with a flood of enthusiasm, if comments written in response to the Second Circuit decision are indicative.[9] The Court's reasoning will surely be debated and questioned, but the legal profession will likely have to live with *Zahn* for the forseeable future. Because *Zahn* may be

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stantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23.

6. 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. 28 U.S.C. § 1332(a) (1966).

7. *See* text accompanying note 44, *infra.*

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

9. *See* Comment, *Zahn v. International Paper: A Further Limitation on Class Action Jurisdiction,* 41 FORDHAM L. REV. 991 (1973); Case Comment, 4 LOYOLA U.L. REV. 531 (1973); Case Note, 9 HOUSTON L. REV. 852 (1972); Case Note, 39 J. AIR & COMMERCE 289 (1973); Recent Developments, 73 COLUM. L. REV. 359 (1973); Recent Developments, 61 GEO. L.J. 1327 (1973); Recent Decisions, 7 GEORGIA L. REV. 390 (1973); Recent Developments, 6 INDIANA L. REV. 812 (1973).

more the product of a distrust of class actions[10] than the result of sound legal theory, this comment will not attempt a discourse on the rationale of the decision.[11] Instead the discussion to follow is devoted to delving into the practical implications of *Zahn* and considering methods of avoiding its impact.

THE PRACTICAL IMPLICATIONS OF *Zahn*

Class Actions Unaffected by Zahn

Zahn is hardly a death knell to all class actions. Jurisdiction was established in *Zahn* by general diversity under 28 U.S.C. § 1332(a) which requires the amount in controversy to be at least 10,000 dollars. The Court's holding that each of the named and unnamed parties in such a suit must have a 10,000 dollar claim was also made applicable to cases based on general federal question jurisdiction[12] under 28 U.S.C. § 1331(a)[13] which likewise requires a 10,000 dollar amount in controversy. *Zahn* is inapplicable, however, to those suits arising under a federal statute which does not require the existence of a minimum amount in controversy. Thus a wide range of federal causes of action, which are noted below,[14] avoid the *Zahn* restriction.

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10. *See, e.g.*, Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972).

11. The *Zahn* dissenters presented a cogent rationale for permitting aggregation of the class claims. Zahn v. International Paper Co., 414 U.S. 302 (1973) (dissenting opinion). Probably the most cogent rationale is as follows: (1) The non-named parties need meet the general diversity requirement, which has Constitutional underpinnings. U.S. CONST. art. III, § 2; 28 U.S.C. § 1332(a) (1966); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). (2) The prohibition against aggregation is not specifically established by statute, but the statute relied upon for this rule also specifically requires diversity. 28 U.S.C. § 1332(a) (1966); Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806). (3) Since the diversity requirement has constitutional underpinnings but can be relaxed, so should the rule against aggregation, which is based on mere statutory interpretation.

12. 414 U.S. at 294-95.

13. The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.
28 U.S.C. § 1331(a) (1966).

14. *Zahn* does not apply to cases based on the following statutes: Admiralty, 28 U.S.C. § 1333 (1966); Bankruptcy, 28 U.S.C. § 1334 (1962); Review of Interstate Commerce Commission orders, 28 U.S.C. § 1336 (Supp. 1974); Statutes regulating commerce, 28 U.S.C. § 1337 (1962); Patent, plant variety, trademark and copyright, 28 U.S.C. § 1338 (Supp. 1974); Postal matters, 28 U.S.C. § 1339 (1962); Internal revenue, 28 U.S.C. § 1340 (1962); Civil rights matters, 28 U.S.C. § 1343 (1962); Election disputes, 28 U.S.C. § 1344 (1962); Cases wherein the United States is a party, 28 U.S.C. §§ 1345-49 (1962, Supp. 1974), 28 U.S.C. §§ 1357-58 (1962), 28 U.S.C. § 1361 (Supp.

In most cases the class litigant should find a particular federal statute is either clearly applicable or clearly inapplicable. In some cases, however, the question of applicability is not so easily answered. This fact can be demonstrated by examining the possibility of finding a federal cause of action having no jurisdictional amount requirement under which the *Zahn* case could have been brought.

