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Federal Jurisdiction - Amount in Controversy - Each Member of the Class in a Class Action Must Independently Satisfy the Requisite Jurisdictional Amount

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erage sales in the state. This state alone does not provide beverage interests with an adequate population base to economically make the necessary alterations to their systems of packaging and distribution. If non-draft beverages were not sold in the state, many North Dakotans, particularly the approximately 50 per cent who live within 135 miles of major shopping centers in western Minnesota,[45] would simply make their beverage purchases out-of-state. The result would be citizen inconvenience, loss of tax revenue, and a failure to keep non-returnable containers out of North Dakota.

WILLIAM L. GUY III

FEDERAL JURISDICTION—AMOUNT IN CONTROVERSY—EACH MEMBER OF THE CLASS IN A CLASS ACTION MUST INDEPENDENTLY SATISFY THE REQUISITE JURISDICTIONAL AMOUNT.

This was a diversity action brought as a class action, under Rule 23(b)(3) of the Federal Rules of Civil Procedure,[1] by four lakeside property owners, representing all lakefront landowners and lessees in the towns of Orwell, Shoreham, and Bridport, Vermont. Plaintiffs claimed impairment of property rights resulting from al-

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tops, (b) there was no requirement that the container be reusable—only recyclable, and (c) a uniform refund value was assigned without regard to any scheme of container standardization.

The bill probably would have been effective in helping to solve the problems of littering and solid waste disposal. The high refund value would be an incentive to bounty hunters who would help keep the ditches and parks clean. However, in not banning disposable containers, recycling with its attendant waste of energy would still be required. Since pull-top cans were not prohibited, injuries to humans and animals resulting from their use would not have been abated. Finally, the distributors would have received a windfall profit as a result of deposits that were not redeemed. H. 1477, 43d Legislative Assembly of North Dakota (1973).

45. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1973 10, table 8 (94th ed.).

1. FED. R. CIV. P. 23(b).
Rule 23(b) reads:

> (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 of 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:

leged pollution caused by defendant's pulp and paper mill. The trial court held that the action could not be maintained as a class action because there was no proper class over which the court had jurisdiction. The court found "to a legal certainty" that all of the unnamed members of the class did not meet the requisite jurisdictional amount. Despite the fact that each of the named representatives did meet the jurisdictional amount, the court did not have jurisdiction over the unnamed members of the class and, therefore, the suit could not be maintained as a class action.[2] On interlocutory appeal under 28 U.S.C. 1229(b),[3] the Court of Appeals affirmed the ruling.[4] The dissent would have allowed the suit to be maintained as a class action, using the doctrine of ancillary jurisdiction to provide the jurisdiction over the unnamed members of the class.[5] The Supreme Court also affirmed, with the dissent arguing that ancillary jurisdiction should allow the suit to be maintained as a class action. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

The class action was an equitable device until 1938 when the Federal Rules of Civil Procedure were adopted.[6]

> [It] was an invention of equity . . . mothered by the practical necessity of providing a precedural device so that mere numbers would not disable large groups of individuals united in interest, from enforcing their equitable rights, nor grant them immunity from their equitable wrongs. . . .[7]

Rule 23 extended class actions to include legal as well as equitable actions. The original Rule 23(a) allowed class actions if: (A) The class is too large to practically bring each member before the court; and (B) The named representatives will adequately represent the interests of all members of the class; and (C) The right being

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(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.

2. Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971).
3. Interlocutory Appeal Act, 28 U.S.C. § 1292(b) (1958).

Section 1292(b) states:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court, unless the district judge or the Court of Appeals or a judge thereof shall so order.

4. Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972).
5. *Id.* at 1036 (Timbers, J., dissenting).
6. Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).
7. Z. CHAFFEE, SOME PROBLEMS OF EQUITY 244 (1950).

enforced is either (1) joint or common, or (2) several, but the action may affect specific property, or (3) several, but common questions of fact or law predominate and common relief is sought. These different categories of class actions were respectively called (1) true[8] (2) hybrid[9] and (3) spurious.[10] Aggregation of claims to meet the jurisdictional amount was allowed in true class actions, since the right involved was common, but aggregation was not allowed in hybrid or spurious class actions, because the right involved was several.[11] In true class actions, all members of the class were bound by the judgment. In hybrid class actions, members of the class were only bound by the judgment as far as it affected the property involved. Spurious class actions did not have any binding effect on those not named as parties.[12] Therefore, spurious class actions were really nothing more than an example of permissive joinder, and as such, duplicated Rule 20(a).[13] This interpretation, resulting in non-binding spurious class actions, combined with the difficulty of determing whether a right in "joint or common" or "several" caused the rule to be amended in 1966.[15] The present functional classifications were substituted for the older, more con-

