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amendment in order to provide law enforcement officials with even more security at the expense of the citizen's right of privacy.[66] Such a trend "would preclude consideration of the reasonableness of any particular search, and so would take away the protection that the [C]onstitution is designed to provide."[67]

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CLASS ACTIONS SCUTTLED IN LAKE CHAMPLAIN

Four owners of property fronting on Lake Champlain in Vermont brought a diversity action against International Paper Company for permitting discharge from its pulp and paper-making plant to pollute the lake, thereby causing damage to lake-front property. Each of the four named plaintiffs alleged individual damages in excess of $10,000. The action was brought as a class action under rule 23(b)(3) of the Federal Rules of Civil Procedure on behalf of approximately 200 property owners and lessees, all of whom had suffered damages. It was not alleged that each unnamed member of the class had suffered individual damages in excess of $10,000, and the trial court was convinced "to a legal certainty" that not every unnamed member of the class had suffered damages in that amount. "[W]ith great reluctance," the United States District Court of Vermont held[1] that *each class member* must independently satisfy the requirement as to jurisdictional amount,[2] thus forcing dismissal of the action as to all members of the class not meeting this requirement. The court further held that in this case the problem of "defining an appropriate class" over which the court had jurisdiction was "insuperable."[3]

66. This theory is buttressed by the recent Supreme Court decision of United States v. Edwards, 94 S. Ct. 1234 (1974) which held reasonable a search of an arrestee's clothing ten hours after his arrest. Mr. Justice Stewart declared that the evidence so obtained could be admissible "only by disregarding established Fourth Amendment principles firmly embodied in many previous decisions of this Court." *Id.* at 1240 (dissent).

67. People v. Watkins, 19 Ill. 2d 11, 18, 166 N.E.2d 433, 437 (1960).

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

2. "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States . . ." 28 U.S.C. § 1332 (1970).

3. Zahn v. International Paper Co., 53 F.R.D. 430, 433 (D. Vt. 1971). Regarding the problem of defining the class, the court said:

> A determination before trial of the landowners actually encompassed within this class would require the unnamed class members to appear and at least plead, and perhaps prove facts substantiating an amount in controversy. This would eliminate any advantage of a class action over joinder; a class action would therefore not be properly mintainable because class treatment would not be "superior to other available methods for the fair and efficient adjudication of the contro-

Therefore the court dismissed the action as to the entire unnamed class, permitting only the four named plaintiffs to proceed on their own behalf. This decision was affirmed by the United States Court of Appeals for the Second Circuit.[4] On certiorari to the United States Supreme Court, *held*, affirmed: Each plaintiff in a rule 23(b)(3) class action must independently satisfy the jurisdictional amount requirement, and any named or unnamed plaintiff who does not do so must be dismissed from the case. *Zahn v. International Paper Co.*, 94 S. Ct. 505 (1973).

Since its adoption from equity in 1938,[5] the class action has been heralded as a means of both eliminating the necessity of repetitious or inconsistent litigation and of providing plaintiffs with a method of prosecuting claims which otherwise would be too small to warrant litigation.[6] Prior to 1966, this latter function was largely defeated in diversity suits by the application of jurisdictional amount requirements to each individual plaintiff in "hybrid" and "spurious" class actions.[7]

In 1966, rule 23 of the Federal Rules of Civil Procedure was revised, and the "true," "hybrid" and "spurious" classifications were abolished. Subsection (b)(3) of "new" rule 23 authorized a class action when

> 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.[8]

Some commentators[9] and courts[10] saw this change as an opportunity, if

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versy," as required by Rule 23(b)(3). Nor could further definition of the class be postponed until after trial on the liability issue.

Id. at 433. The court concluded: "Thus the requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23(b)(3) class suits." *Id.*

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

5. FED. R. CIV. P. 23. See C. WRIGHT, FEDERAL COURTS 306 (2d ed. 1970) [hereinafter cited as C. WRIGHT], and Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 HARV. L. REV. 356, 376 (1967) [hereinafter cited as Kaplan], for discussion on the background of rule 23.