The Civil Rights Act of 1871

Where the defendant is a governmental entity[15] or official[16] or some closely regulated industry,[17] counsel should consider bringing a cause of action based upon violation of the Civil Rights Act of 1871,[18] which does not require an amount in controversy.[19] To as-

1974); Alien's action for certain torts, 28 U.S.C. § 1350 (1962); Cases against consuls, 28 U.S.C. § 1351 (1962); Actions on bonds executed under federal law, 28 U.S.C. § 1352 (1962); Indian allotments, 28 U.S.C. § 1353 (1962); Cases involving land grants from different states, 28 U.S.C. § 1354 (1962); Cases on recovery of federal fines and seizures, 28 U.S.C. § 1355-56 (1962); Cases brought by Indian Tribes, 28 U.S.C. § 1362 (Supp. 1974).

15. Moor v. County of Alameda, 411 U.S. 693 (1973).

16. *E.g.*, Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973) [state prison personnel]; Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973) [state registrar of motor vehicles]; Gill v. Manuel, 488 F.2d 799 (9th Cir. 1973) [policemen].

17. *E.g.*, cases cited note 25, *infra*.

18. 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 to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1974).

19. At one time a personal-property right dichotomy affected jurisdiction. Claims for deprivation of personal rights were said to meet the requirements for the independent basis for jurisdiction under 28 U.S.C. § 1343(3) (1962), while claims based on property rights were required to meet the amount in controversy requirement of 28 U.S.C. § 1332 (1966). *See* Comment, *Federal Jurisdiction Under the Civil Rights Act—The Case Against the Personal-Property Rights Distinction*, 17 VILL. L. REV. 313 (1971); Comment, *Section 1343 of Title 28—Is the Application of the "Civil Rights-Property Rights" Distinction to Deny Jurisdiction Still Viable?*, 49 B.U.L. REV. 377 (1969). This distinction was rejected in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), however, because of some dicta in *Lynch*, it is unclear whether it is still necessary to satisfy the amount in controversy requirement in suits against federal officials. Strausberg, *The Jurisdictional Amount Requirement and Actions to Enjoin Deprivation of Constitutional Rights by Federal Officials: The Lynching Effect*, 17 HOWARD L.J. 867 (1973).

sert a cause of action under this statute, it must be proved that (1) the defendant took certain actions under color or authority of state law which (2) deprived the plaintiff of a constitutional right.[20] Of course, the right not to be deprived of property, except by due process of law, is one such right.[21]

Although the following discussion examines the potentiality for applying this statute to a pollution oriented claim, the sweeping language of the provision is hardly so limited. The number of suits brought under the Act are on the increase; apparently the legal profession is becoming more aware of the great breadth of actions which it covers.[22] In the commercial area, most of the litigation under this statute involving the deprivation of property rights, has been directed toward public utilities; probably because close regulation of public utilities heightens the probability of finding state action. The Surpreme Court has not precisely defined what state action is in this context, but has told us:

> Conduct that is "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.[23]

> Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.[24]

With this direction, the lower federal courts have ruled both ways on the question whether state regulation of public utilities amounts to state action.[25]

The split in the lower federal courts surfaces on the question whether (1) state action requires an overt state act endorsing the

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20. *See* Palmer v. Columbia Gas Co., 479 F.2d 153, 161 (6th Cir. 1973).

21. U.S. CONST. amend. XIV, § 1. *See* Fuentes v. Shevin, 407 U.S. 67 (1972). This theory has not, however, fared well in environmentally oriented lawsuits. *See* Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061 (N.D.W.V. 1973); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972).

22. In 1962 about one percent of all the Federal District Court opinions filed concerned actions brought under 42 U.S.C. § 1983 (1974). In 1973 it was closer to ten percent.