8. Some examples of true class actions are: Gibbs v. Buck, 307 U.S. 66 (1939) (members of the American Society of Composers, Authors and Publishers sought to enjoin enforcement of a Florida statute prohibiting owners of copyrighted musical compositions from combining to fix licensing fees); Boesenberg v. Chicago Title & Trust Co., 128 F.2d 245 (7th Cir. 1942) (suit was brought by a beneficiary of a trust, seeking to restore to the trust funds which were wrongfully diverted); Coke v. City of Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960) (suit for racial discrimination in the use of recreational facilities). *See also* 3B J. MOORE, FEDERAL PRACTICE, § 23.08 (1974), and 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 562.1 (1961).

9. Hybrid class actions were rare. Some examples are: Dickinson v. Burnham, 197 F.2d 973 (2d Cir. 1952) (two stockholders subscribed to a fund for the benefit of a corporation and asserted a claim for secret profits made in breach of a fiduciary relationship); Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Deckert, 123 F.2d 979, 983 (3d Cir. 1941) (a suit was brought for fraudulent inducement to buy corporate stock, if the company had gone into receivership, the suit would have been hybrid). *See also* 3B J. MOORE, FEDERAL PRACTICE, ¶ 23.09 (1974); 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 562.2 (1961).

10. Spurious class actions were those which were formed solely by the presence of a common question of law or fact. *See* 3B J. MOORE, FEDERAL PRACTICE, § 23.10 (1974); 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 563.3 (1961).

11. Snyder v. Harris, 394 U.S. 332, 335 (1968).

12. C. WRIGHT, LAW OF FEDERAL COURTS 311 (2d ed. 1970).

13. FED. R. CIV. P. 20(a).

Rule 20(a) reads:

> (a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo, or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgement may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

14. C. WRIGHT, *supra* note 12, at 311.

15. *See Advisory Committee's Notes*, 39 F.R.D. 98.

fusing conceptual classifications,[16] and judgments were broadened to be binding upon all members of the class who do not ask to be excluded from the class.[17] These amendments were designed to make the class action a viable and workable method of determining and enforcing rights of groups of litigants.[18]

In *Snyder v. Harris*[19] the Supreme Court revived the Classification of class actions based upon the type of right involved. The Court held that claims of class members can be aggregated to meet the requisite jurisdictional amount if the right being adjudicated is joint or common, but aggregation is not permitted if the rights involved are separate and distinct. The Court applied this general rule of aggregation[20] to class actions after reasoning that it was based on an interpretation of the phrase "matter in controversy" in the jurisdictional statute.[21] Further according to Rule 82, "these rules shall not be construed to extend or limit the jurisdiction of the United States district courts, or the venue of actions there in", so the aggregation rule was not to be altered by the 1966 amendments to Rule 23.[22]

There have been attempts to distinguish *Snyder*, and its application, to allow aggregation by designating the rights involved as

16. The old Rule 23 relied on the jural relationship between the members of the class to determine which classification the action belonged to: true, hybrid, or spurious. The new Rule 23 looks to the effect of the action upon the court and the parties in deciding whether the action is maintainable as a class action. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 1753 (1972).

17. FED. R. CIV. P. 23(c)(2), (3).
Rules 23(c)(2) and (3) read:

> (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 judgement, 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.
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> (3) The judgement 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 judgement 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 subsection (c)(2) was directed, and who have not requested exclusion, and who the court finds to be members of the class.

18. *See* Kaplan, *Continuing Work of the Civil Committee*: 1966 *Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 375 (1967); Note, *Class Actions—Federal Rule 23 Amended*, 31 ALBANY L. REV. 127 (1967).

19. 394 U.S. 332 (1968).

20. *See generally* Annot., 3 A.L.R. Fed. 372, 380-83 (1970).

21. Snyder v. Harris, 394 U.S. 332, 336 (1968).

22. *Id.*
The Court says:

> The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rules of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase "matter of controversy". The interpretation of this phrase as precluding aggregation substantially predates the 1938 Federal Rules of Civil Procedure. . . . Nothing in the amended Rule 23 changes this doctrine.

joint or common and not separate and distinct. These distincitions are being developed in cases in which a "common fund" is to be divided among the class members.[23]

The Court in *Zahn* followed the reasoning used in *Synder*, and treated *Zahn* as though it were another aggregation case, saying:

> [T]he Court of Appeals in the case before us accurately read and applied *Snyder v. Harris*: Each 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.[24]

