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The Environmental Class Action after Snyder and Zahn: Obtaining Federal Diversity Jurisdiction over the Class through Application of Ancillary Jurisdiction.

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COMMENTS

THE ENVIRONMENTAL CLASS ACTION AFTER SNYDER AND ZAHN: OBTAINING FEDERAL DIVERSITY JURISDICTION OVER THE CLASS THROUGH APPLICATION OF ANCILLARY JURISDICTION

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> It is precisely because the class action deters the robber barons from plundering the poor that it has been hailed as a very important supplement to law enforcement. Take away the class action and the joy of those who live off the small consumer will, as in the bad old days, be unconfined.[1]

In the growing area of environmental litigation it has become increasingly useful to be able to bring a single action on behalf of a large number of persons whose claims are separate and distinct, yet are based upon common issues of law and fact. The original Rule 23 of the Federal Rules of Civil Procedure identified a prototype of such a single action, the "spurious" class action.[2] This original class action rule proved cumbersome, however, due largely to the ambiguous categories of classes that it created.[3] In 1966 Rule 23 was completely rewritten, and those classes previously designated "spurious" were legitimized as full-fledged class actions under the rule.[4]

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1. Letter from A.L. Pomerantz to the Financial Editor, N.Y. Times, April 25, 1971, § 3, at 22, col. 8. This letter was in response to an article by M. Handler, *Massive Class Actions: A Liability*, N.Y. Times, April 4, 1971, § 3, at 12, cols. 3-8. *See also* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1 (1971).

2. FED. R. CIV. P. 23(a)(3) (1937). This rule has been superceded by Fed. R. Civ. P. 23(b)(3), adopted by the 1966 amendments.

3. For a discussion of the original version of Rule 23 and the problems encountered therein, see 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1752 (1972); COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ADVISORY NOTE, 39 F.R.D. 69, 98 (1966) [hereinafter cited as ADVISORY COMMITTEE NOTE]; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 376-86 (1968).

4. FED. R. CIV. P. 23 presently provides:

CLASS ACTIONS

(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 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.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

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

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with

It is generally agreed that amended Rule 23 is a rule of convenience designed to "achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated . . . ."[5] Major purposes ascribed to the rule include the avoidance of a multiplicity of suits and the prevention of inconsistent or varying adjudications of identical or related controversies.[6] Thus, the effect of the rule should be to provide uniform and binding adjudication for a number of similarly situated plaintiffs.[7]

The new rule established the machinery for resolving a large number of distinct but related claims in a single federal action; first, however, it must be established that the claim comes within the subject matter jurisdiction of the court. Consequently, since actions brought under the Federal Rules must comply with the usual federal jurisdictional requirements,[8] the $10,000 jurisdictional amount must be met in class actions based on a federal question[9] or diversity of citizenship.[10] Liberal interpretation of the new rule is suggested by reason of the economies it is designed to achieve,[11] but unfortu-

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similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Since the 1966 amended versions of Rule 23(b)(3) and (c)(2) provide that the appearing representatives of the class bind the non-appearing class members, it is incorrect and confusing to continue calling such a class "spurious." *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 395 n.150 (1968). Many courts, however, continue to use the term.

A class action may be brought if, in addition to the requirements of numerous members, common issues of law and fact, and fair and accurate representation,

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.

FED. R. CIV. P. 23(b)(3).

5. ADVISORY COMMITTEE NOTE 102-103. *See also* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 390 (1968).

6. ADVISORY COMMITEE NOTE 99. *See also* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 435-37 (1960).

7. Mungin v. Florida E.C. Ry., 318 F. Supp. 720, 730 (M.D. Fla. 1970), *aff'd per curiam*, 441 F.2d 728 (5th Cir. 1971).

8. FED. R. CIV. P. 82 provides that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."

9. 28 U.S.C. § 1331 (1970). Of course, some federal questions have independent jurisdictional bases without an amount requirement. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 32, at 108 n.12-27 (2d ed. 1970).

10. 28 U.S.C. § 1332 (1970).

11. The enactment of the Federal Rules of Civil Procedure in 1938 provided for liberal joinder of parties and claims. The Rules broadened the traditional concept of a single triable "case or controversy" by allowing all parties and all claims related to the main action to be joined in one case. Brandt v. Olson, 179 F. Supp. 363, 370 (N.D. Iowa 1959). In the environmental sphere, a recent Supreme Court decision indicated

nately its potential in the environmental sphere has been significantly curtailed by two recent Supreme Court decisions, *Snyder v. Harris*[12] and *Zahn v. International Paper Co.*[13]

In *Snyder* the Court held that despite the liberal refashioning of Rule 23, class members may not aggregate the amounts of their claims in diversity actions to satisfy the $10,000 jurisdictional minimum[14] unless they share a common and undivided interest.[15] It is unlikely that such an interest will exist in environmental litigation since the class members are usually property owners who have sustained degrees of injury which vary according to the amount of property each owns and its distance from the source of the damage.

The practical effect of *Snyder* on class actions seeking damages is to fence all but the unusually large "small claimants" out of the federal courts.[16] The class action for injunctive relief, on the other hand, remains viable and will validly serve the needs of many plaintiffs with small claims who are willing to forego damages if a source of pollution can be shut down.[17] Nevertheless, the overall effect of *Snyder* frustrates the potential of amended Rule 23.

The *Zahn* decision extended the ruling in *Snyder* by requiring that *all* members of the class in a diversity suit must present a jurisdictionally proper claim; that is, each must either have a claim for damages in excess of $10,000 or risk dismissal from the class.[18] While such a requirement would appear to have effectively restricted the viability of environmental class actions for damages, an alternate method might be practically employed to obtain jurisdiction over the class: a court might well assume jurisdiction over a claim for injunctive relief, and subsequently exercise its ancillary jurisdiction to hear a claim for damages arising out of the same facts, regardless of the amount in controversy

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that the courts should liberally evaluate environmental rights in the context of Federal Rule 23. Illinois v. City of Milwaukee, 406 U.S. 91, 98 (1972); *accord*, Chicago v. General Motors Corp., 332 F. Supp. 285, 287-88 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972); Biechele v. Norfolk & W. Ry., 309 F. Supp. 354, 356 (N.D. Ohio 1969).

12. 394 U.S. 332 (1969).

13. — U.S. —, 94 S. Ct. 505, — L. Ed. 2d — (1973), *aff'g* 469 F.2d 1033 (2d Cir. 1972).

14. 28 U.S.C. § 1331 (1970) ($10,000 minimum amount in controversy requirement in federal question suits); 28 U.S.C. § 1332 (1970) ($10,000 minimum amount in controversy requirement in diversity suits).

15. Snyder v. Harris, 394 U.S. 332, 335 (1969).

16. *Snyder* had no effect on federally created claims (federal questions), so that the small claimant rationale continues to have validity in, for example, class actions for damages under the antitrust and securities fraud statutes.

17. In an action brought for injunctive or declaratory relief under FED. R. CIV. P. 23(b)(2), the class members are seeking no monetary damages and the $10,000 jurisdictional amount requirement is often found to be of small consequence in obtaining jurisdiction.

18. Zahn v. International Paper Co., — U.S. —, —, 94 S. Ct. 505, 512, — L. Ed. 2d —, — (1973).

of the damages action.[19] Conversely, if at least one of the named class representatives meets the jurisdictional amount and otherwise establishes federal question or diversity jurisdiction,[20] the court might hear the entire case and adjudicate the ancillary claims of the other class members who have no independent jurisdictional grounds.[21]

Ancillary jurisdiction is invoked to prevent piecemeal litigation of related claims which would otherwise result due to the limited jurisdiction of the federal courts.[22] The concept is based on the premise that a district court acquires jurisdiction of a case or controversy as an entirety. As an incident to disposition of the entire matter, therefore, the court may "possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented."[23] Furthermore, so long as jurisdiction is properly obtained and exercised over the subject matter of the controversy, the court may exercise its ancillary authority as well over issues collateral to the case, even if these issues fail to independently present a jurisdictionally proper claim.[24] Thus, where a number of litigants seek class

19. *See* John B. Kelly, Inc. v. Lehigh Nav. Coal Co., 151 F.2d 743 (3d Cir. 1945) (action based on nuisance and continuing trespass for alleged siltation of a river by the defendant's coal mines). The court concluded:

> [T]he money damage allegations of the bill are merely a collateral item which the District Court can pass upon provided it possesses jurisdiction of the all important injunctive feature of the litigation.