23. Evans v. Newton, 382 U.S. 296, 299 (1966).

24. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

25. Cases finding state action include: Palmer v. Columbia Gas Inc., 479 F.2d 153 (6th Cir. 1973); Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); Salisbury v. Southern New England Telephone Co., 365 F. Supp. 1023 (D. Conn. 1973); Stanford v. Gas Service Co., 346 F. Supp. 717 (D. Kan. 1972). Cases finding no state action include: Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3d Cir. 1973); Lucas v. Wisconsin Elect. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189 (7th Cir.), *cert. denied*, 409 U.S. 890 (1972).

complained of activity or whether (2) the existence of state administrative control over the activities of a monopoly, while not specifically permitting the complained of activity, also constitutes state action. Apparently, most courts are willing to adopt the first proposition,[26] while fewer courts will adopt the second.[27]

There is no theoretical reason why the foregoing state action analysis is not equally applicable to an enterprise other than a public utility, such as a pulp and paper mill. The state action requirement might be readily established under the first proposition, for instance, if the state has adopted allowable discharge limits for pollutants and the enterprise has complied with those limits.[28] This, of course, assumes that the state has selected inappropriately high limits,[29] which should be an infrequent occurrence. More commonly, however, the state will have either established no limits or reasonable limits, and there thus will be either no damage or no state action. There would be no state action even under the more liberal definition since a pulp and paper mill is just not characterizable as a state authorized monopoly. Thus, the possibility of finding a cause of action under the Civil Rights Act is possible, but unlikely in the case of a corporate polluter.

Another Basis for Jurisdiction

If, on the other hand, the polluter allows pollutants at greater than allowable levels to enter navigable interstate waters, then the

26. *E.g.*, Palmer v. Columbia Gas Inc., 479 F.2d 153 (6th Cir. 1973); Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3d Cir. 1973); Lucas v. Wisconsin Elect. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189 (7th Cir.), *cert. denied*, 409 U.S. 890 (1972). *Cf.* Public Utility Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

27. *E.g.*, Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); Salisburg v. Southern New England Telephone Co., 365 F. Supp. 1023 (D. Conn. 1973); Stanford v. Gas Service Co., 346 F. Supp. 717 (D. Kan. 1972).

28. A majority of states have now adopted intrastate water quality standards. S. REP. No. 414, 92d Cong., 2d Sess. — (1972), *reprinted at* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3671.

29. The state may establish water quality standards pursuant to a public hearing. *See* N.Y. ENVIR. CONS. LAW § 17-0301 (McKinney 1973). This public hearing would not fulfill Substantive Due Process requirements even if it arguably fulfilled Procedural Due Process requirements. Since one of the elements of the cause of action is a deprivation of a constitutional right, the existence of a prior public hearing would not justify the deprivation.

Federal Water Pollution Control Act of 1972[30] may confer jurisdiction.[31] While this Act authorizes the granting of injunctive relief, a private litigant cannot recover money damages under it. Common law remedies are not, however, preempted by the statute[32] and thus a district court should be able to take pendent jurisdiction over a claim for money damages brought by the party plaintiff.[33] The Act also prohibits representative suits,[34] thereby barring a class action under the Act. In a majority of the circuits, however, the Federal Circuit Courts of Appeal have taken pendent jurisdiction over claims involving third parties not a party to the federal cause of action.[35] Since a class action for money damages can be brought as a third-party claim, such a suit should be cognizable in a majority of the circuits, at least until the Supreme Court rules on appropriateness of pendenting third-party claims.

Class Action Under the Thumb of Zahn

If the class litigant is relegated to bringing the cause under general diversity or general federal question jurisdiction, he may well consider himself under the thumb of *Zahn.* Luckily, all is not lost, for there are several potential paths by which the impact of *Zahn* can be averted.

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30. 33 U.S.C. § 1251 *et seq.* (Supp. 1974).

31. The parties need not be diverse and no amount in controversy need be alleged. 33 U.S.C. § 1365 (Supp. 1974).

32. 33 U.S.C. § 1365 (Supp. 1974).

33. Under the theory of pendent jurisdiction a federal court has discretion to take subject matter jurisdiction over a non-federal cause of action, when the court cannot entertain it separately, if it relates to a federal cause of action before the court. The relation between the two causes of action is that they must arise out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

34. 33 U.S.C. § 1365 (Supp. 1974).

