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Federal Procedure: The Class Action--A Social Weapon Disarmed?

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Clearly, Florida's procedure for revoking the conditional liberty of those arrested for felonies needs to be harmonized with the minimal requirements of due process set by the United States Supreme Court. By utilizing the existing committing magistrate system[44] to determine probable cause in revocation cases, the state would save jail space, reduce the number of full-fledged revocation hearings, and, most important, help minimize the loss of liberty caused by unjustified arrests.[45]

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FEDERAL PROCEDURE: THE CLASS ACTION – A SOCIAL WEAPON DISARMED?

Zahn v. International Paper Co., 94 S. Ct. 505 (1973)

By permitting discharges from its New York plant to be carried by stream into Lake Champlain, International Paper Company allegedly polluted the waters of the lake, thereby damaging the surrounding property. Vermont plaintiffs sought damages in a diversity action[1] in federal district court on behalf of a class consisting of themselves as named parties, and 200 other lakefront property owners and lessees as unnamed parties.[2] The Court of Appeals

44. FLA. R. CRIM. P. §3.120 (1972).

45. Pugh v. Rainwater, 332 F. Supp. 1107, 1114 (S.D. Fla. 1971).

1. See 28 U.S.C. §1232(a) (1970). This statute provides: "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 interests and costs, and is between – (1) citizens of different States."

2. Plaintiffs brought a class action suit under FED. R. CIV. P. 23(b)(3), which provides:

"(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 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 . . . (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."

for the Second Circuit affirmed[3] the district court, which had refused to permit the suit to proceed as a class action and had dismissed the unnamed parties.[4] On certiorari, the Supreme Court of the United States affirmed and HELD, each plaintiff, named or unnamed in a rule 23(b)(3) class action must individually meet the minimum jurisdictional amount to avoid dismissal from the case.[5]

Plaintiffs invoking federal diversity jurisdiction under United States Code, title 28, section 1332, must allege that the "matter in controversy" exceeds a threshold amount, currently $10,000.[6] In a 1911 diversity case, the Court held this "matter in controversy" requirement applicable to each one of multiple plaintiffs in suits involving separate and distinct claims.[7] Aggregation of claims was forbidden where none of the plaintiffs met the amount requirement, and claimants failing to satisfy the requirement were dismissed.[8] Where claims arose from a common and undivided right, however, plaintiffs could aggregate claims to satisfy the "matter in controversy" requirement.[9]

Adoption of the Federal Rules of Civil Procedure in 1938 did not significantly alter this scheme. Rule 23, which formally recognized class actions, preserved the historical distinction between multiple plaintiffs with common and undivided claims and multiple plaintiffs with separate and distinct claims.[10] In "spurious" class actions[11] — those involving separate and distinct

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See generally Note, *Federal Rules of Civil Procedure: Rule 23, The Class Action Device and Its Utilization*, 22 U. FLA. L. REV. 631 (1970).

3. Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972) (Timbers, J., dissenting), *noted in* 73 COLUM. L. REV. 359 (1973).

4. Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971). *See* 28 U.S.C. §1292(b) (1970) providing for interlocutory appeals by certification from the district court; Comment, *Interlocutory Appeals from Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292, 1293-94 (1970).

5. 94 S. Ct. 505 (1973) (Brennan, Douglas, Marshall, JJ., dissenting).

6. See note 1 *supra*. The phrase "matter in controversy" has been the subject of judicial interpretation since 1832. *See* Seaver v. Bigelows, 72 U.S. (5 Wall.) 208 (1866); Stratton v. Jarvis, 33 U.S. (8 Pet.) 4 (1832); Oliver v. Alexander, 31 U.S. (6 Pet.) 143 (1832). The intent of Congress in establishing the jurisdictional amount requirement was that: "The jurisdictional amount should not be so high as to convert the federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." S. REP. No. 1830, 85th Cong., 2d Sess. 304 (1948); H.R. No. 1706, 85th Cong., 2d Sess. 3 (1958). The $10,000 amount requirement applies irrespective of the remedy sought. "In injunction actions, the amount in controversy is not the amount that plaintiff might recover at law, but the value of the right to be protected or the extent of the injury to be prevented." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §33, at 116 (2d ed. 1970).