Id. at 746. In actions primarily seeking injunctive relief, jurisdictional amount generally presents lesser problems. *See generally* Moore v. New York Cotton Exch., 270 U.S. 593, 597, 608-610 (1926); Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1964); Comment, *Ancillary Jurisdiction of the Federal Courts*, 48 IOWA L. REV. 383 (1963).

20. Several states provide for class actions to be brought in the state forum under rules identical or similar to the archaic original Federal Rule 23, written in 1941. *E.g.*, FLA. R. CIV. P. 1.210; TEX. R. CIV. P. 42. Such rules either incorporate or assimilate the inefficient "true," "hybrid," "spurious" distinctions that restricted the functional utility of original Federal Rule 23. Many states provide for class actions only through application of conventional joinder and intervention rules. *E.g.*, CT. GEN. STAT. ANN. § 52-101, § 52-104 (1960); N.J. CONST. art. VI, § IV, ¶ 3 (1971). A few states have amended their rules to duplicate the new Federal Rule 23. *E.g.*, DEL. CHAN. CT. R. 23 (1971). Only in such states can the institution of a class action be as effective and advantageous as under new Federal Rule 23. *See* Esposito, *Air and Water Pollution: What to Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32, 36 (1970).

21. *See generally* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) §§ 1659, 1756, 1917 (1972).

22. Walmac Co. v. Isaacs, 220 F.2d 108, 113 (1st Cir. 1955); *see* Symposium—*Exercise of Federal Court Jurisdiction Not "Specifically" Conferred*, 5 ST. MARY'S L.J. 489, 507 (1973).

23. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 9, at 19 (2d ed. 1970).

24. Zahn v. International Paper Co., 469 F.2d 1033, 1036-40 (2d Cir. 1972), *aff'd*, — U.S. —, —, 94 S. Ct. 505, 513-17, — L. Ed. 2d —, — (1973) (dissenting opinions); Walmac Co. v. Isaacs, 220 F.2d 108, 113-14 (1st Cir. 1955); *see* Dugas v. American Sur. Co., 300 U.S. 414, 428 (1937); Symposium—*Exercise of Federal Court Jurisdiction Not "Specifically" Conferred*, 5 ST. MARY'S L.J. 489, 506-507 (1973).

action status, jurisdiction over the claims of those class members who do not satisfy the jurisdictional amount requirement as defined in *Snyder* and *Zahn* may nevertheless be exercised through the concept of ancillary jurisdiction. Similarly, it has been held that a court's ancillary powers may be exercised over a class failing to establish diversity of citizenship in order to fairly and efficiently adjudicate questions of law and fact common to the class.[25]

Although the limits of ancillary jurisdiction in the federal courts are not clear, a connection should exist between the ancillary and principal claims with regard to common issues of law and fact. The ancillary claim does not necessarily have to be subordinate; it may be a claim which could have been the basis for an independent action in a state court.[26] While jurisdiction to hear the ancillary claim depends on jurisdiction over the principal claim, the ancillary claim does not have to present issues dependent on or inferior to the principal claim. Furthermore, while the Federal Rules do not expand the ancillary jurisdiction of the federal courts,[27] they provide opportunities for invoking it in additional unspecified situations and additionally serve to broaden the scope of a particular action rather than to extend federal power over it.[28]

ESTABLISHING DIVERSITY JURISDICTION

Most environmental class actions are brought under diversity of citizenship jurisdiction,[29] although general federal question jurisdiction does occasionally exist.[30] The persistent questions that tend to arise in securing diversity jurisdiction are twofold:

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25. *See* Cooperative Transit Co. v. West Penn. Elec. Co., 132 F.2d 720, 723 (4th Cir. 1943); Winegar v. First Nat'l Bank, 267 F. Supp. 79, 82 (M.D. Fla. 1967); Hobbes v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1755, at 548 (1972); Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1219 (1966). "[A]ncillary jurisdiction exists in order that the court may do complete justice in the chief controversy." Cooperative Transit Co. v. West Penn. Elec. Co., 132 F.2d 720, 723 (4th Cir. 1973). *See generally* Symposium—*Exercise of Federal Court Jurisdiction Not "Specifically" Conferred*, 5 ST. MARY'S L.J. 489, 507 (1973).

26. *Compare* Zahn v. International Paper Co., 469 F.2d 1033, 1037-38 (2d Cir. 1972), *aff'd*, — U.S. —, 94 S. Ct. 505, — L. Ed. 2d — (1973) *with* Biechele v. Norfolk & W. Ry., 309 F. Supp. 354, 356 (N.D. Ohio 1969).

27. FED. R. CIV. P. 82 (1970).

28. *E.g.*, Childress v. Cook, 245 F.2d 798, 803 (5th Cir. 1957); Lesnik v. Public Indus. Corp., 144 F.2d 968, 973 (2d Cir. 1944); Foster v. Brown, 22 F.R.D. 471, 473 (D. Md. 1958).

29. A class must establish diversity of citizenship under the provisions of the diversity statute, 28 U.S.C. § 1332 (1970).

30. If a class desires to proceed under federal question jurisdiction, the matter in controversy must comply with the provisions of the federal question statute, 28 U.S.C. § 1331 (1970). *See generally* Illinois v. City of Milwaukee, 406 U.S. 91, 95 (1972) (suggesting a federal common law of water pollution); Comment, *Illinois v. City of Milwaukee: A Welcome Alternative to Snyder v. Harris: An Answer to the Anti-Aggregation Problem of Class Suits in Federal Courts*, 62 KY. L.J. 211 (1973).

> First . . . there is the problem of whose citizenship can or must be considered for purposes of ascertaining whether diversity jurisdiction exists. Second . . . courts are frequently faced with the question whether the claims of the representative parties or of the entire class may be aggregated in order to satisfy the amount in controversy requirement of the applicable jurisdictional statute.[31]

The first of these issues has not yet been conclusively resolved by the Supreme Court. The general rule, however, both prior to and after the 1966 amendments, is that only the citizenship of the named parties—the class representatives—will be considered in determining whether diversity exists.[32] "[I]nasmuch as Rule 23 would be completely unworkable in the diversity context and its value significantly compromised" by requiring the courts to consider the citizenship of every member of the class, this conclusion appears sound.[33]

The class in environmental litigation, however, may encounter a unique geographical problem in attempting to establish diversity, as the injured parties are usually clustered near a major facility or worksite of the corporate defendant. Furthermore, since the federal diversity statute attributes corporate citizenship to the state of principal business activity as well as to the state of incorporation,[34] the defendant will often be a citizen of the same state as that of the class representatives. Nevertheless, most class representatives do succeed in establishing the candidacy of national corporations for environmental class suits—a fact most likely attributable to the predominantly liberal attitude that prevails at the federal district court level regarding the construction of diversity requirements in conjunction with the mandates of Rule 23.[35]

Satisfaction of Jurisdictional Amount

The more difficult problem for plaintiffs in environmental class actions is that of satisfying the jurisdictional amount requirement, as construed by the

31. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1755, at 548 (1972).

32. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365 (1921); Winegar v. First Nat'l Bank, 267 F. Supp. 79, 81 (M.D. Fla. 1967); Hobbes v. Northeast Airlines, Inc., 50 F.R.D. 76, 79 (E.D. Pa. 1970). There is a statement by Mr. Justice Black in Snyder v. Harris, 394 U.S. 332, 339-40 (1969), which indicates that he assumes the old doctrine has not been changed by the 1966 amendments.

33. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1775, at 551 (1972).

34. 28 U.S.C. § 1332(c) (1970).

35. *See, e.g.*, Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, —U.S. —, 94 S. Ct. 505, — L. Ed. 2d — (1973); Chicago v. General Motors Corp., 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972), which were both based on diversity of citizenship and dismissed on other grounds. *Cf.* Biechele v. Norfolk & W. Ry., 309 F. Supp. 354 (N.D. Ohio 1969) (successful class action to abate air pollution removed to federal court by defendant under 28 U.S.C. § 1441(c) (1970)).