35. Traditionally, pendent jurisdiction has been found only with respect to parties properly before the court on the federal cause; it could not be applied to third parties. This rule has undergone erosion in many of the circuits where pendent jurisdiction is now being used to confer subject matter jurisdiction over claims involving third parties not party to the federal cause of action. *E.g.*, Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Connecticut General Life Insurance Co. v. Craton, 405 F.2d 41 (5th Cir. 1968); Beautytuft, Inc. v. Factory Insurance Ass'n, 431 F.2d 1122 (6th Cir. 1970); Hatridge v. Aetna Casualty & Surety Co., 415 F.2d 809 (8th Cir. 1969). The Supreme Court recently had the opportunity to decide the question whether pendent jurisdiction can confer subject matter jurisdiction over a third party. Moor v. County of Alameda, 411 U.S. 693 (1973). After noting that the weight of authority in the circuits favored granting jurisdiction, the Court declined to decide the point saying the district court judge, in exercise of legitimate discretion, had properly disallowed the joinder. 411 U.S. at 715.

AVOIDING THE IMPACT OF *Zahn*

Each of the techniques to be examined offer some hope to the class litigant of circumventing the *Zahn* decision. The first method, requesting exemplary damages, is placed first because of its straightforwardness. The second and third techniques, finding a common or joint right and requesting injunctive relief, are placed next because they rely on common concepts and are more useful than the fourth method, defining the class to eliminate claims of less than 10,000 dollars. The third technique, seeking injunctive relief, may very well prove to be the most useful tool of all.

Exemplary Damages

It probably goes without saying that a good faith prayer for exemplary damages should be made whenever possible since counsel always strives to get the most complete relief for his client. It is worth recalling, moreover, that exemplary damages may be added to actual damages in determining whether the amount in controversy requirement is satisfied.[36]

The question can arise, however, of the proper ratio of actual to exemplary damages. To illustrate, a claim of 8,000 dollars actual damages plus 4,000 dollars punitive damages is likely to satisfy most everyone as meeting the jurisdictional amount as long as punitive damages are permitted on the cause of action pleaded,[37] but a claim of 10 dollars actual damages and 10,000 dollars punitive damages might well elicit a plea that it was made in bad faith.[38] The federal courts have not laid down a mathematical rule as to when the request for exemplary damages becomes a bad faith claim; the plaintiff's claim can be overcome only if it can be shown to a legal certainty that the amount recoverable is less than the jurisdictional

36. 1 J. MOORE, FEDERAL PRACTICE ¶ 0.93[4] (2d ed. 1974).

37. *Id. See, e.g.*, Wood v. Stark Tri-County Building Trades Council, 473 F.2d 272 (6th Cir. 1973) [a claim for 3,000 dollars actual damages and 7,000 dollars punitive damages was held as satisfying the jurisdictional amount requirement]; Green v. Keithley, 86 F.2d 238 (8th Cir. 1936) [a claim for 1,670 dollars actual damages and 10,000 dollars punitive damages was held as satisfying the jurisdictional amount requirement of 3,000 dollars].

38. Fleming v. United States Fidelity & Guaranty Co., 146 F.2d 128 (5th Cir. 1944) held that a claim of 103 dollars actual damages and 3,000 dollars punitive damages against a state sheriff's bond did not satisfy the 3,000 dollar jurisdictional amount requirement because state law required an award of punitive damages must not be excessive or oppressive.

amount.[39] With such a plaintiff-oriented rule, the class litigant may well have a potent weapon to combat *Zahn* in the appropriate case.

Several versus Common Rights

In 1966, the much criticized[40] old Rule 23[41] which attempted to pigeonhole class actions into "true," "hybrid" or "spurious" classes gave way to the more functional approach of modern Rule 23. A major objection to the older rule was that in deciding to which category the action belonged, the courts had to determine whether the rights involved were "common" for a true class or "several" for a hybrid or spurious class. These proved to be elusive terms for both legal theorists[42] and judges.[43] Under the prior law, claims could be aggregated by the class members to meet the jurisdictional amount only if the rights asserted were "common." Even though not mentioned in modern Rule 23, these terms are now once again part and parcel of many class action jurisdiction questions. The Court held that each member of a class must satisfy the amount in controversy requirement unless the claimants are seeking to enforce a "common and undivided interest."[44]

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39. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

40. *See, e.g.*, Z. CHAFEE, SOME PROBLEMS OF EQUITY, 244-58 (1950); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendment of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 380 (1967); Wright, *Class Actions*, 47 F.R.D. 169, 176 (1969).