6. C. WRIGHT, *supra* note 5, at 306.

7. The rule distinguished three types of class actions: "true," in which the "character of the right" asserted for or against the class must be "joint or common," "hybrid," in which the right must be " 'several' with the action directed to the adjudication of claims affecting specific property," and "spurious," in which the right is " 'several' with a common relief sought." In cases involving "true" class actions, in which the right asserted was not distinguishable among class members, courts required only that the *total* claim asserted exceed the jurisdictional amount requirement. However, in cases involving "hybrid" or "spurious" actions, "aggregation" of claims was not permitted. *See* Kaplan, *supra* note 5, at 377.

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

9. Professor Kaplan, the reporter for the committee which drafted the 1966 rule, commented:

> New Rule 23 alters the pattern of class actions; subdivision (b)(3), in particular, is a new category deliberately created. Like other innovations from time to time introduced into the Civil Rules, those as to class actions change the total situation on which the statutes and theories regarding subject matter jurisdiction are brought

not a signal, to reinterpret the jurisdictional requirements with respect to class actions. However in 1969, the United States Supreme Court in *Snyder v. Harris*[11] ruled that despite the revision of rule 23, plaintiffs could not *aggregate* their claims to meet the jurisdictional amount requirement.

Following *Snyder*, one possibility remained: Perhaps, as in the cases of ancillary jurisdiction[12] and diversity requirements,[13] jurisdictional amount requirements would only be applied to the named plaintiffs and not to the other members of the class. Now, in *Zahn*, the Court has eliminated this last hope, and in doing so, has struck a devastating if not fatal blow to diversity class actions.

In affirming the dismissal of all unnamed plaintiffs, the *Zahn* Court applied the "familiar rule" that

> when several plaintiffs assert *separate* and *distinct* demands in a single suit, the amount involved in each separate controversy must be of the requisite amount [as specified in 28 U.S.C. 1332 (1970)] . . . , and . . . those amounts cannot be added together to satisfy jurisdictional requirements.[14]

Citing *Snyder*, the Court reiterated its determination that the 1966 revision of rule 23 in no way modified the jurisdictional amount requirement. While acknowledging that *Snyder* was distinguishable in that there was no single plaintiff who met the $10,000 requirement, the Court asserted, nonetheless, that "there is no doubt that the rationale of that case controls this one."[15]

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to bear. . . . [I]t also presents a new complex in deciding questions of permissible "aggregation" of amounts in controversy.

Kaplan, *supra* note 5, at 399-400. Professor Sherman Cohn was even more positive, describing inclusion of "all members of the former spurious class" as "the clear mandate of the [new] rule 23." Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1219 (1966).

10. Referring to rule 23(b)(3), the United States Court of Appeals for the Tenth Circuit declared:

> [T]he rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To hold that the former classifications of "true," "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

Gas Serv. Co. v. Coburn, 389 F.2d 831, 834 (10th Cir. 1968).

11. 394 U.S. 332 (1969) [hereinafter referred to as *Snyder*]. See 24 U. MIAMI L. REV. 173 (1969), for a critical analysis of the Court's reasoning in this case.

12. See note 25 *infra*, and accompanying text.

13. In Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), the Court held that if the named members of the class are of diverse citizenship from the opposing party, then a diversity action may be brought in federal court, even though some or all of the unnamed members of the class are citizens of the opponent's state. Referring to this case, the dissenters in *Zahn* commented that "it is difficult to understand why the practical approach the Court took in *Supreme Tribe of Ben-Hur* must be abandoned where the purely statutory 'matter in controversy' requirement is concerned." 94 S. Ct. at 516.

14. 94 S. Ct. at 509 (emphasis added). In effect, by basing its decision upon the separateness of the plaintiffs' claims, the court has retained the "spurious" classification allegedly abolished by the 1966 revision of rule 23. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1756 (1972) [hereinafter cited as C. WRIGHT & A. MILLER].

15. 94 S. Ct. at 511.

