Fordham Law Review

Volume 41 | Issue 4 Article 8

1973

Zahn v. International Paper: A Further Limitation on Class Action Jurisdiction

ZAHN V. INTERNATIONAL PAPER: A FURTHER LIMITATION ON CLASS ACTION JURISDICTION

In *Zahn v. International Paper Co.*[1] four residents of Vermont invoked the diversity jurisdiction of the United States District Court for the District of Vermont in a suit to recover damages for injury to their lakefront property allegedly caused by the defendant corporation's pollution of Lake Champlain. The plaintiffs sought to maintain their suit as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure,[2] alleging that more than two hundred lakefront owners and lessees were properly members of the class. The district court, "with great reluctance,"[3] ordered that reference to persons other than the four named plaintiffs be stricken from the complaint, holding that each class member must independently satisfy the amount in controversy requirement of section 1332(a) of Title 28, United States Code. The question of "the propriety of class treatment" was certified for interlocutory appeal and the United States Court of Appeals for the Second Circuit affirmed the denial of class treatment in a two-to-one decision.[4] The Supreme Court has granted certiorari[5] and on its review of the case it will be faced with the difficulty of reconciling two heretofore distinct lines of precedent: on one hand, the traditional interpretation of the amount in controversy requirement, particularly as applied to the class action device in the Court's 1969 decision in *Snyder v. Harris*;[6] and, on the other, the expanding notions of "pendent" and "ancillary" jurisdiction.

The majority of the Second Circuit panel relied almost exclusively on *Snyder*, a decision which surprised the academic community in holding that actions brought pursuant to Rule 23(b)(3) could not be made to satisfy the amount in controversy requirement of section 1332(a) by aggregating individual claims that would have been classified as "separate and distinct" by traditional analysis. The *Snyder* decision rested on a settled interpretation of the phrase "matter in controversy" which precluded aggregation of claims for less than the jurisdictional amount that were bound together only by common questions of law or fact, and, as a corollary, held that a suit consisting only of such claims was not within the congressional grant of jurisdiction to the federal courts.[7] The majority in *Zahn* recognized that it was confronted with a "novel question,"[8] but found "persuasive internal evidence" that the rule of *Snyder* ex-

1. 53 F.R.D. 430 (D. Vt. 1971), aff'd, 469 F.2d 1033 (2d Cir. 1972), cert. granted, 41 U.S.L.W. 3441 (U.S. Feb. 20, 1973) (No. 72-888).

2. Fed. R. Civ. P. 23(b)(3) [hereinafter cited as Rules].

3. 53 F.R.D. at 433.

4. 469 F.2d at 1033.

5. 41 U.S.L.W. 3441 (U.S. Feb. 20, 1973) (No. 72-888).

6. 394 U.S. 332 (1969).

7. Id. at 336-40. The term "jurisdiction" is used throughout to mean what is called jurisdiction "of the subject matter" in the Rules; that is, a court's power to hear and decide a case. The power to hear a case is to be distinguished from jurisdiction "of the person."

8. 469 F.2d at 1033.

tended even to situations in which the named representatives of a class have independently cognizable claims.[9]

Judge Smith, speaking for the *Zahn* majority noticed at least an apparent conflict with the stated policy of the Second Circuit favoring "'a liberal rather than a restrictive interpretation'"[10] of Rule 23 in order to aid the small claimant, but gave no hint as to what eventual impact the majority decision might have. In fact, a general acceptance of the majority position in *Zahn* would deny the use of Rule 23(b)(3) not only to diversity plaintiffs with small claims, but also to virtually all diversity plaintiffs and to those federal questions plaintiffs who are unable to benefit from a statutory exception to the amount in controversy requirement.[11]

Such a limited reading also appears to be contrary to the 1966 revision of Rule 23 which attempted to cut through the complexities of the old rule by making the class action device available, once its use is shown to be fair and expedient, wherever there is a large number of related claims. The chief defect of the old rule was found to be that the availability of the class device was made to depend on the "jural relation" existing between the rights sought to be adjudicated, class treatment being permitted to enforce a "common" right, but not where the rights asserted were "several" or "separate and distinct."[12]

Vital to the implementation of the amended rule in the Rule 23(b)(3) situation (where class members are linked only by common questions of law or fact) is the so-called "opting out" procedure described in Rule 23(c)(2). Prospective class members are given notice of the action and are bound by the judgment unless they affirmatively request exclusion. "Otherwise [without the provision for binding silent members] the (b)(3) type would become a class action which was not that at all—a prime point of discontent with the spurious action from which the Advisory Committee started its review of rule 23."[13] It is precisely this amended procedure for binding silent class members that is in most direct conflict with the lower courts' reasoning in *Zahn*.