41. The old Rule 23 reads in pertinent part:

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

Fed. R. Civ. P. 23, 39 F.R.D. 69, 94 (1965).

42. *See* note 40, *supra.*

43. *See, e.g.*, Gullo v. Veterans Coop. Housing Ass'n., 13 F.R.D. 11 (D.D.C. 1952); Deckert v. Independence Shares Corp., 27 F. Supp. 763 (E.D. Pa. 1939), *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd*, 311 U.S. 282 (1940), *on remand*, 39 F. Supp. 592 (E.D. Pa. 1941), *rev'd sub nom.* Pennsylvania Co. for Ins. on Lives v. Deckert, 123 F.2d 979 (3d Cir. 1941). *See* Z. CHAFEE, *supra* note 40, at 263-65.

44. 414 U.S. at 294.

A simple way to skirt this definitional problem has been suggested by Judge Frankel of the Southern District of New York. He suggests that Rule 23(b)(1) and (b)(2) class suits embrace the old "true" and "hybrid" classifications and similarly, that Rule 23(b)(3) class suits correspond to the old "spurious" actions.[45] Therefore, he reasons "aggregation may be proper for actions classified under subdivision (b)(1) or (b)(2), but not under (b)(3)."[46] This approach has been criticized, however, since it is generally felt that class actions meeting the Rule 23(b)(1) or (b)(2) functional requirements may still involve separate and distinct rights instead of necessarily common and undivided rights.[47]

The Supreme Court, although confining the *Zahn* decision to Rule 23(b)(3) class actions,[48] relied so heavily on its finding that the claims were separate rather than common that one is left with the impression that the Court has rejected Judge Frankel's suggestion.[49] To determine whether each unnamed, as well as named, member of the class must have a claim meeting the amount in controversy requirement, it must be determined, therefore, whether the rights asserted are "common" or "several."

The fact that a "common and undivided right" would justify a "true" class action under old Rule 23 does not help the definitional problem.[50] Professor Moore attempted to define a true class as follows:

> The "true class suit" is one wherein, but for the class action device, the joinder of all interested persons would be essential. This would be in cases where the right sought to be enforced was joint, common or derivative. . . .[51]

But such a definition provides little enlightenment on this difficult concept and led Professor Chafee to exclaim:

> Perhaps I am color-blind with respect to class suits, but I often

45. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967).
46. *Id.* at 49.
47. 3B J. MOORE, FEDERAL PRACTICE ¶ 23.08 at n. 17 (2d ed. 1974). *See also* Wright, *supra* note 40, at 177.
48. 414 U.S. at 301.
49. *Id.* at 294-98.
50. Knowles v. War Damage Corp., 171 F.2d 15, 18 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 914 (1949).
51. 3B J. MOORE, FEDERAL PRACTICE ¶ 23.08 (2d ed. 1974).

> have as much perplexity in telling a "common" right from a "several" right as in deciding whether some ties . . . are green or blue.[52]

Although the "common" right- "several" right dichotomy is not generally believed to be precisely definable, the Supreme Court has asserted:

> [The] lower courts have developed largely workable standards for determining when claims are joint and common, and therefore entitled to be aggregated, and when they are separate and distinct and therefore not aggregable.[53]

Unfortunately the Court did not refer to any cases where this matter is so clarified.[54]