Mr. Justice Fortas, dissenting in *Snyder*, had indicated that this result would follow from that decision.[25] The *Zahn* Court relied upon *Troy v. G. A. Whitehead*,[26] which first voiced the general rule of aggregation with respect to joinder, and on *Clark v. Paul Gray, Inc.*,[27] which extended this rule to class actions under the old Rule 23.[28] After *Snyder*, it is clear that class actions under the new Rule 23 come within the general aggregation rule, and that aggregation is not appropriate here. The Court recognized the basic difference between *Zahn*, and *Clark* and *Snyder*. In *Zahn*, all of the named representatives met the jurisdictional amount, but in both *Clark* and *Snyder* they did not. In *Clark* only one member of the class met the required amount, and in *Snyder* no member met the requirement. But, the Court dismissed this difference as insignificant, and said that if the jurisdictional amount would only apply to named plaintiffs, this would give an advantage to the unnamed members by allowing their claims to be heard in federal court without having to pass muster under the jurisdictional requirement.[29]

The Court made only passing comment on ancillary jurisdic-

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23. *Id. See* Cass Clay Inc. v. Northwestern Public Service Co., 42 U.S.L.W. 2586 (D.S.D. 1974). Suit was brought seeking refund of overcharges by Northwestern Public Service Co. Northwestern had a contract with the Government by which it was supposed to refund to its customers any savings that it realized from purchasing electricity from the Government. Cass Clay alleged on behalf of all the customers that an overcharge resulted when the savings were not passed on to the customers. The Court ruled that the right involved was joint and common, since the rights of one member of the class could not be determined without affecting the rest of the class, as opposed to *Snyder*, in which each stockholder was statutorily authorized to bring suit.

24. Zahn v. International Paper Co., 414 U.S. 291, 301 (1974).

25. Snyder v. Harris, 394 U.S. 332, 343 (1968) (Fortas, J., dissenting). The rule in *Snyder* would apply "in all cases where one or more of the co-plaintiffs have a claim of less than the jurisdictional amount. . ."

26. *Id.* Zahn v. International Paper Co., 414 U.S. 291, 294 (1974), *citing* Troy v. G. A. Whitehead, 222 U.S. 39, 40-1 (1911). The Court said:

> 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; but when several plaintiffs unite to enforce a single title of right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.

27. *Id.* 306 U.S. 583 (1938).

28. Zahn v. International Paper Co., 414 U.S. 291, 294-95 (1974).

29. *Id.* at 300 n.9.

tion,[30] citing the Court of Appeals statement that "one plaintiff may not ride in on another's coattails."[31] However, Justice Brennan, dissenting, viewed this doctrine as providing jurisdiction over the class and allowing the suit to be maintained as a class action.[32]

Ancillary jurisdiction is a concept by which "a district court acquires jurisdiction of a case or controversy as an entirety and may, as an incident to dispostion 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."[33] No independent basis for jurisdiction is necessary for claims which are ancillary to claims within the jurisdiction of the court.[34] Ancillary jurisdiction was first used in *Freeman v. Howe*.[35] It originally encompassed only claims which have a "direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit."[36]

In *Moore v. New York Cotton Exchange*[37] ancillary jurisdiction was expanded to be used as a matter of convenience. Since that case, the twin doctrines of ancillary and pendant jurisdiction have gone through a great development.[38] Ancillary jurisdiction has been found to apply in: compulsory counterclaims under Rule 13(a),[39] even if additional parties are brought in with the counterclaim under Rule 13(h);[40] cross claims under Rule 13(h);[41] impleader of a

30. *Id.* at 301.

31. 469 F.2d 1033, 1035 (2d Cir. 1972).

32. 414 U.S. at 306.

33. C. WRIGHT, *supra* note 12, at 19.

34. 20 A. J. MOORE, FEDERAL PRACTICE, ¶ 8.07[5] (1974).

35. 65 U.S. (24 How.) 450 (1860). Freeman, a U.S. marshall, seized railroad cars under writ of attachment. The mortgagees of the railroad brought action in state court against Freeman for replevin, and obtained judgement there. The Supreme Court held that the state court did not have jurisdiction over property that is under control of a federal court The mortgagee argued that they would be left without a forum to adjudicate their claim. But, the Supreme Court held that the federal court would have ancillary jurisdiction over this claim and it could be brought there regardless of lack of an independent basis for jurisdiction.

36. Fulton Nat. Bank v. Hozier, 267 U.S. 276, 280 (1925).

37. 270 U.S. 593 (1926). Plaintiff brought suit in federal court claiming a violation of the Sherman Act, and seeking an injunction. Defendant asserted a compulsory counterclaim that did not involve a federal question. Plaintiff's claim was dismissed, but the court retained jurisdiction over the counterclaim, despite lack of diversity, by using ancillary jurisdiction.