The district court raised the problem by discussing the difficulties of defining the class. Definition of the class must, of course, be done at some point in the

---

9. Id. at 1034-35.

10. Id. at 1035, quoting Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968).

11. 28 U.S.C. § 1331(a) (1970) grants jurisdiction over "civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States" only where the amount in controversy exceeds $10,000. Statutory exceptions are so frequently made, however, that the exceptions are now much broader than the general rule. See C. Wright, Handbook of the Law of Federal Courts, 108-10 (2d ed. 1970) [hereinafter cited as Wright].

12. See Z. Chafee, Some Problems of Equity 243-58 (1950). Confusion became an acceptable reaction to these categories when Professor Chafee admitted: "Perhaps I am color-blind with respect to class suits, but I often have as much perplexity in telling a 'common' right from a 'several' right as in deciding whether some ties and dresses are green or blue." Id. at 257.

13. Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 398 (1967).

litigation in order to give guidance to a court enforcing the judgment.[14] Given the jurisdictional amount requirement as an added element in class definition, resort could not be had to the ordinary opting-out notice to determine class membership. A determination of class membership prior to judgment would have required each prospective class member to come forward and "at least plead, and perhaps prove facts substantiating, an amount in controversy."[15] The result would be to reinstate the practice followed in the old spurious class actions, that is, to reduce the (b)(3) action to "merely a device of permissive joinder"[16] much like its predecessor.[17] To leave precise definition of the class until after judgment as is sometimes done in (b)(3) actions, would also be no solution.[18] As the district court pointed out, the difficulties that would be met in determining the res judicata effect of a decision where definition of the class had been delayed until after judgment would preclude class treatment:

> [I]f liability were found not to exist in the case at bar, the res judicata effect of the judgment would depend on an evaluation at some future date of whether a given class member had $10,000 in controversy at the time of this action. This is clearly an impossible task. And if liability were found to exist, the question of jurisdiction would be hopelessly intertwined with the determination of damages . . . .[19]

Thus, to delay in defining the class until after judgment would allow a form of the "one-way" intervention that was a major incentive for change of the old rule. A plaintiff, at least if his claim were unliquidated,[20] might remain aloof until judgment on the liability issue. If judgment were favorable to the class he might then come forward characterizing his claim as one for more than $10,000. Unless it appeared "to a legal certainty" that plaintiff could not recover the amount claimed, he would get the benefit of the judgment.[21] Even a plaintiff with a clearly inadequate claim might seek to benefit from the judgment by bringing suit in a state which has abrogated the mutuality doctrine in collateral estoppel and permits offensive use of a prior judgment by

14. Rule 23(c)(3) provides that the judgment "shall include and . . . describe those . . . whom the court finds to be members of the class."

15. 53 F.R.D. at 433.

16. California Apparel Creators v. Wieder of California, Inc., 162 F.2d 893, 897 (2d Cir.), cert. denied, 332 U.S. 816 (1947).

17. Cf. Korn v. Franchard Corp., 50 F.R.D. 57, 60 (S.D.N.Y.), rev'd on other grounds, [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,845 (S.D.N.Y. 1970), rev'd, 456 F.2d 1206 (2d Cir. 1972).

18. 7 C. Wright & A. Miller, Federal Practice and Procedure § 1760, at 583-84 (1972).

19. 53 F.R.D. at 433-34.

20. If all the class members' claims were liquidated, presumably the problems of class definition will not be increased by the addition of a jurisdictional amount factor. Of course, the point is very hypothetical.