A hazy pattern does seem to emerge from the cases finding a common interest. As might be expected, a common interest is found when the plaintiffs are asserting rights in property which they hold in tenancy in common.[55] The common interest for jurisdictional purposes, however, is not limited to common ownership of property. A common interest is also found in those suits resembling a derivative suit by stockholders. In these suits the plaintiff cannot sue on his own behalf; he can only assert some right which is held in common with others. Bondholder and vendor lien foreclosures,[56] or contract rights for the benefit of a group[57] are examples of such common interests. Another common pattern occurs in suits which, if successfully brought in a non-representative action, could adversely affect the rights of unrepresented parties. These cases commonly involve a limited fund from which the various claims can be satisfied.[58] Although the pattern associating these interests is necessarily general, the class litigant may be able to avoid *Zahn* where there exists some factor linking the interests of the parties so that they might be characterized as common interests. *Zahn* is, of course, an obstacle to the class litigant pressing a claim sounding in tort and brought by different property owners.

Seeking Injunctive Relief in Addition to Money Damages

By seeking injunctive relief when money damages alone are inadequate, as in cases of continuing nuisances or violations of civil

52. Z. CHAFEE, *supra* note 40, at 257.
53. Snyder v. Harris, 394 U.S. 332, 341 (1969).
54. *Id.*
55. Phillips Petroleum Co. v. Taylor, 115 F.2d 726 (5th Cir. 1940).
56. Troy Bank v. Whitehead & Co., 222 U.S. 39 (1911); New Orleans Pacific Ry. Co. v. Parker, 143 U.S. 42 (1891).
57. Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970).
58. Manufacturers Casualty Insurance Co. v. Coker, 219 F.2d 631 (4th Cir. 1955); Miller v. National City Bank, 147 F.2d 798 (2d Cir. 1945).

rights, several new factors must be considered in the determination of the amount in controversy.

By requesting injunctive relief, the class action can be, of course, categorized as a Rule 23(b)(1) or (2) class.[59] If the Supreme Court were to follow Judge Frankel's suggestions that aggregation be permitted for those classes, then *Zahn's* impact would be easily avoided if injunctive relief were a proper remedy. As discussed *supra*, however, the likelihood of the Court accepting the Judge's suggestions is not great.[60] There is, however, another route by which the advantages of aggregation can be attained without revising the Court's thinking on common and several rights.

The federal courts, through the first part of this century, determined the amount in controversy in cases seeking injunctive relief by the cost to plaintiff if the injunction were denied or the cost to defendant if the injunction were granted, whichever was greater.[61] This original rule gave way and later cases without expressly overruling the precedents[62] and generally[63] considered the amount in controversy from the plaintiff's viewpoint only. In a case such as *Zahn*, determining the amount in controversy from the defendant's viewpoint would be nearly, if not equally, as beneficial as aggregating the class claims. The aggregated value of the injunctive relief may be greater than the cost to the defendant of complying with the injunction, but this cost should, in most cases exceed 10,000 dollars.

59. *See* Biechele v. Norfolk & W.R.R. Co., 309 F. Supp. 354, 355 (N.D. Ohio 1969).

60. See text accompanying note 49, *supra*.

61. Mississippi & M.R. Co. v. Ward, 67 U.S. (2 Black) 485, 492 (1862) [held the value of the object which would be removed pursuant to the injunction is basis for jurisdiction]; Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U.S. 121, 125 (1915) [held that jurisdictional amount is measured from plaintiff's viewpoint if that is greater than measuring from defendant's viewpoint]. *See also* 1 R. FOSTER, FEDERAL PRACTICE § 13 (6th ed. 1920). This test may also be successfully applied in certain cases where injunctive relief is not sought. *Cf.* Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970).

62. *See, e.g.*, Purcell v. Summers, 126 F.2d 390, 394 (4th Cir.), *cert. denied*, 317 U.S. 640 (1942); Minsky's Follies v. Sennes, 206 F.2d 1 (5th Cir. 1953). *See also* 1 J. MOORE, FEDERAL PRACTICE ¶ 0.96[2] (2d ed. 1974).

63. *Contra*, Hatridge v. Aetna Casualty & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Ridder Bros. v. Blithern, 142 F.2d 395 (9th Cir. 1944); Ronzio v. Denver & R.G.W.R. Co., 116 F.2d 604 (10th Cir. 1940).