Supreme Court in *Snyder* and *Zahn*. Prior to the 1966 amendments class actions under Rule 23 were divided into three categories cast in terms of jural relationships and classified according to the character of the right sought to be enforced. These types of class suits became popularly known as "true," "hybrid," and "spurious."[36] The "true" class action was one in which the right to be enforced was joint or common, in that if the possessor of a primary right refused to enforce that right, a member of the class then became entitled to enforce it.[37] In this type of action the joinder of all interested parties was required.[38]

All class actions that were not "true" were either "hybrid" or "spurious." The "spurious" action was particularly characterized by the existence of a common question of law or fact affecting the several rights for which common relief was sought.[39] The label applied to the suit often determined jurisdictional requirements, the binding effect of the judgment, and the application of the statute of limitations.[40]

Most suits against polluters, whether in equity or at law, would have been characterized as "spurious" since any injured party could sue without joining other interested parties even though a successful defense might prejudice the rights of other potential class members. The relevant factor here is that the claims of members of a "spurious" class could not be aggregated to satisfy the jurisdictional amount requirement.[41]

In 1966 the draftsmen of the new Rule 23 concluded that "[i]n practice, the terms, 'joint,' 'common,' etc., which were used as the basis of the Rule 23 classifications, proved obscure and uncertain."[42] Efforts at clarification resulted in a revision which "substitutes functional tests for the conceptualisms that characterized practice under the former rule."[43] Although new Rule 23

36. These labels were not found within Rule 23 itself, but were coined by Prof. Moore, chief architect of the original rule. *See* J. MOORE, 3 MOORE'S FEDERAL PRACTICE §§ 23.08-23.11 (2d ed. 1969); Moore, *Federal Rules of Civil Procedure: Some Problems Raised By the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937).

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

38. FED. R. CIV. P. 23; J. MOORE, 3 MOORE'S FEDERAL PRACTICE § 23.08 (2d ed. 1969).

39. In Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Deckert, 123 F.2d 979, 983 (3d Cir. 1941) the court stated:

> Spurious class actions . . . were in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact.

40. *See* Moore, *Federal Rules of Civil Procedure: Some Problems Raised By the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937); Moore & Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 318-21 (1937).

41. Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Pinel v. Pinel, 240 U.S. 594 (1916); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1756 (1972).

42. ADVISORY COMMITTEE NOTE 98.

43. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1753, at 538 (1972).

superficially resembles the old rule in that the class must qualify under one of the three headings of amended Rule 23(b), the three general categories are now based on the nature of the relief sought, rather than on jural relationships between the parties.[44] Since the new rule omits reference to joint or common interests, and because its draftsmen specifically repudiated the old scheme, there was a brief period of uncertainty regarding the non-aggregation doctrine. Some courts, as well as the draftsmen of the new rule, thought that the amendment had the effect of redefining the amount in controversy for class action purposes and therefore concluded that aggregation was possible in those actions that would have formerly been termed "spurious."[45] The decision in *Snyder v. Harris*[46] effectively refuted this assumption.

In *Snyder* the Supreme Court revitalized the discarded categories of the old rule by adopting the pre-1966 standard and holding that claim aggregation is allowed only in suits involving multiple plaintiffs who seek to enforce a single right in which they have a common interest, that is, only in "true" class actions.[47] Most environmental class actions for damages will generally not meet the standard of *Snyder* because each member of the class will have suffered a separate wrong, and relatively small individual damages will be at issue.[48] The effect of the decision, therefore, is generally to restrict environmental class litigants to injunctive relief,[49] or whatever relief is available in the state courts.

Although the Court in *Snyder* reasoned that denying a federal forum to such plaintiffs was justified since this type of diversity case involves only issues of state law,[50] it did not consider the practical aspect that state class

44. FED. R. CIV. P. 23(b). These new groupings were not intended to be coterminous with the categories of original Rule 23. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1752, at 514-15 (1972).

45. Gas. Serv. Co. v. Coburn, 389 F.2d 831, 834 (10th Cir. 1968), *rev'd*, 394 U.S. 332 (1969); Snyder v. Epstein, 290 F. Supp. 652 (E.D. Wis. 1968); Collins v. Bolton, 287 F. Supp. 393, 397 (N.D. Ill. 1968); Booth v. General Dynamics Corp., 264 F. Supp. 465, 471 (N.D. Ill. 1967); ADVISORY COMMITTEE NOTE 104; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 400 (1968).

46. 394 U.S. 332, 338 (1969).

47. *Id.* at 336. The Court stated that the discarded "spurious" and "true" categories were never and are not now the reason for not allowing aggregation of separate and distinct claims, since the non-aggregation "doctrine is based . . . upon this Court's interpretation of the statutory phrase 'matter in controversy.'" *Id.* at 336. It is quite clear, however, that *Snyder* forces the district courts to determine whether the interests involved are "joint" or "several" for jurisdictional purposes, "an inquiry that not only frequently is quite difficult but one that supposedly the amended rule is designed to avoid." *Id.* at 356; *see* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1756, at 561 (1972).

48. *See* Lamm & Davidson, *Environmental Class Actions Seeking Damages*, 16 ROCKY MT. MIN. L. INST. 59, 87-88 (1971). *See also* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 72, at 316 (2d ed. 1970).

49. FED. R. CIV. P. 23(b)(2).

50. Snyder v. Harris, 394 U.S. 332, 341 (1969). "Suits involving issues of state

action remedies are of limited utility,[51] especially where local procedural systems do not adequately provide for maintenance of class actions.[52]

Although the viability of state class actions is limited,[53] several methods exist to circumvent the restrictions of *Snyder* that are compatible with the exercise of ancillary jurisdiction. First, certain federal question statutes provide for jurisdiction without regard to the amount in controversy.[54] Second, as a result of the ambiguity of the categories that characterized old Rule 23, a court interested in seeing the class action continue due to the existence of a predominant question or element common to the class may label an essentially "spurious" class action as "true."[55] As a third method, some courts have allowed plaintiffs to meet the jurisdictional amount by measuring the amount in controversy from the point of view of the defendant rather than the plaintiffs.[56] The amount of controversy would thus be measured, for example, by the cost to the defendant of closing a factory or installing expensive antipollution equipment. This method, commonly referred to as the "defendant's view" doctrine, is particularly appropriate when the class is seeking injunctive relief.

A fourth method indicates that the limitations of *Snyder* might be circumvented in some situations by allowing the state to bring an action on behalf

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law and brought on the basis of diversity of citizenship can often be most appropriately tried in state courts." *Id.* at 341.

51. Discussion and authorities cited note 20 *supra.*

52. It is generally agreed that "state class action doctrines are presently even less viable than was the federal [class action] provision before *Snyder*, although there may remain considerable room for innovation in the state courts." Esposito, *Air & Water Pollution: What to Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32, 36 (1970).

53. Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972), where Judge Timbers stated:

> 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.

Id. at 1040 (dissenting opinion).

54. *See, e.g.*, 42 U.S.C. § 1857h-2(a)(1)(2) (1970) (Clean Air Act Amendments); 33 U.S.C. § 1365(a) (Supp. 1973) (Water Pollution Control Act); 28 U.S.C. § 1337 (1970) (interstate commerce and antitrust matters); 28 U.S.C. § 1343 (1970) (civil rights). It should be noted that in the private attorney general role citizens are frequently confronted with the obstacle of federal agency noncompliance with federal statutes. *See* Comment, *Environmental Protection: Citizen Action Forcing Agency Compliance Under Limited Judicial Review*, 6 ST. MARY'S L.J. 421, 425-39 (1974).

55. *E.g.*, Manufacturers Cas. Ins. Co. v. Coker, 219 F.2d 631, 632 (4th Cir. 1955); Dixon v. Northwestern Nat'l Bank, 276 F. Supp. 96, 101 (D. Minn. 1967).

56. Mississippi & Mo. R.R. v. Ward, 67 U.S. (2 Black) 485, 492 (1862); Ronzio v. Denver & R.G.W.R.R., 116 F.2d 604 (10th Cir. 1940); City of Chicago v. General Motors Corp., 332 F. Supp. 285, 288 (N.D. Ill. 1971), *aff'd*, 467 F.2d 1262 (7th Cir. 1972); *see* Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum—A Post Snyder v. Harris Analysis*, 22 AM. U.L. REV. 79, 102-107 (1972) (suggesting this approach as the principal way to mitigate the impact of *Snyder*, particularly in all federal question cases).

of its citizens.[57] In *West Virginia v. Charles Pfizer & Co.*[58] a private antitrust action was brought under Rule 23 by several states against a manufacturer of antibiotic drugs. The Court of Appeals for the Second Circuit said that recovery by the states could be justified under two theories. The first was institution of the suit as *parens patriae*.[59] Use of this doctrine is limited, however, to cases in which the state has an interest independent of its citizens.[60] The theory actually relied on by the court involved the state's instituting a traditional Rule 23 class action on behalf of its citizens.[61] Those citizens having small claims for environmental injury could thus circumvent the *Snyder* decision by transferring their claims to the state attorney general. Although this would prevent personal recovery by the citizens, it would serve the more important social goal of deterrence by forcing the polluter to internalize the costs of his pollution.[62]

The final means of avoiding the limitations of *Snyder* and *Zahn* was sug-

57. West Virginia v. Charles Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); see 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1782, at 105-109 (1972).