21. See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1148-49 (2d ed. 1973). After establishing his class membership, a plaintiff would, of course, have an absolute right to the benefit of the judgment. Under the new rule, therefore, a court cannot avoid the one-way intervention problem by the simple expedient of disallowing post-judgment intervention.

one not a party to the first suit.[22] If, on the other hand, judgment were against the class, a plaintiff who had remained silent might commence an action in a state court seeking less than $10,000 in damages. To get the res judicata protection of his judgment, the defendant would have to take the singular position that, although the plaintiff now claims less than $10,000, the matter in controversy between the two in the prior class action was in fact greater than $10,000. Where not inherently ludicrous, the situation would be at least undesirable since the determination of the judgment's res judicata effect would probably require inquiry into the merits. At a minimum, then, it is unlikely that a district court faced with the prospect of unclear res judicata effect will find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[23]

Snyder v. Harris itself imposed severe restrictions on the usefulness of Rule 23(b)(3), but the conclusion that the rule is of virtually no use wherever amount in controversy is an obstacle awaited the decision in *Zahn*.[24] Although it may be, in a sense, untidy to have an apparently viable rule which is in fact inapplicable to a large class of cases, the *Snyder* decision indicates that the Court will not shrink from such a result where it sees a clear conflict between the Rules and the jurisdictional mandate of the federal courts.

This result will be welcomed by the critics of Rule 23(b)(3), who cite the increased burden on federal courts and the possibility of unfairness to defendants as reasons favoring its effective repeal.[25] The critics of diversity jurisdiction itself will also find the result unobjectionable, particularly in a case such as *Zahn* where plaintiffs invoke diversity jurisdiction in their own state.[26] But surely the qualitative difference between a finding that class treatment is inappropriate for whatever reasons of policy or practicality, and a finding that class treatment is impossible due to lack of power in the federal courts is too fundamental to be overlooked. Regardless of what sympathy it may have with the wisdom of disallowing class treatment in the *Zahn* case,

22. See, e.g., B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147-48, 225 N.E.2d 195, 198-99, 278 N.Y.S.2d 596, 601-02 (1967).

23. Rule 23(b)(3). A finding of superiority is among the prerequisites to class treatment under this rule.

24. Rule 23(b)(2), intended to be used where only injunctive relief is sought, is not quite so seriously affected, even where the rights asserted are classified as "several" or "separate and distinct." It is often not difficult for a court to value the enjoyment of a right at more than $10,000. See Marquez v. Hardin, 339 F. Supp. 1364, 1370 (N.D. Cal. 1969); Biechele v. Norfolk & Western Ry., 309 F. Supp. 354, 355 (N.D. Ohio 1969).

25. Rule 23(b)(3) has been described as "legalized blackmail." Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9 (1971). Judge Lumbard, dissenting in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968), referred to the controversy which had been sanctioned for class treatment as a "Frankenstein monster." It has also been suggested that Rule 23 encourages lawyers to promote litigation. See 168 N.Y.L.J., Oct. 26, 1972, at 1, col. 3.

26. See The American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts § 1302(a) (1969).

or even in diversity cases in general, the Court will find itself unable to affirm the Second Circuit's decision without answering, at least by implication, some basic questions concerning the jurisdiction of the federal courts, and, in particular, the doctrines of "pendent" and "ancillary" jurisdiction and their relation to the Federal Rules of Civil Procedure.

Rule 82 provides that the Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ." In *Snyder*, this was held to mean that "the 1966 changes in Rule 23 did not and could not have changed the interpretation of the statutory phrase 'matter in controversy' [in the jurisdiction-granting statute]."[27] The disposition of the case, then, turned on the prior interpretation of section 1332:[28] "We have consistently interpreted the jurisdictional statute passed by Congress as not conferring jurisdiction where the required amount in controversy can be reached only by aggregating separate and distinct claims."[29]

The relationship of the rules to the district courts' jurisdiction is less clear, however, where a court has jurisdiction of an independently justiciable suit and the claims as to which that court's jurisdiction is in question are in some sense incidental to it. Under the doctrines of "pendent" and "ancillary" jurisdiction, federal courts have found themselves able to exercise jurisdiction where its denial would effectively negate the usefulness of a rule, although the mere preservation of a rule's utility would, under Rule 82, be an inadequate basis on which to assert jurisdiction. Professor Wright describes "ancillary" jurisdiction as an "ill-defined concept" whereby "it is held that 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."[30] Together with "pendent" jurisdiction it constitutes the most important exception to the general rule that lower federal courts exercise only that power which is specifically granted to them by Congress pursuant to article III of the Constitution.[31] In fact, no specific mention of such a power is to be found either in congressional enactments or in the Constitution.[32]

---

27. 394 U.S. at 338.