In two concluding paragraphs the Court stated that it felt no inclination to "overrule" *Snyder* or to change its "long-standing construction of the 'matter in controversy' requirement" for to do so "would undermine the purpose and intent of Congress in providing that plaintiffs in diversity cases must present claims in excess of the jurisdictional amount."[16]

The holding of the Court in *Zahn* is neither original nor surprising.[17] However, while the decision is consistent with the trend set in *Snyder* and previous cases, it was certainly not dictated by those decisions. First, the facts in *Zahn* are easily distinguishable from those in *Snyder* and other cases cited.[18] In *Zahn*, each and every one of the named plaintiffs individually met the jurisdictional amount requirement, a situation nonexistent in prior cases. Second, rule 23(b)(3), by providing "a series of functional tests for determining the propriety of a class action" and by omitting all reference to "joint or common interests,"[19] does provide an opportunity to move away from the "nice judicial distinctions"[20] of "true," "hybrid" and "spurious" followed under the 1938 rule. Third, the pivotal factor in the case is the Court's own previous interpretation of "matter in controversy," which could be reinterpreted if the Court so wished. Indeed there is ample precedent for such a reinterpretation, particularly in the area of ancillary jurisdiction.

It is the Court's steady liberalization of jurisdictional requirements with regard to ancillary jurisdiction which presents the best precedent for a contrary holding in *Zahn*, and which also makes the existing holding so disappointing. In a number of cases where all *original* parties have met federal jurisdictional requirements, other parties who have been unable to meet the traditional diversity or jurisdictional amount requirement have nonetheless been held to be within the court's jurisdiction. Such cases have involved compulsory counterclaims,[21] intervention,[22] impleader[23] and interpleader.[24] In these instances, the creation of ancillary jurisdiction has been justified in terms of "fairness," "efficiency" or

16. *Id.* at 512. The crucial issue which the *Zahn* majority failed to discuss is the intent of Congress in revising rule 23. It was suggested by the dissenters in both *Snyder* and *Zahn* that this revision was made for the express purpose of broadening the jurisdiction of the federal courts.

17. In fact, Justices Fortas and Douglas in their dissent in *Snyder* suggested that *Snyder* might eventually be applied to "all cases where one or more of the co-plaintiffs have a claim of less than the jurisdictional amount . . . ." Snyder v. Harris, 394 U.S. 32, 343 (1969).

18. In its six page opinion, the Court cited 46 cases, suggesting to this writer that the Court recognized that its *reasoning* is lacking in persuasiveness.

19. C. WRIGHT, *supra* note 5, at 307. *See also* the dissenting opinion in *Snyder* for an analysis of the 1966 revisions.

20. Gas Serv. Co. v. Coburn, 389 F.2d 831, 834 (10th Cir. 1968).

21. Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961).

22. Phelps v. Oaks, 117 U.S. 236 (1886). *See also* FED. R. CIV. P. 24(a).

23. Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962). *See also* FED. R. CIV. P. 14.

24. Walmac Co. v. Isaacs, 220 F.2d 108 (1st Cir. 1955). *See also* FED. R. CIV. P. 22.

"uniformity."[25] Yet when faced with a class action—a concept whose very existence is based upon a need for efficiency and uniformity—the Court refused to follow this liberalizing trend.

The fact that the *Zahn* Court was faced with a clear opportunity to render a contrary verdict is significant. For in deliberately choosing to restrict its jurisdiction, the Court has demonstrated a clear intent to keep the small claimant out of federal court, regardless of the actual total amount at issue. The Court in *Zahn* declined to acknowledge that it was faced with a choice, or to discuss any public policy reason for the decision it made. However its real motivation undoubtedly was a desire to avoid if at all possible the addition of any further "burdens" upon the "already overloaded federal court system."[26]

With the creation of rule 23(b)(3) in 1966, the class action was seized upon as a particularly effective device for consumers and those suffering environmental damage.[27] Although such persons might have very small individual claims, when combined such claims could amount to millions of dollars—thus permitting effective litigation against large and well-financed manufacturers, sellers or polluters. Under the *Zahn* rule, 23(b)(3) class actions will only be permitted where: (1) each named plaintiff alleges damages in excess of $10,000, (2) each unnamed plaintiff has more than $10,000 damages, and (3) the unnamed plaintiffs constitute a "definable"[28] class. The possibility that all of these requirements can be met is slim at best.