7. "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount . . . ." Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40 (1911). *Accord*, Pinel v. Pinel, 240 U.S. 594, 596 (1916).

8. *See, e.g.*, Scott v. Frazier, 253 U.S. 243, 244 (1920).

9. *See, e.g.*, Skokomish Indian Tribe v. France, 269 F.2d 555 (9th Cir. 1959) (single tract of land claimed by Indian tribe).

10. Prior to 1966, rule 23 class actions were divided into three types: true, hybrid, and spurious. "The true class suit involved principles of compulsory joinder and rights of a

claims — judicial authority continued to prohibit the aggregation of insufficient claims.[12] The adoption of rule 23, a procedural rule, had little effect on the "matter in controversy" requirement of section 1332.[13]

With the amendment of rule 23 in 1966,[14] categories of class actions under the old rule were discarded.[15] The new rule 23 was intended to provide a functional, pragmatic approach to class actions in place of the perplexing conceptualism of the old rule.[16] Nevertheless, it was unclear whether the amended rule would produce new principles concerning aggregation of claims, or whether the former doctrines governing spurious class actions would still control.[17]

The United States Supreme Court provided an answer in *Snyder v. Harris*.[18] Plaintiffs, each having a claim less than $10,000, argued that in light of the rationale underlying the 1966 amendment to rule 23,[19] aggregation of separate and distinct claims should be permitted.[20] Focusing on past interpretations of

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joint, common, or secondary character . . . . The hybrid class suit involved rights of a several character, where the object of the action was the adjudication of claims which do or may affect specific property involved in the action . . . . The spurious class suit dealt with rights of a several character where there was a common question of law or fact." 3B J. MOORE, FEDERAL PRACTICE ¶23.02-1, at 23-121 (2d ed. 1969). *See* 39 F.R.D. 69, 98 (1966) (Advisory Comm. Note to Proposed Rule 23); Note, *Aggregation of Claims in Class Actions*, 68 COLUM. L. REV. 1554, 1555-56 (1968).

11. "The spurious class suit was a permissive joinder device . . . . The right or liability of each party was distinct. The class was formed solely by a common question of law or fact. When a suit was brought by or against such a class, it was merely an invitation to joinder . . . which might or might not be accepted. It was an invitation and not a command performance." J. MOORE, *supra* note 10, ¶23.10(3)(1), at 2601-03.

12. *See* Alfonso v. Hillsborough County Aviation Authority, 308 F.2d 724 (5th Cir. 1962); Ames v. Mengel Co., 190 F.2d 344 (2d Cir. 1951); Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir.), *cert. denied*, 313 U.S. 385 (1941).

13. "The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase 'matter in controversy.'" Snyder v. Harris, 394 U.S. 332, 336 (1969). *See* Ford, *The History and Development of Old Rule 23 and the Development of Amended Rule 23*, 32 A.B.A. ANTITRUST L.J. 254 (1966).

14. The text of amended rule 23 is set forth in note 2 *supra*.

15. *See, e.g.*, Snyder v. Harris, 394 U.S. 332, 335 (1969).

16. Zahn v. International Paper Co., 469 F.2d 1033, 1034 (2d Cir. 1972); C. WRIGHT, *supra* note 6, §72, at 307.

17. The courts of appeals were divided on this point. *See* Alvarez v. Pan Am. Life Ins. Co., 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967) (holding no change in the aggregation prohibition). *But see* Gas Serv. Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968).

18. 394 U.S. 332 (1969). The issue addressed in *Snyder* was whether the 1966 amendment of rule 23 changed the jurisdictional amount requirements of §1332 in class actions formerly classified as spurious.