28. 28 U.S.C. § 1332 (1970).

29. 394 U.S. at 338.

30. Wright 19. The term "pendent jurisdiction" was, until United Mine Workers v. Gibbs, 383 U.S. 715 (1966), reserved for the situation in which the independently cognizable suit was based on federal law and a state claim was joined with it. Since Gibbs, the distinction has not been carefully observed. The term is now applied in joinder situations (either of claims or parties) regardless of the jurisdictional basis of the principal claim.

31. "If congress has given the power to this court, we possess it, not otherwise . . . ." Turner v. Bank of North America, 4 U.S. (4 Dall.) 7, 9 n.(a) (1799).

32. Wright 19. U.S. Const. art. III, § 2 provides: "The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . . to Controversies . . . between Citizens of different States . . . ." Constitutional sanction for ancillary power has been sought in expansive in-

Escape from the prohibition of Rule 82, where pendent or ancillary jurisdiction is involved, is commonly sought via the following formulation: "The Federal Rules do not expand the ancillary jurisdiction of the federal courts, but they provide opportunities for invoking it in additional situations."[33] There remains, however, the brute fact that an individual who prior to a rule's adoption might successfully have objected to the court's jurisdiction will now find himself in federal court, or, if he was already a party, answering additional claims. There are two ways of viewing this phenomenon. One might object that the party in question stands in the same relation to the controversy with or without the rule. All the rule has done, therefore, is to give the party a name (*e.g.*, "third party defendant under Rule 14"). If the court lacked power with respect to him before the naming, it should equally lack power thereafter. The second and more sympathetic view, however, is that the court never lacked power with respect to a party so situated, but, instead, remembered it only when the rule took effect. It would follow, then, that a dismissal prior to the rule for lack of jurisdiction would really not have been that at all, but only a dismissal for lack of an appropriate rule. To whatever degree it makes sense to posit the existence of this latent power even without a mechanism for using it, the need to reconcile the constraint of Rule 82 with the undeniable fact that the rules have had a profound effect upon the exercise of jurisdiction[34] has forced the courts to adopt this second view.[35]

Since discussion of this aspect of the federal courts' jurisdictional power has usually been in the context of particular rules, a test applicable to all cases has not emerged. To summarize the situation prior to the 1966 amendments to the Rules, ancillary jurisdiction had usually been found to permit compulsory counterclaims under Rule 13(a), even when they brought in additional parties under Rule 13(h); cross-claims under Rule 13(g); impleader of a third party defendant under Rule 14; interpleader under Rule 22; and intervention as of right under Rule 24(a). Ancillary power was generally found not to extend to permissive counterclaims under Rule 13(b); permissive intervention under Rule 24(b); joinder of claims under Rule 18 except where an independently cognizable federal claim was so closely related to a state claim that they amounted to "two distinct grounds in support of a single cause of action" under the doctrine of *Hurn v. Oursler*;[36] or joinder of parties under Rule 20. As Professor Wright has stated: "If there is any single rationalizing principle that will explain these diverse rules, it is not easily discerned."[37]

---

terpretation of the terms "case" and "controversy." See note 43 infra and accompanying text.

33. Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts, 33 F.R.D. 27, 28 (1964) (footnotes omitted).

34. See Baker, Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction, 33 U. Pitt. L. Rev. 759 (1972).

35. A good example is the impleader case of Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959); see text accompanying notes 66-68 infra.

36. 289 U.S. 238, 246 (1933).