58. 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

59. *Id.* at 1089. *See generally* Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945); Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570 (1970).

60. Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). In *Pfizer* the state itself had purchased antibiotics from the defendant drug company and was thus able to meet requirements of independent interest. Had the state lacked this independent claim for more than $10,000, it could not have used *parens patriae* to sue solely on behalf of its injured citizens. As stated in Hawaii v. Standard Oil Co., 301 F. Supp. 982 (D. Hawaii 1969), *rev'd on other grounds*, 481 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972),

> [T]he state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23 . . . .

Id. at 986.

61. West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971).

62. The economic concept of "externalities" has become increasingly popular in attempting to allocate properly the liability for pollution. *See* Esposito, *Air and Water Pollution: What To Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32, 34-36 (1970); Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 606-12 (1969); McCarthy, *Recent Legal Developments in Environmental Defense*, 19 BUFFALO L. REV. 195, 201 (1969); Note, 21 STAN. L. REV. 383 (1969). For example, a food processor who chooses not to treat the noxious wastes resulting from its operations but instead dumps the sewage into a nearby stream, as in Ratzlaff v. Franz Foods, 468 S.W.2d 239, 240 (Ark. 1971), produces an example of what economists call an external diseconomy—a cost of production not borne by the business activity but by the public at large. This form of public subsidy provides an economic windfall to many enterprises, distorts the price mechanism, and results in a misallocation of resources. Society is diverting too many resources into the food processer because his prices do not accurately reflect the total economic and social cost of his business. *See generally* Esposito, *Air and Water Pollution: What To Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32, 34-35 (1970). It has been advocated that one of the primary functions of a legal system should be to force the polluter to internalize all of his costs. Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1, 39 (1968).

gested in *Biechele v. Norfolk & Western Railway*,[63] a successful federal environmental class action in which the plaintiffs sought damages and injunctive relief to abate certain air pollution caused by the defendant's operations. The court kept open the possibility of monetary damages, even after acknowledging that *Snyder* would not permit aggregation of these claims for less than $10,000 each, by holding that "there [were] two separate and distinct class actions involved."[64] The claim for injunctive relief was described as the "first and principal action."[65] The requisite jurisdictional amount for this action was found on two theories—the mandate for liberal evaluation of the right to live in a clean environment and the defendant's viewpoint doctrine.[66] Having established the jurisdictional basis for the injunctive action, the court turned to the action for damages, and proceeded to exercise its ancillary jurisdiction over the claim.[67] The damages action could not have been heard by itself in federal court, because the plaintiffs could not have met the jurisdictional amount requirement without aggregation. But since the same evidence would be presented for the damage claims as for the equitable claim already properly before the court, the district judge concluded that "this Court, in the interest of judicial efficiency, will assume jurisdiction over the entire controversy."[68]

The rationale underlying the *Biechele* approach is generally applicable insofar as it supports the exercise of ancillary jurisdiction by a federal district court in the proper factual setting. As *Biechele* demonstrates, so long as the damage claims arise out of the same facts as the principal injunctive claim, a court may obtain jurisdiction over the suit for injunction and subsequently exercise its ancillary jurisdiction over the claims for damages regardless of the amount in controversy.[69]

A second approach based upon application of ancillary jurisdiction also remains viable after *Snyder* and *Zahn*. If at least one of the named representatives of the class meets the jurisdictional amount and otherwise establishes federal question or diversity jurisdiction, a district court might hear the entire

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63. 309 F. Supp. 354 (N.D. Ohio 1969).

64. *Id.* at 355.

65. *Id.* at 355.

66. The court held that "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 $10,000.00." *Id.* at 355.

67. *Id.* at 355.

68. *Id.* at 355.

69. *See* John B. Kelly, Inc. v. Lehigh Nav. Coal Co., 151 F.2d 743 (3d Cir. 1945) (action based on nuisance and continuing trespass for alleged siltation of a river by defendant's coal mines).

> [T]he money damage allegations of the bill are merely a collateral item which the District Court can pass upon provided it possessed jurisdiction of the all important injunctive feature of the litigation.

Id. at 746; *see* authorities cited note 19 *supra*. *See generally* Symposium—*Exercise of Federal Court Jurisdiction Not "Specifically" Conferred*, 5 ST. MARY'S L.J. 489 (1973).

case and adjudicate the ancillary claims of other class members who have no independent jurisdictional grounds.[70] Although several decisions prior to *Snyder* indicated that the claim of each of the representatives must satisfy the amount in controversy requirement,[71] the view in favor of ancillary jurisdiction extending over collateral claims was recently adopted in *Lesch v. Chicago & Eastern Illinois Railroad*:[72]

> [I]n a spurious class action, if one of the representative parties has a claim in excess of the jurisdictional minimum, then federal jurisdiction attaches, and if that party alone can adequately represent the entire class, then there is federal jurisdiction over the entire class action even where members of the class having smaller claims are originally named parties.[73]

It is interesting to note that although *Lesch* was decided in 1968, the court referred to the class action as "spurious," indicating it to be an action in which any of the parties could sue without joining other interested parties upon whom the judgment would have a conclusive effect.[74] Professor Wright has stated that his holding "seems sound and is a natural corollary to other applications of the ancillary jurisdiction concept."[75]

Although application of the ancillary jurisdiction concept appears logical in this context, three federal courts of appeals have rejected the approach and held that all members of the class must present a jurisdictionally proper claim.[76] One of these decisions[77] was rendered before *Snyder*; the other two, *City of Inglewood v. City of Los Angeles*[78] and *Zahn v. International Paper Co.*[79] were environmental suits decided after *Snyder*. The *Zahn* decision, recently affirmed by the Supreme Court, is the more significant and conclusive of the two.

Zahn involved four owners of lakefront property who sought to bring a Rule

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70. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1756, at 563-68, § 1917, at 585-89 (1972).

71. Newsom v. E.I. DuPont de Nemours & Co., 173 F.2d 856, 860 (6th Cir. 1949); Hartman v. Secretary of the Dep't of HUD, 294 F. Supp. 794, 796 (D. Mass. 1968); *see* Giesecke v. Denver Tramway Corp., 81 F. Supp. 957, 961 (D. Del. 1949).

72. 279 F. Supp. 908 (N.D. Ill. 1968).

73. *Id.* at 912.

74. *Id.* at 912.

75. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1756, at 564 (1972).

76. Zahn v. International Paper Co., 53 F.R.D. 430, 431-32 (D. Vt. 1971), *aff'd*, 469 F.2d 1033, 1034 (2d Cir. 1972), *aff'd*, — U.S. —, 94 S. Ct. 505, — L. Ed. 2d — (1973); City of Inglewood v. City of Los Angeles, 451 F.2d 948, 953-54 (9th Cir. 1971); Alvarez v. Pan American Life Ins. Co., 375 F.2d 992, 993 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

77. Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

78. 451 F.2d 948 (9th Cir. 1971).

79. 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, — U.S. —, 94 S. Ct. 505, — L. Ed. 2d — (1973).

23(b)(3) class action on behalf of themselves and some 200 other lakefront property owners. Under Rule 23(b)(3) damages were sought from a New York corporation for allegedly polluting the lake with industrial discharges and impairing the value and utility of plaintiffs' property. Each of the named plaintiffs alleged that his property had been damaged in an amount exceeding $10,000, and a total of $40 million was sought in compensatory and punitive damages. There were no allegations, however, of damages sustained by the unnamed members of the class.[80] The trial court determined that it was unlikely that every member of the class had a claim in excess of $10,000;[81] the issue therefore became whether the claimants who did not satisfy the jurisdictional amount requirement could have their claims adjudicated through a Rule 23(b)(3) class action for damages brought by claimants who did individually satisfy the jurisdictional amount.