19. 39 F.R.D. 98, 102-03 (1966) (Advisory Comm. Note to Proposed Rule 23) (amendment was intended to achieve economies of time, effort, and expense, and to promote uniformity of decision as to persons similarly situated); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (pt. I)*, 81 HARV. L. REV. 356, 393 (1967).

20. 394 U.S. at 333.

section 1332, rather than on rule 23, the Court rejected this argument and stated categorically that aggregation was still prohibited where claims were separate and distinct.[21] Absent a joint or common interest, therefore, each party was required to individually meet the jurisdictional amount requirement in section 1332 diversity actions.[22]

Unlike the named plaintiffs in *Snyder*, none of whom satisfied the minimum jurisdictional amount, all four named plaintiffs in the instant case met the requirement.[23] Thus, the issue was whether unnamed parties, as well as named parties, in a rule 23(b)(3) class action must satisfy the jurisdictional amount. A majority of the Supreme Court, finding *Snyder* to be controlling, held that each plaintiff must individually meet the requirement.[24] Ignoring the dissent's contention that changes in civil rules have consistently affected the jurisdictional framework, the Court reasoned that to overrule *Snyder* would undermine congressional intent in setting limits on federal jurisdiction.[25]

In concluding that *Snyder* dictated the result reached in the instant case, the Court failed to consider adequately the differences between the two cases.[26] In the instant case all named plaintiffs met the jurisdictional amount, so that jurisdiction over the action was not at issue;[27] in *Snyder* none of the named parties satisfied the $10,000 requirement and hence jurisdiction over the action could never have attached.[28] Furthermore, reliance by *Snyder* and the instant majority on *Clark v. Paul Gray, Inc.*[29] appears unjustified because *Clark* was a joinder case, not a class action.[30] These disparities led the dissent in the principal case to conclude that neither *Snyder* nor *Clark* was controlling.[31]

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21. *Id.* at 336.

22. *Id.* at 335. *See generally* Note, *Aggregation Doctrine Continues To Limit Class Actions*, 24 Sw. L.J. 354 (1970).

23. *Compare* Snyder v. Harris, 394 U.S. 332, 333 (1969), *with* Zahn v. International Paper Co., 94 S. Ct. 505, 507 (1973).

24. "None of the plaintiffs in *Snyder v. Harris* alleged a claim exceeding $10,000, but there is no doubt that the rationale of that case controls this one." 94 S. Ct. at 511.

25. *Id.*

26. Both the district and the circuit court factually distinguished the two cases, though each found *Snyder* dispositive of the aggregation issue. *See* Zahn v. International Paper Co., 53 F.R.D. 430, 432 (D. Vt. 1971), *aff'd*, 469 F.2d 1033, 1034 (2d Cir. 1972).

27. Zahn v. International Paper Co., 94 S. Ct. at 507.

28. *Id.* at 516 (Brennan, J., dissenting). The petitioner in *Snyder* sought damages of $8,740. If all other claims had been aggregated, however, the amount in controversy would have been $1,200,000. Snyder v. Harris, 394 U.S. 332, 333 (1969).

29. 306 U.S. 583 (1939).

30. *Id.* at 589. Moreover, only one of numerous named plaintiffs met the amount requirement. *Id.* at 585-86.

31. 94 S. Ct. at 516. The dissent's position on the issue appears to have been contemplated by at least one commentator who, prior to the instant decision, concluded that only *original* parties need meet the amount in controversy requirement in a rule 23(b)(3) suit. J. MOORE, *supra* note 10, ¶23.95. *See also* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (permitting federal courts to do those acts necessary to effectuate their judgments).