37. Wright 21.

The main impetus in recent years for the expansion of the "ancillary" concept has been the case of *United Mine Workers v. Gibbs*,[38] in which the Court discussed in a more general way the underpinnings of "pendent" jurisdiction. In *Gibbs*, the plaintiff brought suit in a federal court alleging a secondary boycott in violation of section 303 of the Labor Management Relations Act.[39] To this federal claim he joined the common law claim of interference with contract, since both claims arose out of the same labor dispute. After trial to a jury, it was held on a motion notwithstanding the verdict that, as a matter of law, Gibbs' federal claim was not cognizable under section 303. The court nevertheless sustained the jury's finding of liability on the state claim and a remitted amount was awarded.[40] On certiorari, the Supreme Court ruled that jurisdiction over the state claim was properly assumed by the district court under the doctrine of "pendent" jurisdiction laid down in *Hurn v. Oursler*.[41] The Court found that the approach taken by the lower courts to the *Hurn* doctrine had been "unnecessarily grudging."[42] The difficulty with the *Hurn* test was found to be that it rested on the antique concept of "cause of action," which, with "the adoption of the Federal Rules of Civil Procedure" was replaced by a broader concept for other purposes but "remained as the keystone of the *Hurn* test . . . ."[43] The Court observed that "[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[44] The clear implication was that this impulse is a salutary one that should not be defeated by a narrow view of judicial power. Established as the new focus in determining the permissible extent of pendent jurisdiction was a broad interpretation of the term "case" as it appears in article III of the Constitution.[45] A pragmatic rather than conceptual test now determines the content of a constitutional "case":

> The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then . . . there is *power* in federal courts to hear the whole.[46]

Implicit, then, in the Supreme Court's reasoning in *Gibbs* is the view that the general federal question statute, section 1331, although it is silent on the subject, carries with it the entire constitutional authorization of ancillary power, at least where federal and state claims between the same parties are concerned.[47]

---

38. 383 U.S. 715 (1966).
39. 29 U.S.C. § 187 (1970).
40. 383 U.S. at 720-21.
41. 289 U.S. 238 (1933); see text accompanying note 36 supra.
42. 383 U.S. at 725.
43. Id. at 724.
44. Id. (footnote omitted).
45. See note 32 supra.
46. 383 U.S. at 725 (footnote omitted).
47. As indicated in note 31 supra, the constitutional grant of judicial power in article

In so holding, the Court took care not to encourage the unreflecting exercise of jurisdiction wherever power might be found to exist. A sharp distinction was made between the question of a court's *power* to hear a case, a matter which "will ordinarily be resolved on the pleadings," and the question of the propriety of exercising that power, an issue "which remains open throughout the litigation."[48] Of primary importance in this regard is that the policy considerations of fairness, convenience to parties, convenience to courts, reluctance to decide matters of state law, and the relative importance of the federal and state claims go only to the propriety of hearing a claim,[49] while the power to hear a claim is determined from its fact relatedness alone.[50]

Zahn provides the Supreme Court with its first opportunity to comment on the dispute that has arisen as to the reach of the *Gibbs* doctrine. Confronted with cases presenting various combinations of bases of federal jurisdiction and jurisdictional defects in assertedly pendent or ancillary claims, courts have reached disparate conclusions. Disagreement has centered around two fundamental questions: (1) does the doctrine operate where the jurisdiction-granting suit is founded on state law?; and (2) does the doctrine permit the assertion of claims by or against individuals who are not parties to the jurisdiction-granting suits?[51] In fact, the two questions are not entirely separable: the question of pendent jurisdiction under *Gibbs* will arise, for example, in a diversity suit only if a claim is asserted against a non-party.

Jurisdiction over most state claims sued upon originally in federal courts is based on diversity of citizenship.[52] The Third Circuit took the lead even prior to *Gibbs* in holding that a wrongful death action brought by an out-of-state administrator in a federal court would support a survival action brought by the decedent's parents even though their citizenship was the same as that of the defendants.[53] The tendency to permit such joinder was reinforced by the decision in *Gibbs*, and there followed a series of tort cases, not confined to the Third Circuit, in which family members of the party by whom or on

III, § 2 is not self-executing. The Gibbs Court did not explain precisely how the ancillary power was transmitted to the district courts.

48. 383 U.S. at 727.

49. Id. at 726.

50. It has been pointed out that the sentence beginning "But if" in the passage quoted at note 44 supra can plausibly be read as an alternative to the fact-relatedness test rather than an addition to it. Baker, supra note 34, at 764-65. Proponents of both readings would probably agree, at least, that it establishes a common sense approach to fact-relatedness.

51. These questions arise only after the Gibbs decision, for a claim by or against a non-party was almost certain to be a separate cause of action under the Hurn test.