38. Baker, *Toward a Relaxed View of Federal Ancillary and Pendant Jurisdiction*, 33 U. PITT. L. REV. 759, 762 n.24 (1972). Pendant jurisdiction is described in this manner. "[T]he concept of pendant jurisdiction is generally confined to the joinder of a state law claim to a federal claim by the same plaintiff against the same defendant in a federal question jurisdiction case, but essentially it is closely related to ancillary jurisdiction and may be regarded as a subspecies of it." *Id.*

39. Moore v. New York Cotton Exchange, 270 U.S. 593 (1926). *See also* 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 392 n.25 (1960).

40. Union Paving Co. v. Downer Corp., 276 F.2d 468 (9th Cir. 1960). *See also* 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 392 n.41 (1960); Note, *Joinder of Co-Citizen to Compulsory Counterclaim Permitted by Federal Ancillary Jurisdiction*, 56 COL. L. REV. 130 (1956).

41. R. M. Smythe & Co. v. Chase National Bank, 291 F.2d 721 (2d Cir. 1961). *See* 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 392 (1960).

third party defendant under Rule 14;[42] interplleader under Rule 22;[43] and intervention as of right under Rule 24(a).[44] Ancillary jurisdiction does not extend to permissive counterclaims under Rule 13(b);[45] joinder of claims under Rule 18,[46] except where federal and non federal claims are so closely related as to amount to seperate grounds in support of a single cause of action;[47] joinder of parties under Rule 20;[48] or permissive intervention under Rule 24(b).[49] It has been suggested that, "If there is any single rationalizing principle that will explain these diverse rules, it is not easily discerned."[50] Justice Brennan suggested that factors to consider in determining whether or not ancillary jurisdiction will be appropriate include,

> impact of adjudication on the parties and third persons, the susceptibility of the dispute or disputes in the case to resolution in a single adjudication, and the structure of the litigation as governed by the Federall Rules of Civil Procedure.[51]

Under these considerations ,class actions would certainly seem to be an appropriate area in which to exercise ancillary jurisdiction.[52] The requirement of Rule 23(b) (3) that "questions of law or fact common to the members of the class must predominate" provides the protection from using ancillary jurisdiction in class actions solely as a means of getting around the federal jurisdictional limitations.[53]

The dissent argues that the decision of the Court in this case will actually result in an increased workload for the judiciary as a whole. The four named representatives meet the jurisdictional amount individually, and have a right to be heard in federal court. However, the unnamed members of the class must litigate their claims in state court, duplicating the efforts of the federal court in many complicated areas of expert testimony and determinations

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42. Smith v. Whitmore, 270 F.2d 741 (3d Cir. 1959). *See*, 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 424 n.21 & 22 (1960).

43. Walmac Co. v. Isaacs, 220 F.2d 108 (1st Cir. 1955).

44. East v. Crowdus, 302 F.2d 645 (8th Cir. 1962).

45. Autographic Register Co. v. Philip Hano Co., 198 F.2d 208 (1st Cir. 1952). *See* 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 392 n.31 (1960).

46. Delman v. Federal Products Corp., 251 F.2d 123 (1st Cir. 1958).

47. Hurn v. Oursler, 289 U.S. 238, 245-46 (1933).

48. Diepen v. Fernow, 1 F.R.D. 378 (W.D. Mich. 1940).

49. Hunt Tool Co. v. Moore, Inc., 212 F.2d 685 (5th Cir. 1954).

50. C. WRIGHT, *supra* note 12, at 21.

51. 414 U.S. 291, 305.

52. Using this ancillary jurisdiction approach had been rejected in a number of decisions, but this was usually dictum, due to the failure of any of the parties to meet the jurisdictional amount. Hartman v. Secretary of Dep't. of H.U.D., 294 F. Supp. 794 (D. Mass. 1968). The Fifth Circuit has applied ancillary jurisdiction in a case such a *Zahn*. Lesch v. Chicago Eastern Illinois Railroad Co., 279 F. Supp. 908 (D. Ill. 1968). And this approach has been hailed as "sound, and is a natural corollary to other applications of the ancillary jurisdiction concept." 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL, at 564 (1972).