In reaching its decision in *Snyder v. Harris*,[82] the Court relied heavily on the aggregation rule.[83] The majority in *Zahn*, therefore, read the *Snyder* decision to stand for the broad proposition 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 . . . ."[84]

Although the federal district court in *Zahn* explained that it felt "precluded" by *Snyder* from taking jurisdiction over those members of the class who did not meet the jurisdictional amount requirement,[85] it is relevant that *Snyder* did not deal directly with this issue since none of the representatives in that case asserted claims in excess of $10,000.[86] The dissent in *Snyder* argued, however, that the rule would apply "in all cases where one or more of the co-plaintiffs have a claim of less than the jurisdictional amount . . . ."[87] In *Zahn*, on the other hand, the four named representatives presented valid claims that met the amount in controversy requirement, and it appears that some other members of the class could have recovered similar amounts as well.[88] The factual distinction is significant inasmuch as one of the principal

80. Zahn v. International Paper Co., 469 F.2d 1033, 1034 (2d Cir. 1972), *aff'd*, — U.S. —, —, 94 S. Ct. 505. 507, — L. Ed. 2d —, — (1973).

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

82. 394 U.S. 332 (1969).

83. *Id.* at 336. The aggregation rule was stated in Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911):

> 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 . . . .

Id. at 40; *see* Clark v. Paul Gray, Inc., 306 U.S. 583, 589 (1939); Pinel v. Pinel, 240 U.S. 594, 596 (1916).

84. Zahn v. International Paper Co., — U.S. —, —, 94 S. Ct. 505, 512, — L. Ed. 2d —, — (1973).

85. Zahn v. International Paper Co., 53 F.R.D. 430, 431-32 (D. Vt. 1971).

86. Snyder v. Harris, 394 U.S. 332, 333-34 (1969).

87. *Id.* at 343 (Fortas, J.).

88. This supposition is supported by the fact that the defendant contended that "*many* members of the proposed class fail to meet . . . jurisdictional amount . . . ."

considerations that led the Court to affirm the non-aggregation doctrine in *Snyder* was a need to reduce the "burdens of an already overloaded federal court system."[89] If *Snyder* had allowed aggregation when *none* of the class members could individually have come into the federal courts, it would have provided plaintiffs a means to circumvent the jurisdictional amount requirement and perhaps appreciably increase the federal courts' caseload. Conversely, in *Zahn* the four named representatives and all other plaintiffs who allege the jurisdictional amount must be allowed to go to trial in federal district court. Their former fellow class members must duplicate all of the evidence in state court. The *Zahn* extension of the *Snyder* rationale is thus unnecessary and impractical. It does not lessen the burden on the federal judiciary, but it does promote expensive and time-consuming duplicative litigation in the state courts.[90]

Mr. Justice Brennan, dissenting in *Zahn*, asserted that application of ancillary jurisdiction is appropriate in Rule 23 (b)(3) class actions.[91] Since the crucial issue in *Zahn* involved the *extent* of jurisdiction over claims of the various class plaintiffs as opposed to the question in *Snyder* concerning mere aggregation of such claims, it is apparent that the alternative approach of ancillary jurisdiction was a viable and proper path for the district court to have considered. Such an approach would have permitted the court to entertain the unnamed plaintiffs' claims, but would not have made such considerations mandatory.[92]

Zahn v. International Paper Co., 53 F.R.D. 430, 431 (D. Vt. 1971) (emphasis added), as well as by the court's discussion of the possibility of a class defined as all plaintiffs in the named class having $10,000 in controversy. *Id.* at 433.

89. Snyder v. Harris, 394 U.S. 332, 341 (1969).

90. Zahn v. International Paper Co., 469 F.2d 1033, 1039 (2d Cir. 1972); *see* Note, 9 HOUS. L. REV. 852, 857 (1972).

91. Zahn v. International Paper Co., — U.S. —, —, 94 S. Ct. 505, 515 — L. Ed. 2d —, — (1973).

92. In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the Court recognized the power of the federal courts to adjudicate pendent or ancillary claims without independent grounds of jurisdiction. The Court held that the exercise of federal question jurisdiction over the action empowered the district court to adjudicate a companion state claim by means of pendent jurisdiction, even though no independent basis for federal jurisdiction over the state claim existed. *Id.* at 724-26. The requirement was established that plaintiff's claims must be of the type which would ordinarily be litigated in one judicial proceeding, and that the claims "derive from a common nucleus of operative fact." *Id.* at 625.

Pendent jurisdiction involves the joinder, at the discretion of the court, of federal and state claims where necessary to fully adjudicate a cause of action. Original jurisdiction resting under the federal claim extends to any non-federal claim against the same defendant if the federal question is substantial and the federal and non-federal claims constitute a single cause of action. Fullerton v. Monongahela Connecting R.R., 242 F. Supp. 622, 626 (W.D. Pa. 1965); *see* Symposium—*Exercise of Federal Court Jurisdiction Not "Specifically" Conferred*, 5 ST. MARY'S L.J. 489, 513-14 (1973).

Although it is generally held that a federal court does not have jurisdiction in a diversity case if any plaintiff is a citizen of the same state as any defendant, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), it is significant that the Supreme Court has

It is plain that the class action caseload would rapidly become unmanageable were this standard to be applied to all related claims without discretion. The dissent in *Zahn* recognized this problem:

> [T]he questions of law or fact common to the members of the class [as required under Rule 23(b)(3)] [must] predominate over any questions affecting only [individual] members, to guarantee that ancillary jurisdiction will not become a facade hiding attempts to secure federal adjudication of nondiverse parties' disputes over unrelated claims . . . . [T]he practical reasons for permitting adjudication of the claims of the entire class are certainly as strong as those supporting ancillary jurisdiction over compulsory counterclaims and parties that are entitled to intervene as of right.[93]

The dissent emphasized that the class action is a necessary device for full and complete adjudication of questions of law or fact common to multiple parties, the unfavorable alternatives being "joiner of the entire class, or redundant litigation of the common issues."[94]

Although the exercise of ancillary jurisdiction necessarily results in an increased burden on the federal courts since a greater number of claims are adjudicated, such an objection is applicable to the exercise of ancillary jurisdiction in any context. Furthermore, unless a class action is permitted to proceed as such, many claimants will be unable to obtain any federal determination of their rights. The problem is compounded in view of the absence of effective remedies at the state level due to inadequacy of the procedural mechanisms for handling class actions.[95] The denial of ancillary jurisdiction

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sustained ancillary jurisdiction over the non-appearing members of a diversity class action who failed to meet the diversity of citizenship requirement. The judgment was rendered prior to the creation of the Federal Rules, the class action involved being pursuant to Rule 3 of the Equity Rules. In Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), the Court distinguished between named plaintiffs and the unnamed members of the plaintiff class on the issue of diversity of citizenship. It held that the diversity requirement was satisfied, and that the district court had jurisdiction, as long as the *named* plaintiffs in the class were citizens of states other than that of the defendant. *Id.* at 366-67. This was true even though some unnamed members of the class were citizens of the same state as the defendant.

Without specifically addressing the issue, the majority in *Zahn* refused to extend ancillary jurisdiction over non-appearing class members who, although cumulatively sustaining property damage far in excess of $10,000 as a class, failed to individually meet the jurisdictional amount requirement, while stating there was no doubt that the rationale of *Snyder* controlled *Zahn*. Zahn v. International Paper Co., — U.S. —, —, 94 S. Ct. 505, 511-12, — L. Ed. 2d —, — (1973). In his dissent, Mr. Justice Brennan found it difficult to understand why the Court felt free to ease the diversity requirement, which has constitutional roots, but not the purely statutory amount in controversy requirement. *Id.* at —, —, 94 S. Ct. at 511, 516, — L. Ed. 2d at —, —. No explanation was given by the *Zahn* majority explaining why the *Ben-Hur* approach would not be equally suitable for the matter in controversy issue.

93. Zahn v. International Paper Co., — U.S. —, —, 94 S. Ct. 505, 514-15, — L. Ed. 2d —, — (1973), *citing in part* FED. R. CIV. P. 23(b)(3).

94. *Id.* at —, 94 S. Ct. at 515, — L. Ed. 2d at —.

95. The dissent in *Zahn* emphasized the problem:

> Many states discourage class actions and if the individual claims are so small that

also imposes increased burdens on the state and federal judiciary as a whole by necessitating duplicative litigation and by substantially impairing the ability of prospective class members to assert their claims.