The most significant shortcoming of the majority's opinion was its failure to deal adequately with the dissent's argument regarding ancillary jurisdiction. This judicially created doctrine permits the court, in its discretion, to disregard the jurisdictional amount requirements with respect to parties whose claims should be heard in the same proceeding with those meeting the requirement.[32] Essentially, a judicial timesaving device,[33] ancillary jurisdiction has been applied to compulsory counterclaims[34] and to claims by intervening parties,[35] among others. In reasoning that the doctrine should be applicable to unnamed parties in class action suits, the dissent advanced several arguments. First, the rule 23(b)(3) requirement that class-related issues predominate over individual claims would prevent ancillary jurisdiction from becoming a facade hiding nondiverse parties' attempts to secure federal adjudication of unrelated claims.[36] Moreover, failure to invoke ancillary jurisdiction might result in needless expense and redundant litigation. Unnamed plaintiffs failing to meet the $10,000 requirement would be forced to litigate their claims in state courts; but, since class actions are discouraged or are unavailable in many states, numerous state claims would have to be heard separately.[37] Named parties, meanwhile, could litigate the same issues in federal court. Because all claims arose out of the same set of circumstances, the same proof would be presented and the same expert witnesses heard. Thus, while the majority advocated efficiency in the courts, its rejection of the ancillary jurisdiction argument would actually promote judicial diseconomy.[38]

Another criticism of the instant decision is that it undermines the basic purpose of rule 23(b)(3) class actions: to provide an efficient and economically

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32. "[A] district court acquires jurisdiction of a case or controversy as an entirety and may, as an incident to disposition of a matter properly before it possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented." C. WRIGHT, *supra* note 6, §9, at 19. For a discussion of the history of ancillary jurisdiction, see 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICES AND PROCEDURES §23 (1961).

33. *See generally* Note, *The Ancillary Concept and the Federal Rules*, 64 HARV. L. REV. 968 (1951).

34. Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961); Moore v. New York Cotton Exch., 270 U.S. 593 (1926).

35. Phelps v. Oaks, 117 U.S. 236 (1886).

36. 94 S. Ct. at 514-15.

37. "[T]here is no guarantee that a class action could be initiated in the state court. Many states discourage class actions and if the individual claims are so small that suit would have to be instituted in a state court of limited jurisdiction, most likely the class action device would be unavailable." Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2d Cir. 1972) (Timbers, J., dissenting).

38. 94 S. Ct. at 515. Ignoring the jurisdiction-shifting effect necessarily entailed by rejection of ancillary jurisdiction, the majority in the instant case focused on the increased federal workload resulting from invocation of the doctrine. This fear appears largely ungrounded. "[N]amed plaintiffs here meet the jurisdictional requirements; a federal court must adjudicate their claims. The burden on the federal courts would not be substantially increased if the claims of the other class members were to be heard by the same court . . . ." Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2d Cir. 1972) (Timbers, J., dissenting).

effective procedure for adjudicating closely related claims.[39] Litigation of the small claims that comprise most class actions[40] will be virtually precluded in federal forums. Consumer actions against merchants present a vivid illustration. Most such actions involve claims of less than $300,[41] so that the cost of litigation, when balanced against the potential benefit, will be prohibitive.

The predominance of small claims in class action suits raises additional problems that the courts eventually will have to confront. First, some feasible procedure must be established for determining whether each of the unnamed parties meets the $10,000 minimum.[42] In the instant case, as in all federal cases, the district court turned first to the sufficiency of the pleadings and denied class action status to all unnamed parties solely on that basis.[43] The instant case was atypical in that it was possible to deduce from the pleadings that the unnamed plaintiff's claims fell below the $10,000 jurisdictional minimum.[44] Such a determination on the pleadings alone, however, will be extremely difficult in most rule 23(b)(3) class actions.[45] Moreover, once unnamed parties are severed from the suit, the remaining plaintiffs may fail to meet the requirement that the class be "so numerous that joinder of all members is impracticable."[46] If this requirement is not met, the suit may not be maintainable as a class action, forcing parties to litigate their claims individually.[47]

Another significant aspect of the principal case is its extension of the *Snyder* doctrine beyond diversity actions to include class actions founded upon general federal question jurisdiction.[48] The practical effect of this extension is to limit class actions to cases governed by statutes that do not require the $10,000 jurisdictional amount.[49] Although such statutes are found in several areas

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39. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Escott v. Barchris Constr. Corp., 340 F.2d 731 (2d Cir. 1965).