52. The impact of Gibbs has also been considered in other instances of original federal jurisdiction over state claims. Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970) (action brought in federal court pursuant to Federal Tort Claims Act, 28 U.S.C. § 1346(b)); Latch v. TVA, 312 F. Supp. 1069 (N.D. Miss. 1970) (action against a federally created company). In both cases, jurisdiction was found to exist over pendent claims against non-parties.

53. Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964).

whose behalf the jurisdiction-granting suit was brought were permitted to join without regard to the amount in controversy or the citizenship of the parties to that suit.[54] After a brief hesitation,[55] the Third Circuit has gone on to use the pendent jurisdiction doctrine outside the family situation to join defendants as well as plaintiffs regardless of whether the jurisdictional defect of the pendent claim was lack of diversity or lack of the jurisdictional amount.[56] Not all circuits, however, have been as liberal as the Third. The major exponent of the narrow view of the doctrine is the Ninth Circuit which has held that it only applies where the principal suit is grounded in a federal question and then only between original parties to the suit.[57]

But the applicability of the doctrine to diversity cases in general, and in particular to the situation in which a claim for less than the jurisdictional amount is asserted in a diversity case, has been put in doubt by *Snyder v. Harris*.[58] The Constitution certainly provides no support for the view that the pendent power does not exist in diversity cases: no reason appears for treating the term "controversy" as it appears in article III as narrower than the term "case."[59] Moreover, a constitutional argument against the existence of pendent power in diversity cases would entail the unconstitutionality of the removal statute,[60] which specifically vests power over claims that would be classified as ancillary or pendent in the context of original jurisdiction.[61] The argument has been made, however, that, unlike the federal question statute (section

54. See, e.g., Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966); Townsend v. Quality Court Motels, Inc., 338 F. Supp. 1140 (D. Del. 1972); Newman v. Freeman, 262 F. Supp. 106 (E.D. Pa. 1966). The American Law Institute has recommended codification of this result. The American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, § 1301(e) (1969).

55. Olivieri v. Adams, 280 F. Supp. 428 (E.D. Pa. 1968); McSparran v. Weist, 270 F. Supp. 421 (E.D. Pa. 1967), aff'd, 402 F.2d 867 (3d Cir. 1968); see Comment, Pendent Jurisdiction in Diversity Cases, 30 U. Pitt. L. Rev. 607, 619-25 (1969).

56. Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968); Campbell v. Triangle Corp., 336 F. Supp. 1002 (E.D. Pa. 1972).

57. Moor v. Madigan, 458 F.2d 1217 (9th Cir.), cert. granted, 409 U.S. 841 (1972); Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); Rundle v. Madigan, 331 F. Supp. 492 (N.D. Cal. 1971), aff'd, 458 F.2d 1217 (9th Cir.), cert. granted, 409 U.S. 841 (1972). But see Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971).

58. 394 U.S. 332 (1969).

59. See note 32 supra.

60. 28 U.S.C. § 1441 (1970).

61. "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction." Id.; see J. Moore, Commentary on the United States Judicial Code 253 (1949), for comment on the constitutionality of the removal statute and some justifications for it.