PROCEEDING UNDER RULE 23

Rule 23 clearly confronts the environmental class plaintiff with distinctive jurisdictional hurdles that are, nevertheless, generally amenable to application of ancillary jurisdiction. The rule also presents significant procedural difficulties that are peculiar to diversity class actions. The possibilities for a court to exercise its ancillary authority over jurisdictionally insufficient claims are greatly enhanced if the procedural aspects of Rule 23 can be shown to apply comprehensively to the environmental complaint. Once the prerequisites of Rule 23(a) are satisfied, the environmental class plaintiff must fit his action within one of the three categories of Rule 23(b) and satisfy its conditions.[96]

Rule 23 (b)(1)

Class actions may be brought under the first category, Rule 23(b)(1), when their use will eliminate undesirable effects that might result from non-class suits brought by or against individual class members.[97] Actions brought under subsection (b)(1) might be classified as "protective" class actions. Subsection (b)(1) is further divided into subsection (A), designed to protect the party *opposing* the class, and subsection (B), which provides for a class action when the rights of class members *not parties to the original action* might otherwise be jeopardized.[98] Subsection (b)(1)(A) provides that a class action may be brought when the prosecution of separate actions creates a risk that incompatible standards of conduct might be established for the party opposing the class.[99] Accordingly, it has been urged that actions for money damages should not qualify under subsection (b)(1)(A) because the payment of damages to members of a class does not create "incompatible standards of conduct" within the meaning of that limitation:

> This phrase implies that the separate judgments will affect an opposing party's continuing course of conduct brought into issue by the suits and not that the judgments will cause inconsistent isolated actions. In the damages example, the payment or nonpayment of money damages are

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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). *See also* discussion and authorities cited note 20 *supra*.

96. The action must meet the requirements of one of the three subsections of Rule 23(b), 23(b)(1), 23(b)(2) or 23(b)(3).

97. *See* FED. R. CIV. P. 23(b)(1).

98. FED. R. CIV. P. 23(b)(1)(A), 23(b)(1)(B).

99. FED. R. CIV. P. 23(b)(1)(A).

single inconsistent actions which may not affect the party's continuing course of conduct.[100]

Furthermore, to the extent that an environmental class action is brought under the premise that the class members individually are financially unable to prosecute their grievances, the corresponding risk that individual suits would establish incompatible standards of conduct is reduced.[101]

Subsection (b)(1)(B) permits a class action when a judgment in a non-class action involving a member of the class would, as a practical matter, jeopardize the interests of class members not parties to the suit.[102] Except in limited instances when claims are made by many persons against a fund insufficient to satisfy all claims, damage claims are unlikely to qualify under subsection (b)(1)(B).[103] Therefore, it is improbable that environmental class actions will fall within the parameters of either (b)(1)(A) or (b)(1)(B).[104]

Rule 23(b)(2)

While the environmental class action faces a small likelihood of success under subsection (b)(1), the reverse is true under the second category of Rule 23(b), subsection (b)(2), which might well be referred to as the "injunctive subsection." A class action under this subsection arises when "the party opposing the class has acted or refused to act on grounds generally applicable to the class . . . ."[105] In other words, a subsection (b)(2) suit is appropriate when the remedy applicable is "final injunctive relief or corresponding declaratory relief. . . ."[106] While the subsection does not preclude the awarding of damages, the Federal Rules Advisory Committee was careful to state that a subsection (b)(2) action was not appropriate when "final relief relates exclusively or predominantly to money damages."[107]

The practicability of bringing a class action under subsection (b)(2) may appear questionable since one plaintiff can sue just as effectively as a class when seeking only injunctive or declaratory relief. Considering the fact that the subsection (b)(2) plaintiff risks final defeat for the entire class, as no provision exists to allow other subsection (b)(2) class members to exclude themselves from the class, the utility of class suits seeking injunctive relief

100. Sabbey, *Rule 23: Categories of Subsection (b)*, 10 B.C. IND. & COM. L. REV. 539, 540-41 (1969).
101. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), *criticized in* Note, 44 N.Y.U.L. REV. 198, 201-202 (1969).
102. FED. R. CIV. P. 23(b)(1)(B).
103. ADVISORY COMMITTEE NOTE 101.
104. *See* Travers & Landers, *The Consumer Class Action*, 18 KAN. L. REV. 811, 823-24 (1970).
105. FED. R. CIV. P. 23(b)(2).
106. *Id.*
107. ADVISORY COMMITTEE NOTE 102.

would seem to be marginal. Nevertheless, a number of reasons can be advanced in support of the usefulness of subsection (b)(2) class actions.[108]

In a pessimistic assessment of the usefulness of the injunctive subsection for sustaining ancillary jurisdiction over the class in environmental litigation, a recent commentator concluded:

> Indiscriminate selection of [subsection (b)(2)] . . . invites time-consuming objections by defendants eager to stall. More significantly, it also encourages adverse determinations by hostile judges, who are sometimes only too glad to cloak substantive dismissal in the garb of procedural defect.[109]

Despite this assessment, at least three recent suits to enjoin activities in violation of the National Environmental Policy Act have succeeded.[110] Each was based on Rule 23(b)(2), and each was aimed at a specific and limited objective.[111] The outcome of these suits indicates that the possibilities for

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108. One obvious reason is the sharing of the costs of litigation: a single plaintiff might not be able to afford the expense of pressing his claim if, for example, a corporate defendant is permitted to contest his liability with each claimant individually. Furthermore, protection of the plaintiff with a small claim has long been recognized as a justification for the class action device. Weeks v. Bareco Oil Co., 125 F.2d 84, 90 (7th Cir. 1941). This justification has been recently recognized in an environmental class action:

> The policy reasons for permitting the conservation groups to represent the interests of their members in a class action are compelling. Any other rule would have the practical effect of preempting many meritorious actions, as one individual, or a small number of individuals, would have to sustain the entire financial burden of the lawsuit.

Sierra Club v. Hardin, 325 F. Supp. 99, 110-11 (D. Alas. 1971).

The subsection (b)(2) action also gives the class plaintiff a psychological advantage as compared to the individual plaintiff, based on the notion that there is strength in numbers. *See* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 435 (1960). The scope of the action, if brought on a class basis, together with the realization by the defendant of plaintiffs' financial ability to sustain litigation and their seriousness of purpose, may very well put the defendant in a position in which the possibilities for settlement or compromise are greatly increased.

Another reason supporting the use of the subsection(b)(2) class action for injunctive relief rests on the likelihood that such actions are more likely to call attention to the alleged environmental wrong and are thus more probable to elicit public support for the action. *See* Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 408 (1969); Comment, *The Environmental Lawsuit: Traditional Doctrines & Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1098 (1970). Public reaction in the form of outside aid consisting of amicus curiae briefs submitted by informed and influential parties and environmental groups, as well as concurrent financial backing from such parties, may well be the result of publication of the "cause" of the class action.

109. Comment, *The Viability of Class Actions in Environmental Litigation*, 2 ECOL. L.Q. 533, 564 (1972).

110. Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971); Harrisburg Coalition v. Volpe, 330 F. Supp. 918 (M.D. Pa. 1971); Izaak Walton League v. Macchia, 329 F. Supp. 504 (D.N.J. 1971).

111. In Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971), the court enjoined the construction of an interstate highway through the campus of the University of South Dakota. It found that failure of the Secretary of Transportation to file an environmental impact statement as required by the National Environmental Protection Act § 102(2)(c)

success directly correspond to the degree of selectivity exercised by the class representatives in presenting only those issues that are common to the class.[112] Where the class representatives succeed in invoking general diversity jurisdiction under subsection (b)(2), the possibilities for achieving application of ancillary jurisdiction over the remainder of the class are correspondingly increased.

Rule 23(b)(3)

While a class pursuing injunctive relief will normally cast its action in terms of Rule 23(b)(2), a class seeking damages will ordinarily frame its action under the third category of Rule 23, subsection (b)(3).[113] Although Rule 23(b)(3) is potentially the most valuable of the three categories for protecting the environment and the rights of small-claims plaintiffs from the standpoint of damages, its promise in this context has been significantly impeded as a result of the restrictive interpretation given the jurisdictional amount requirement in *Zahn v. International Paper Co.*[114] There the Court ruled that every member of a proposed Rule 23(b)(3) class action based on diversity must meet the $10,000 jurisdictional amount requirement, and those who do not risk dismissal from the class.[115] A consonance of opinion emerged between Supreme Court and circuit court dissenters on the question of aggregation of damage claims, emphasizing the majorities' indifference to the imperative need for modernization of the class action.[116] The dissents deplored the majorities' disregard for the merits of judicial efficiency, asserting that the exercise of diversity jurisdiction over the class, supported by implementation of ancillary jurisdiction over individuals not presenting sufficient money claims, would have achieved just and proper ends through a single adjudication in the interests of judicial efficiency.[117]

(1969), 42 U.S.C. § 4332 (1970), was a refusal to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief. Nolop v. Volpe, 333 F. Supp. 1364, 1368-69 (D.S.D. 1971).