The Supreme Court in *Illinois v. City of Milwaukee, Wisconsin*[64] has recently endorsed the original rule. In *Illinois* the Court dismissed on forum non-conveniens grounds an original action brought by the State of Illinois to enjoin several Wisconsin municipalities from polluting Lake Michigan. The Court held that it was not necessary to bring the case originally to the Supreme Court if this case satisfied the general federal question jurisdiction requirements for a suit brought at the District Court level. In determining that the amount in controversy requirement was satisfied, the Court approvingly cited three cases standing for the proposition that the amount in controversy is measured from the plaintiff's or defendant's viewpoint, whichever is greater.[65] Despite the fact that the Court's reaffirmation of the older rule may be dicta, *Illinois* does provide the class litigant needed ammunition for asserting the reestablishment of the original rule and would, in many cases, facilitate compliance with the amount in controversy requirement if injunctive relief is sought.

A third factor which comes into play when injunctive relief is sought is suggested by a class action involving air pollution brought before District Court Judge Young of the Northern District of Ohio.[66] Judge Young held that while none of the individual damage claims could possibly involve 10,000 dollars needed for jurisdiction, that under the injunctive relief sought "the right of each member of the class to live in an environment free from excessive coal dust and conversely, the right of the defendant to operate its coal loading facility are both in excess of" 10,000 dollars,[67] giving the court jurisdiction. Judge Young neatly avoided the plaintiff's-defendant's viewpoint controversy, but what is more important is that he felt the value of the injunctive relief to each class member was in excess of 10,000 dollars.

In theory, the amount in controversy should not be affected if the plaintiffs are entitled to money damages for the decrease in the fair market value of the property instead of injunctive relief.[68] In practice, however, a judge may more readily find the jurisdictional amount satisfied if injunctive relief is sought because his jurisdic-

64. 406 U.S. 91 (1972).

65. 406 U.S. at 98. The Court cited Mississippi & M.R. Co. v. Ward, 67 U.S. (2 Black) 485 (1862), Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U.S. 121 (1915) and Ronzio v. Denver & R.G.W.R. Co., 116 F.2d 604 (10th Cir. 1940).

66. Biechele v. Norfolk & Western R.R. Co., 309 F. Supp. 354 (N.D. Ohio 1969).

67. *Id.* at 355.

68. *Cf.* 1 J. MOORE, FEDERAL PRACTICE ¶ 0.96[2] (2d ed. 1974).

tional conclusion will not be tested later when the judgment is rendered. Of course, a money judgment for less than the jurisdictional amount does not void it, but it could cause some criticism. The litigants in this case avoided the problem altogether by requesting injunctive relief.

Judge Young's decision brings up still another factor which should be considered in determining whether the amount in controversy requirement is satisfied. Judge Young seemed to think that the amount in controversy must be satisfied for either the legal or the equitable remedy alone. After determining the request for injunctive relief satisfied the amount in controversy requirement, he also took jurisdiction over the claim for money damages "in the interest of judicial efficiency."[69] This "quasi-ancillary" jurisdiction, it is suggested, is incorrect since money damages and injunctive relief are merely compatible remedies needed to compensate the plaintiff on his single cause of action. Since a plaintiff is allowed to aggregate his claims when brought on different causes of actions,[70] it would seem anomalous to prohibit aggregation of compatible, non-alternative, remedies on a single cause of action.[71] Clearly, then, the value of the injunctive relief should be added to the actual and exemplary damages to determine whether the amount in controversy requirement is satisfied.

Limiting the Class to Claimants Having $10,000 Claims

At first glance, limiting the class to only those persons who have a 10,000 dollar claim seems to be a simple solution. Simple solutions, however, are not always workable solutions. It has been said that "an essential prerequisite to a class action is the existence of a class whose bounds are precisely drawn."[72] Such a precise class definition is apparently required because a (b)(3) suit is *res judicata* to all members of the class except those who elect to opt-out[73] and the proposed limitation of the class could lead to the side-

69. 309 F. Supp. at 355. Although this case was removed to the District Court, this fact should not affect the determination whether the amount in controversy requirement is satisfied.