53. Zahn v. International Paper Co., 414 U.S. 291, 307 (1974) (Brennan, J., dissenting).

of fact. Exercising ancillary jurisdiction would increase the burden on the federal court by requiring it to perform the special functions necessary in a class action and to determine the damages of the unnamed members of the class, but this increased burden is much less than the burden of a duplicate lawsuit which the state and federal judiciary as a whole must now bear.[54] A study prepared by Georgetown University Law School Journal indicates that class actions do not impose undue administrative burdens on the courts.[55] The majority will also deprive many small claimants of a forum, because many states do not provide for a device similar to Rule 23(b)(3). Therefore, this decision runs contrary to the two major reasons for allowing class actions, the economy of judicial resources, and to provide a forum for a large number of small claims, which individually would not be worth the bother to litigate, but collectively, become substantial.[56]

This decision is also inconsistent with the rule regarding determination of diversity of citizenship. Only the representatives will be considered when determining whether complete diversity exists.[57] Considering the fact that diversity has a constitutional base, while the limitation of amount in controversy is only statutory, "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."[58]

The net result of this decision is to retard the development of the ancillary jurisdiction concept and to all but destroy class actions under Rule 23(b)(3), "in diversity cases save for the extraordinary situation in which every member of the class has a claim in excess of $10,000."[59] This decision will severely damage any attempt to make the class action a viable and workable tool in the federal courts. In states which have no provision for class actions similar to Rule 23(b)(3) the only remedy available will be piecemeal litigation. In states such as North Dakota, which have adopted a rule similar to Federal Rule 23(b)(3),[60] state courts must be ready to bear the burden of litigating class actions of this type, which previously went to federal court. This seems particularly important in

54. *Id.* at 308.
55. STAFF OF SENATE COMM. ON COMMERCE, 93d CONG., 2d SESS., CLASS ACTION STUDY (Comm. Print 1950).
56. Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501, 504 (1969).
57. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).
Suit was brought against a fraternal organization and its officers, headquartered in Indiana, by a member, resident of Kentucky, on behalf of all members. This suit was held to be binding on members who were residents of Indiana, stating that "the intervention of the Indiana citizens in the suit would not have defeated the jurisdiction already acquired." *Id.* at 366.
58. Zahn v. International Paper Co., 414 U.S. 291, 309 (1974) (Brennan, J., dissenting).
59. C. WRIGHT, *supra* note 12, at 316.
60. N.D.R. CIV. P. 23(b)(3) is identical to the federal rule.

North Dakota in view of the impending coal development, and its accompanying electrical generating plants, gasification plants with all of the possibilities of damage to the environment similar to the pollution of Lake Champlain in *Zahn*.

At this point, the primary method of repairing the damage done to class actions with the *Snyder* and *Zahn* decisions is by Congressional action to amend the amount in controversy clause to allow aggregation to meet the requirement or to allow ancillary jurisdiction over the unnamed class members or to amend the jurisdictional statute to give private citizens standing to sue for environmental degradation.[61] It may also be possible to bring two suits, one for injunctive relief under existing federal law, and another for damages, arguing that the suit for damages is ancillary to the suit for injunctive relief.[62] But, it is clear that some mechanism should be found to bring environmental class actions within the jurisdiction of the federal courts, to allow people who have been injured by environmental degradation to receive compensation.

JON BEUSEN

ENVIRONMENTAL LAW—ATTORNEYS' FEES—FEES AWARDED UNDER EQUITY TO ENVIRONMENTAL INTEREST LITIGANTS FOR PROMOTING SUBSTANTIAL PUBLIC INTERESTS.

Environmental Defense Fund, Inc. and Friends of the Earth instituted an action against R. C. Morton, Secretary of the Interior, in the United States District Court for the District of Columbia, to bar construction of the trans-Alaska pipeline. The controversy focused on whether the Secretary of the Interior had authority to grant special land use permits for pipeline rights-of-way in excess of statutory width specifications[1] and whether he had prepared

61. Bills such as this have been introduced. In the second session of the 92d Congress (1972), S. 1032 and H. 1049 both provided citizens with standing to bring suit for injunctive or declaratory relief for environmental degradation regardless of the amount in controversy.

62. This approach was successful in Biechele v. Norfolk & Western Ry., 309 F. Supp. 354 (N.D. Ohio 1969). The action was brought in state court and removed. Jurisdiction over the suit for injunctive relief was obtained by the Court, saying: "It appears to the Court 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. The court then assumed jurisdiction over the suit for damages as ancillary to the suit for injunctive relief.

For a discussion of the basis for jurisdiction over suits for injunctive relief, see, Note, *The Federal Class Action in Environmental Litigation: Problems and Possibilities*, 51 N.C.L. REV. 1385, 1401 (1973).

1. The Mineral Leasing Act of 1920 § 28, 30 U.S.C. § 185 (1970), provides that "Rights-of-way through public lands . . . may be granted . . . to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same . . ."