112. In Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971), the court emphasized that

> [t]he plaintiffs fulfill all of the Rule 23(a) requirements . . . . [T]he class is so numerous that joinder of all members is impracticable. The applicability of the National Environmental Policy Act . . . is common to all members of the class and the claims are typical of the entire class. . . . The common questions of fact and law predominate and therefore a class action will best aid a fair and efficient adjudication of the controversy.

Id. at 1366-67.

113. FED. R. CIV. P. 23(b)(3).

114. — U.S. —, 94 S. Ct. 505, — L. Ed. 2d — (1973).

115. *Id.* at —, 94 S. Ct. at 512, — L. Ed. 2d at —.

116. Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972). Judge Timbers, outspoken in his opposition to the anti-aggregation rule, emphasized in his dissent that

> [t]he majority's decision . . . disregards the development of a sound doctrine for more efficient and economical judicial administration and severely impairs the efforts of those who would modernize the federal law of class actions.

Id. at 1040.

117. Zahn v. International Paper Co., — U.S. —, —, 94 S. Ct. 505, 512-17, — L.

In order to avoid the effects of *Snyder* and *Zahn* which would result in a denial of the right to proceed as a subsection (b)(3) class, it is necessary (1) to structure the action in such a way "that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members,"[118] and (2) to demonstrate "that a class action is *superior* to other available methods [of adjudication.]"[119] Predominance does not call for a quantitative evaluation of the time necessary to litigate the common questions as opposed to those questions that must be resolved individually for each class member.[120] Rather it presupposes that the class representatives should establish a "common nucleus of operative fact" or a common course of conduct[121] toward the class on the part of the defendant. The action could then proceed under Rule 23(b)(3).[122]

Ed. 2d —, — (1973). Mr. Justice Brennan concluded in his dissent that "[i]n view of the Court's previous concern with practical realities in both its cases involving class actions . . . I think that this [jurisdictional amount] limitation is both unwarranted and unwise." *Id.* at —, 94 S. Ct. at 517, — L. Ed. 2d at —.

118. FED. R. CIV. P. 23(b)(3) (emphasis added); *see* Zahn v. International Paper Co., 469 F.2d 1033, 1037-39 (2d Cir. 1972), *aff'd*, — U.S. —, —, 94 S. Ct. 505, 512-16, — L. Ed. 2d —, — (1973).

119. FED. R. CIV. P. 23(b)(3) (emphasis added).

120. A most emphatic rejection of the quantitative test occurred in Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968), where the court, in an antitrust case, reasoned:

> [I]t is true that *as a class action* more time in toto will be spent in proof of individual damage claims . . . than will be spent in proof of conspiracy . . . . [I]t would seem, however, that the situation should be considered and compared to that which would exist were *no class action* to be allowed. So for instance, if there were to be but a single case for trial, the court would expect that the great bulk of the time of that trial would be consumed with proof or the attempted proof of the existence and effect of a conspiracy and that the fraudulent concealment and damage issues would be far less predominant in the sense of time consumed at trial. Were there to be 500 separate suits, this same pattern undoubtedly would prevail as to each. It seems specious and begging the question to say that if these 500 law suits were brought into a class so that proof on the issues of conspiracy need be adduced only once and the result then becomes binding on all 500, that thereby the common issue of conspiracy no longer predominates because from a *total time* standpoint, cumulatively individual damage proof will take longer.

Id. at 569 (emphasis added).

121. The phrase "common nucleus of operative fact" was first coined in Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). Although it was probable that defendant had made differing oral misrepresentations to numerous purchasers of his securities, the court found questions relating to the omission of certain material facts to be common to all of these misrepresentations. The court concluded, "Consequently there does exist as to the totality of issues a common nucleus of operative facts such as would justify allowing the class action to proceed under . . . Rule 23." *Id.* at 99; *accord*, Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 488 (N.D. Ill. 1969) ("a common core of questions").

The application of this "common nucleus" test appears to be quite analagous to the test for the finding of pendent jurisdiction announced in UMW v. Gibbs, 383 U.S. 715, 725 (1966), from which the key words were taken. *See, e.g.*, Epstein v. Weiss, 50 F.R.D. 387, 393 (E.D. La. 1970); Dolgow v. Anderson, 43 F.R.D. 472, 489 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970).

122. Except for Foster v. City of Detroit, 405 F.2d 138, 145-47 (6th Cir. 1968), which arose before the 1966 amendments to Rule 23, only Biechele v. Norfolk & W.

The problem that faces the subsection (b)(3) litigant in attempting to show predominance is demonstrated by *In re Motor Vehicle Air Pollution Control Equipment*.[123] Plaintiffs there alleged an unusual type of antitrust injury—"injury resulting from pollution caused by the conspiracy to hinder and delay the research, development, manufacture and installation of effective motor vehicle air pollution control equipment."[124] The alleged conspiracy was, in effect, "a conspiracy to maintain a public nuisance—smog."[125] Even though the court recognized that the conspiracy was a question common to all of the classes involved in the action, it refused to find that the issue of conspiracy predominated over the individual issues of "impact" (smog-produced injuries) and "damages."[126] Since the alleged smog-produced injuries would be "as varied as the public itself," the court held that "impact" and the amount of damages were issues that should be individually litigated.[127]

A similar problem was resolved in an identical manner in *Diamond v. General Motors Corp.*,[128] a class action brought in the state courts of California. The plaintiffs purported to represent a class composed of all the citizens residing in Los Angeles County—over seven million persons—in a suit against some three hundred industrial corporations and municipalities who were alleged to have polluted the atmosphere of the county. The crux of plaintiffs' case was that the defendants were maintaining a public nuisance; under California law, however, a private person could maintain an action for a public nuisance only if it were "specially injurious to himself."[129] In evaluating the difficulties that would arise in trying to resolve special damages issues in a class setting, the court in effect summarized the major problem that the subsection (b)(3) plaintiff must overcome in federal court any time he seeks damages:

> Whether an individual has been specially injured in his person will depend largely upon proof relating to him alone — going to such matters as his general health, his occupation, place of residence, and activities. Whether a parcel of real property has been damaged will depend upon its unique characteristics, such as its location, physical features and use.[130]

These questions must be affirmatively resolved as being common to the class, not unique to the individual, in order to maintain a favorable position for

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Ry., 309 F. Supp. 354, 359 (N.D. Ohio 1969), provides a favorable precedent for finding predominance under subsection (b)(3) in class actions for damages.

123. 52 F.R.D. 398 (C.D. Cal. 1970).
124. *Id.* at 404.
125. *Id.* at 404.
126. *Id.* at 404.
127. *Id.* at 404-405.
128. 97 Cal. Rptr. 639, 642 (Ct. App. 1971).
129. CAL. CIV. CODE § 3493 (West 1970).
130. Diamond v. General Motors Corp., 97 Cal. Rptr. 639, 643 (Ct. App. 1971).

the application of ancillary jurisdiction to the members of the class.

A pivotal area concerning the significance of predominance in obtaining ancillary jurisdiction was dealt with in *Biechele v. Norfolk & Western Railway*,[131] involving the pollution of plaintiffs' land by defendant's coal storage and loading facilities. Common questions were held to predominate even though it was obvious that if the defendant were found liable, the court would be faced with several hundred separate claims for damages.[132] Although most of the claims would be of a similar nature—the cost of cleaning up the personal property on which the coal dust accumulated—the opinion of the court does not support the suggestion that only a common and limited scope of damage recovery was being considered:

> The factual conclusion is inescapable that the plaintiffs were injured in various respects, and to various extents, in their real estate, their personal property and effects, and in their persons by large quantities of coal dust blown from the shipping and storage facilities of the defendant.[133]

It is important to isolate those issues in *Biechele* by which the case was allowed to proceed as a class action. If a court can readily ascertain the common issues in a cause of action, it will be more likely to exercise its ancillary authority. In *Biechele* a dichotomy was established by the fact that the defendant was held liable for individual as well as joint class damage claims; clearly the liability of the defendant was the major area found by the court to be common to all members of the class. It is equally evident that the amount of damages had to be individually determined for each class member.