1331), the diversity statute (section 1332) vests less than the entire constitutional authorization of ancillary power.[62] Urged in support are the rule of narrow construction of the grant of diversity jurisdiction[63] and the reasons of policy from which the rule stems: the added difficulties a federal court faces in deciding issues of state law, the interests of states in adjudicating state matters, and the rising workload of the federal courts.[64] It is suggested that these considerations will be entitled to great weight in some cases but not in others. Therefore, a mechanical rule against the exercise of ancillary power in diversity cases will not reliably separate those situations in which the policies are actually served by denying jurisdiction from those in which they are not or from those situations in which they are only served at the expense of fairness, convenience, and sound judicial administration. No doubt, the factors favoring dismissal are less likely to be overborne by considerations favoring acceptance of jurisdiction in a diversity case since there will always be a competent alternative forum. Of course, the view that the diversity statute confers some ancillary power is implicit in the exercise of that power in the context of particular rules. To allow the use of ancillary power in connection with some rules but not others and, thus, to make a court's power over a particular claim turn on its procedural relationship to the "controversy" rather than on a common-sense determination of its actual relationship to the "controversy" not only imposes a needlessly complex interpretation on the jurisdiction-granting statute but is, in fact, one way of achieving the result prohibited by Rule 82. In fact, it was only to rebut the suggestion that the Court's decision would keep many deserving cases out of federal court that Justice Black spoke unfavorably of diversity cases in *Snyder*.[65] In view of the similarity of the sources of the former so-called "ancillary" power and the so-called "pendent" power described in *Gibbs*, and the similarity of the justifications for their use, there seems to be no reason not to generalize the *Gibbs* doctrine and apply it regardless of the particular rule in whose service it is invoked, the jurisdictional basis of the principal suit, or the jurisdictional defect of the additional claim. The striking similarity of the reasoning of *Gibbs* and the reasoning of pre-*Gibbs* cases justifying the use of ancillary jurisdiction in the context of impleader under Rule 14 reinforces this view. In *Dery v. Wyer*[66] it was held that the Federal Rules had replaced the old term "cause of action" with the more flexible term "claim." "'It is used to denote the aggregate of operative facts which give rise to a right enforceable in the courts.'"[67] Thus, ancillary power was grounded on something very like the constitutional "case" in *Gibbs*. No distinction is observed between impleader

62. Robison v. Castello, 331 F. Supp. 667, 669 n.1 (E.D. La. 1971). See also Hart & Wechsler, supra note 21, at 1081.

63. City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941).

64. Annual Rep. of the Dir. of the Admin. Office of the United States Courts (1970).

65. 394 U.S. at 341.

66. 265 F.2d 804 (2d Cir. 1959).

67. Id. at 807, quoting Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187, 189 (2d Cir. 1943).

cases in which the principal suit is based on federal law and those in which it is not.[68]

A joint contributor to the special difficulties surrounding the amount in controversy requirement is the tendency of decisions written prior to the expansion of the ancillary and pendent concepts to apply the term "aggregation" not only to the situation in which two or more parties sought to add together their claims to reach the jurisdictional amount, but also to the situation in which one party had a separately cognizable claim and others attempted to ride in on his coattails.[69] The *Snyder* Court accepted this use of the term uncritically,[70] as did the *Zahn* majority, although the lack of a sufficient amount in controversy as a jurisdictional defect has never presented a greater obstacle to the exercise of ancillary jurisdiction than the lack of diversity. The use of the term "aggregation" to include the pendent claim situation was not essential to the decision in *Snyder*. It would be anomalous indeed if a court could, after weighing such considerations as fairness to parties and federal-state comity, overcome the defect of lack of diversity of citizenship[71] in the parties to an ancillary claim but find itself without power if the claim did not exceed the jurisdictional minimum. Again, the amount requirement is not likely to be an accurate test of the propriety of hearing an ancillary claim.

Taken by itself, the question of whether additional parties can be brought in under the *Gibbs* doctrine has presented less difficulty. Perhaps the most

68. See, e.g., Stemler v. Burke, 344 F.2d 393 (6th Cir. 1965); Huggins v. Graves, 337 F.2d 486 (6th Cir. 1964); Smith v. Whitmore, 270 F.2d 741 (3d Cir. 1959). The Huggins case may be compared with Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968). In both cases, suit was brought against doctors and the hospital for negligence. If the doctrine of pendent jurisdiction had not been allowed to operate in Jacobson, the plaintiff would have had to act against the hospital in state court since its liability was limited to $10,000. At the same time, the doctors' claim against the hospital for contribution might have been treated as ancillary under Huggins if it had been the defendants who had tried to bring the hospital into federal court via Rule 14. It has been suggested that ancillary power should be exercised only over the claim of one who seeks to maintain his position, not over the claim of a party seeking to improve his position. Hart & Wechsler, supra note 21, at 1080. Surely this is a factor for the court to weigh in the exercise of its discretion under the Gibbs doctrine, but does not go to the court's power. Indeed, ancillary power is recognized over compulsory counterclaims whether they seek affirmative recovery or merely a set-off or recoupment.

69. See, e.g., Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).

70. 394 U.S. at 335-38.