40. *See* Deans, *Class Action Lawsuits*, 1 EDITORIAL RESEARCH REP. 3 (1973).

41. *Id.* at 4. *See generally* Note, *Consumer Class Actions: A Proposal for Florida*, 26 U. FLA. L. REV. 58 (1973).

42. *See* FED. R. CIV. P. 23(c)(3), which requires that judgment in a (b)(3) action "include and specify or describe those . . . whom the court finds to be members of the class."

43. "[T]he District Court was convinced to 'a legal certainty' that not every individual owner in the class had suffered pollution damages in excess of $10,000." 94 S. Ct. at 507.

44. Zahn v. International Paper Co., 53 F.R.D. 430, 431 (D. Vt. 1970).

45. The courts will face the dilemma of ruling on the sufficiency of the claim of each unnamed party. *See* 73 COLUM. L. REV. 359, 371 (1973). *See also* Fed. R. Civ. P. 23(c)(3).

46. FED. R. CIV. P. 23(a)(1).

47. *Id. See also* Comment, *supra* note 45, at 371.

48. 28 U.S.C. §1331 (1970). "Because a class action invoking general federal question jurisdiction under 28 U.S.C. §1331 would be subject to the same jurisdictional amount rules with respect to plaintiffs having separate and distinct claims, the result here would be the same even if a cause of action under federal law could be stated . . . or if substantive federal law were held to control the case." 94 S. Ct. at 512 n.11. *See, e.g.*, Rucker v. Wills, 358 F. Supp. 425 (E.D.N.C. 1973) (class suit to prevent future environmental damage dismissed for failure of unnamed parties to satisfy jurisdictional amount).

49. For examples of some exempted areas see 28 U.S.C. §1333 (admiralty, maritime, and prize cases), §1334 (bankruptcy matters and proceedings), §1337 (commerce and antitrust regulations), §1338 (patents, copyrights, trademarks, and unfair competition).

where federal class action litigation is common, they are restricted to cases raising claims with a certain subject matter.[50] The class action device, however, serves a useful function across the entire range of legal questions. Thus, in those areas not exempted by statute, the holding in the instant case will severely limit class suits.

From the standpoint of social policy, and in view of the underlying purpose of class action law,[51] a broader solution is mandated. Such a solution could readily be provided by congressional amendment of section 1332, expanding the phrase "matter in controversy" to provide for aggregation of claims in any case that meets the class action requirements of the Federal Rules of Civil Procedure.[52] This action would revitalize a much needed federal remedy. No longer would the class action be restricted to the "extraordinary situation" where all parties' claims exceed $10,000.[53] Unless the instant decision is legislatively modified, there can be little doubt that efforts to modernize the federal law of class actions will be severely impaired.[54]

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50. See Clayton Anti-Trust Act, 15 U.S.C. §15 (1970); Securities Exchange Act of 1934, 15 U.S.C. §78(a) (1970); Water Pollution Control Act, 33 U.S.C. §1365(a) (Supp. 1973); Clean Air Act Amendments, 42 U.S.C. §1857(h)-2(a)(1) (1970).

51. J. MOORE, *supra* note 10, ¶¶23.02(1), .05.

52. It would be "highly desirable if Congress were to amend 28 U.S.C. §1332 to provide that in any case permitted to be maintained as a class action under the Federal Rules of Civil Procedure, the aggregate claims for or against all members of the class shall be regarded as a matter in controversy." Wright, *Class Actions*, 47 F.R.D. 169, 184 (1970).

53. C. WRIGHT, *supra* note 6, §72, at 316.

54. Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2d Cir. 1972).