The theoretical result of the *Zahn* decision, as previously suggested by the Court in *Snyder*,[29] is that those plaintiffs having more than $10,000 damages will maintain individual or joint actions in federal court, while those having smaller claims will bring class or individual actions in state court. In reality, the result will probably be that many plaintiffs, and particularly those in consumer or environmental suits, will bring no actions at all.[30]

It is ironic that one source quoted by both the majority and the three dissenters in *Zahn* was a statement by the 1958 Senate Judicial Conference regarding the increase in the jurisdictional amount requirement from $3,000 to $10,000. That statement says, in part, that "[t]he jurisdictional amount should not be so high as to convert the federal courts into courts of big business . . . ."[31] Unquestionably, in choosing to ex-

25. Zahn v. International Paper Co., 469 F.2d 1033, 1036 (2d Cir. 1972). *See also*, C. WRIGHT & A. MILLER, *supra* note 14, at § 1917; Note, *Federal Practice: Jurisdiction of Third-Party Claims*, 11 OKLA. L. REV. 326 (1958).

26. This was the reasoning employed in Snyder v. Harris, 394 U.S. 332, 341 (1969).

27. *See* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969); Starrs, *The Consumer Class Action*, 49 B.U.L. REV. 211 (1969).

28. See note 3 *supra*.

29. 394 U.S. 332, 341 (1969).

30. Another result, suggested by the Court in *Zahn*, is that the same jurisdictional amount requirements will also be applied to class actions where jurisdiction is sought under general federal questions. 94 S. Ct. at 508.

31. S. REP. No. 1830, 85th Cong., 2d Sess. 3-4 (1958).

clude the small claimant from diversity class actions the Court has taken a significant step[82] toward precisely the conversion which it purported to avoid.

THOMAS A. BODDEN

"MARY CARTER" LIMITATION ON LIABILITY AGREEMENTS BETWEEN ADVERSARY PARTIES: A PAINTED LADY IS EXPOSED

As the result of an accident involving a bus and two automobiles, the plaintiffs' minor son was killed. A wrongful death action was brought against Markam, the owner of the bus, Ward, the operator of the bus, and Brinkman, the owner and driver of the other automobile. Ward and Markam filed pre- and post-trial motions to produce[1] any "Mary Carter Agreement"[2] which existed between their co-defendant Brinkman and the plaintiffs. The motions were denied by the trial court on the theory that such agreements are inadmissable into evidence. A judgment for $15,000 was subsequently entered in the plaintiffs' favor. The Florida District Court of Appeal, Fourth District, affirmed and held that, although the trial court erred in denying the motions, the error did not result in prejudicial harm to the movants since they could have obtained a set-off for the amount paid by Brinkman to the plaintiffs.[3] On certiorari, the Supreme Court of Florida remanded the decision of the Fourth District and *held*: The failure, upon the request of any adversely affected defendant, to admit into evidence or to allow production of agreements which proportionately diminish the liability of one defendant by increasing the liability of other defendants is prejudicial to the conduct of a fair trial. *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973).

The Mary Carter agreement derived its name from *Booth v. Mary Carter Paint Co.*[4] There certain defendants secretly entered into an agree-

32. Another large step in this same direction is the Court's recent decision in Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974), under which the plaintiffs must bear the costs of notifying all members of the class.

1. FLA. R. CIV. P. 1.350.

2. A Mary Carter agreement is an agreement

> between the plaintiff and some (but less than all) defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery which the plaintitff is able to make against the nonagreeing defendant or defendants.

Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 446 n.1 (Fla. 4th Dist. 1972).

3. Ward v. Ochoa, 271 So. 2d 173 (Fla. 4th Dist. 1972).

4. 202 So. 2d 8 (Fla. 2d Dist. 1967) [hereinafter referred to as *Booth*]. For a recitation of the facts, see Booth v. Mary Carter Paint Co., 182 So. 2d 292 (Fla. 2d Dist. 1966), which involved an appeal from an order granting a summary judgment.