70. Alberty v. Western, 249 F.2d 537 (9th Cir. 1958); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.97[1] (2d ed. 1974).

71. 1 J. MOORE, FEDERAL PRACTICE ¶ 0.97[1] at n.1 (2d ed. 1974).

72. Dolgow v. Anderson, 43 F.R.D. 472, 491 (1968); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.04 (2d ed. 1974).

73. Rule 23 provides in pertinent part:

(c)(2) In any class action maintained under subdivision (b)(3),

line sitting or one-way intervention which existed under the old Rule 23.[74] If the class were limited to those persons having 10,000 dollar claims, a member of the class, whose actual claim amounted to something greater than the jurisdictional amount, might easily discover that his damages are somewhat less than the jurisdicitonal amount if the class action failed in an attempt to avoid its *res judicata* effects.

An opt-in procedure, which is not authorized by Rule 23, but which has been utilized in some jurisdictions,[75] would eliminate this one way intervention, especially if those opting-in were required to demonstrate that their claims were not merely colorable.[76] A requirement of such a demonstration would bring all the parties before the court, which raises doubt whether class treatment would still be "superior to other available methods for the fair and efficient adjudication of the controversy" as required by Rule 23. Perhaps this last objection could be overcome if the *bona fides* of the claim belonging to the opting-in party were tested only when that party seeks to enforce the judgment or when the judgment is given *res judicata* effect.[77] In addition, all this assumes, of course, that a case with numerous parties having 10,000 dollar claims would arise. That is, at least, an infrequent occurrence.

> the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

FED. R. CIV. P. 23.

74. *Compare* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1963) *with* York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

75. *See* Biechele v. Norfork & W.R.R. Co., 309 F. Supp. 354, 356 (N.D. Ohio 1969); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403 (S.D. Iowa 1968). An opt-in procedure which seemingly is authorized, is the dual notice method. Under this method, the first notice is the standard opt-out notice which is followed by a second notice requiring interested class members to file a notice of the extent of their claim. The second notice is authorized by 23(d)(2) which permits "for the protection of the members of the class" notice be given requiring them "to come into the action." FED. R. CIV. P. 23. Those members who fail to file claims are dismissed. Arey v. Providence Hospital, 55 F.2d 62, 70-72 (D.D.C. 1972); In Re Antibiotic Antitrust Actions, 333 F. Supp. 267, 271-72 (S.D.N.Y. 1971); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 459-60 (E.D. Penn. 1968).

76. District Judge Liddy suggested that such a demonstration might be necessary in Zahn v. International Paper Co., 53 F.R.D. 430, 433 (D. Vt. 1971).

77. *See* note 75, *supra*.

CONCLUSION

Zahn v. International Paper Co. surely increases the difficulty of bringing a class action suit based on diversity or general federal jurisdiction due to the requirement that even the unnamed parties have claims in excess of the 10,000 dollar jurisdictional amount if the right to be enforced is only a "several" right. With this as a starting point, it would seem that the (b)(3) class suit is an empty hulk, an impotent vestige of a system designed to protect the small guy. Perhaps this is the result the Court intended, having found that the abuses attendant to the class action device outweigh its benefits.

This comment proposed several methods by which the class litigant might circumvent the *Zahn* rule. The best method, if injunctive relief is appropriate, is to assert that, based on the Court's decision in *Illinois v. City of Milwaukee, Wisconsin*, the amount in controversy should be determined by the cost to plaintiff if the injunction is refused or cost to defendant if granted, whichever is greater. This should provide an easy mechanism to overcome *Zahn*, but if the driving force behind the *Zahn* decision was a distrust of class action litigation, even this method may fail.

Other means of overcoming *Zahn* include, besides the greater measure of damages if injunctive relief is sought, establishing a federal cause of action such as under the Civil Rights Act of 1871 or the Water Pollution Control Act of 1972, increasing the claims through requests for exemplary damages or limiting the class to claimants having a legitimate 10,000 dollar claim. All these evasions are, however, vulnerable to a court which is hostile to class actions in general.

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