71. There is some authority to the effect that the citizenship of a class for purposes of § 1332 may be determined solely from the citizenship of the named representatives. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). The Court in Snyder noticed, without apparent disapproval, the prevailing view that this rule applies to all class actions regardless of the character of the rights asserted. 394 U.S. at 340. Indeed, that the Cauble rule does apply to (b)(3) actions was squarely held by the district court in Zahn. 53 F.R.D. at 430-31. Neither the district court nor the Second Circuit attempted to reconcile the apparently conflicting views of judicial power represented in Cauble on the one hand and Zahn on the other.

liberal approach is that taken by the Second Circuit itself in *Almenares v. Wyman*.[72] The plaintiffs invoked jurisdiction under section 1343 of title 28, United States Code, alleging that hearing procedures with respect to local agency action terminating or reducing welfare payments failed to meet the requirements of due process. Joined with the constitutional claim was a statutory one alleging violation of the hearing requirements prescribed by the United States Department of Health, Education and Welfare.[73] Named as defendants were both the City Commissioner and the State Commissioner.[74] Plaintiffs sought to maintain their suit as a class action with respect to both claims.[75] The court found no difficulty in holding that the pendent statutory claim could be maintained against the State Commissioner although he might not have been a party to the jurisdiction-granting claims.[76] Nor was it an obstacle that the individual statutory claims of the plaintiffs did not exceed the jurisdictional minimum.[77] But a special problem confronted the court since the district court had found class action treatment appropriate only with respect to the statutory claim. The result was that the rights of a large class of plaintiffs who were not parties to the jurisdiction-granting claim against a defendant who was not a party to the jurisdiction-granting claim were being adjudicated in the pendent claim. Chief Judge Friendly found an objection to the court's jurisdiction to be without merit:

> The question of the court's power revolves around two bodies of law: on the one hand, there are the traditional statutory jurisdictional requirements; on the other, there are the expanding principles of ancillary and pendent jurisdiction. To be sure, before an action can be brought in the federal courts, the requirements of some jurisdictional statute must be met. Here the named plaintiffs satisfied this under 28 U.S.C. § 1343(3). This is sufficient to vest the court with subject-matter jurisdiction not merely over . . . their own pendent claims—all those arising from the "common nucleus of operative facts"—whether against the defendant to the primary claim or another. We see no valid distinction in the *power* of the court to join additional plaintiffs. Neither do we perceive any inherent limitation that makes Rule 23 *per se* inapplicable to a pendent claim so long as the claim meets the *Gibbs* test of a "common nucleus of operative facts" with the primary claim as well as those of Rule 23 itself.[78]

Surely, the modest view of its judicial power expressed by the Second Circuit in *Zahn* is hard to reconcile with so robust an acceptance of the *Gibbs*

72. 453 F.2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972).
73. Id. at 1078.
74. Id. at 1080.
75. Id.
76. Id. at 1083.
77. Id.
78. Id. at 1084 (footnotes omitted). Other courts have followed the example of Almenares in exercising pendent jurisdiction over a class action. Serritella v. Engelman, 339 F. Supp. 738 (D.N.J. 1972); Fischer v. Weaver, 55 F.R.D. 454 (N.D. Ill. 1972). In Fischer, the court held that it had power to hear two assertedly pendent class actions, one seeking damages, the other seeking only injunctive relief. In its discretion, the court declined to hear the damage action.

doctrine as *Almenares*.[79] This is not to say that the result achieved in *Zahn* was incorrect. That the plaintiffs are residents of the forum state, that there may be unsettled areas of state law involved, that the alleged class members may be apathetic—these and other factors appearing either at the outset or in the course of the litigation might well be found to outweigh any benefit to be gained in assuming jurisdiction. Of course, this only underlines the crucial distinction between a court's power and its discretion that the *Zahn* court failed to make. The Supreme Court will find in *Zahn* not only their first opportunity to respond to the generally unfavorable commentary elicited by the *Snyder* decision, but, more importantly, an opportunity to place the doctrine of ancillary power on a sound theoretical basis, and thus put an end to the disputes that were bound to result from the previous case by case or rule by rule analysis.

79. There are indications that the Second Circuit is sharply divided on this point. On petition for rehearing of the Zahn case en banc, the vote was 4-3 in favor of rehearing. Since a majority of the full authorized complement of judges was needed to grant the petition, it was denied (at the time of the vote there was one vacancy and Chief Judge Friendly had disqualified himself).