The remaining subsection (b)(3) issue was that of causation or "impact."[134] The court attempted to handle part of the causation issue as a common question. The plaintiffs had been permitted to show the various types of damage which could be caused by "airborne coal dust."[135] The use of expert testimony to delineate the scope of actual causation was important in that it reduced the scope of inquiry of the special master appointed to determine damages. Plaintiffs were thereby left in such a position that, individually, they had to show only that they were in fact injured and the amount of the injury.[136] The question of whether defendant's conduct *could* have caused plaintiffs' injuries was determined largely as a common question.

The innovative manner in which *Biechele* handled the problem of actual

131. 309 F. Supp. 354 (N.D. Ohio 1969).
132. *Id.* at 355.
133. *Id.* at 357.
134. "Impact," as the term was employed in *In re* Motor Vehicle Air Pollution Control Equip., 52 F.R.D. 398 (C.D. Cal. 1970), refers to the direct injury caused by the alleged wrong practiced by the defendant, as opposed to damages resulting therefrom. *Id.* at 404.
135. Biechele v. Norfolk & W. Ry., 309 F. Supp. 354, 357 (N.D. Ohio 1969).
136. *Id.* at 358.

causation can be utilized in other types of pollution cases in which the effects of the pollutant on property and persons is determinable through expert testimony. Plaintiffs can maintain predominance by formulating their complaints into distinct subclasses under Rule 23(c)(4) when the effects of the pollutant fall into specific categories.[137] Even where causation cannot be determined as a common issue, plaintiffs may still convince the court that a class action on a particular issue—the defendant's liability— will result in a considerable saving of judicial time, effort, and expense. Where the court is uncertain as to whether common questions predominate or a class action on a particular issue is appropriate, the plaintiffs may seek a "conditional order" that the action is maintainable, subject to a later alteration or amendment by the court striking the class action portion of the complaint if it becomes clear that common questions do not predominate or that the action is unmanageable.[138] The conditional order affords the class representatives the opportunity to enter a plea for the exercise of ancillary jurisdiction over the class members whose individual claims are of an insufficient amount. The corollary effect of strengthening the argument for predominance is thereby brought about by the creation of an opportunity for presenting the individual members' claims as *the* predominant claim.

Directly related to the issue of predominance is the requirement of superiority of the class action. If it can be demonstrated that a class action in the particular case is "superior to other available methods for the fair and efficient adjudication of the controversy," the favorable possibilities for ancillary jurisdiction to attach will be multiplied.[139] The thrust of the superiority determination "requires the court to make a determination that the objectives of the class action procedure really will be achieved *in the particular case.*"[140] The court must also consider any other possible methods by which the representative plaintiffs might proceed. Among the alternatives to the class action are individual actions, the test case, and multidistrict consolidation. In most environmental class actions, however, the search for substitutes will be fruitless; the alternatives will be either a class action or no relief at all.

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137. In addition to increasing the manageability of the action, division into subclasses naturally facilitates the presentation of common questions that may be sustained by the court. FED. R. CIV. P. 23(c)(4).

138. FED. R. CIV. P. 23(c)(1) provides that "[a]n order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." *See* FED. R. CIV. P. 23(d).

139. FED. R. CIV. P. 23(b).

140. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1779, at 59 (1972) (emphasis added).

> [T]he court must initially consider what other procedures, if any, exist for disposing of the dispute before it. It then must compare the possibilities to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the Court.

Id. § 1779, at 59.

Generally, the environmental plaintiff seeking damages has a claim too small to merit individual litigation. If the class action is maintainable such that the other requirements of Rule 23(a) and (b) are met, a finding that it is superior to other means of adjudicating the claim will ordinarily present no problem[141] and will effectively augment the argument in favor of ancillary jurisdiction.[142]

CONCLUSION

In a period of increasing concern over misuse and despoilation of the environment, the class action has great potential as a tool to slow the process of degradation and to make accountable those primarily responsible for environmental harm. Unfortunately, this potential has been frustrated in the federal courts by the burden of the jurisdictional amount requirement as it has been interpreted in *Snyder v. Harris*[143] and *Zahn v. International Paper Co.*[144] With the rejuvenation of the concept of ancillary jurisdiction and

141. *Id.* § 1779, at 61; 3B MOORE'S FEDERAL PRACTICE ¶ 23.45(3), at 23-807 to 808 (1974).

142. It should be noted that an additional requirement—that of notice—must also be satisfied under Rule 23. The requirement of notice, while greatly overshadowed by such factors as common manageability problems, requisites for the predominance of common issues, and mitigation of the jurisdictional amount requirement, carries with it due process as well as manageability considerations such as cost and practicability.

Rule 23(c)(2) requires that class members in subsection (b)(3) class actions be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 23(d)(2) provides for additional, discretionary notice procedures which the court may utilize in order to protect the interests of the class. These rules, construed in accordance with the recent Supreme Court decision in Eisen v. Carlisle & Jacquelin, — U.S. —, 94 S. Ct. 2140, — L. Ed. 2d — (1974), can pose serious practical problems for securities fraud, antitrust or consumer class action plaintiffs, since *Eisen* specifically held that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Id.* at —, 94 S. Ct. at 2150, — L. Ed. 2d at —.

Securities, antitrust and consumer class actions are likely to involve a considerable number of class members (*Eisen* involved over six million) making compliance with the notice requirement prohibitively expensive and thus impractical for most organizational plaintiffs. The usual environmental class action, conversely, will normally involve a geographically defined class of limited number, and, as such, the notice requirement imposes no greater burden. Should an impractically large environmental class be formed it would likely meet with the same problems of manageability as did *In re* Motor Vehicle Air Pollution Equip., 52 F.R.D. 398 (C.D. Cal. 1970), and Diamond v. General Motors Corp., 97 Cal. Rptr. 639 (Ct. App. 1971) (organizational plaintiffs sued in behalf of all the citizens of Los Angeles County) and dismissal would result.

Had *Eisen* not been a case of first impression in the area of Rule 23(c)(2) and 23(b)(3) notice requirements, certiorari would obviously have not been granted and, in this author's opinion, the case would likewise have been dismissed on the basis of its failure to comply with the manageability requirements of Rule 23(b). Thus, it appears that success of the class suit, especially in the environmental context and invoking a court's ancillary jurisdiction, is more dependent upon the presentation of typical, common and predominant questions of law and fact brought by a clearly defined, commonly-interested class desirable of concentrating the litigation of claims in a particular forum.

143. 394 U.S. 332 (1969).

144. — U.S. —, 94 S. Ct. 505, — L. Ed. 2d — (1973).

recognition of its potential class action aspects, however, the reasonable construction and application of Rule 23 and the desire of class members to secure physical rather than monetary relief can combine to preserve the utility and effectiveness the rule was designed to achieve.

The rule itself is not without fault. Although it purportedly represents a significant departure from the philosophy and conceptualistic orientation of the original rule,[145] the old tripartite classification of juristic relationships continues to be employed. The formidable complexity and obscurity of the old categories were recognized to be the insidious defects of the original rule.[146] Nevertheless, both *Snyder* and *Zahn* categorize the interests of class members thereby indicating a regression to the tradition and pitfalls of the old rule. By focusing on the identity rather than on the solidarity of interests, whether for the purpose of determining jurisdictional amount or maintenance of the suit as a class action, the problem of fashioning an effective group remedy becomes an increasingly difficult task.

The class action for injunctive relief brought under Rule 23(b)(1) or (2) is more likely to succeed under the present status of the law. The jurisdictional amount requirement is clearly susceptible to modification through careful application of the concept of ancillary jurisdiction. Plaintiffs also need be less concerned about the requirements of predominance, manageability, and best possible notice in class injunctive suits than in subsection (b)(3) damages actions.

While ancillary jurisdiction can be effectively employed in certain cases to moderate the demands of the jurisdictional amount requirement, it should be considered a means to an end rather than an end in itself. The persistently problematic position of the revised rule and the need for responsive judicial procedures must be dealt with, either by the judiciary or the legislature. At the same time it must be recognized that the conflict between the equitable demands of the environmental class action and the pragmatic dictates of the overtaxed judiciaries are not necessarily incapable of harmonization. Resolution of that conflict is peculiarly within the congressional domain.

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145. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (CIVIL) § 1752, at 515 (1972).

146. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 245, 246 (1950); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 380-94 (1967). *See also* Ford, *The History and Development of Old Rule 23 and the Development of Amended Rule 23*, 32 ANTITRUST L.J. 254 (1966); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 707 (1941); Note, 46 COLUM. L. REV. 818, 822 (1946).