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of the ecclesiastical courts from which our society has long since transcended. To allow the police to "inadvertently" omit one of the *Miranda* warnings, in effect, is to strip the Fifth and Sixth Amendments of all meaning.

Further, *Tucker* cannot be reconciled with the Court's ruling in *Wong Sun*. The use of Tucker's statement to learn the identity of Henderson is clearly a part of "the fruits of the poisonous tree" as was the evidence derived from the illegal arrest in *Wong Sun*. To allow the police to use Henderson as a witness against Tucker is to allow Tucker to incriminate himself through his own statements and to help make the prosecution's case a clear violation of the accused's rights under the Fifth Amendment.

Clearly, the *Tucker* decision represents a blotch on the theory that the courts are the ultimate protectors of the rights of an accused person. The majority speaking through Rehnquist felt that by allowing the respondent an opportunity to attack Henderson's credibility by confrontation and cross-examination was to keep Tucker's Fifth Amendment rights secure and safe. Thus the court either inadvertently or knowingly overlooked the fact that confrontation and cross-examination come at a later stage in the criminal process. Henderson's testimony should have been suppressed *ab initio*. Obviously, an accused's Fifth Amendment rights need protecting before trial during in-custody interrogation if *Miranda* is to be regarded as no more than vacuous dicta.

If police are continually allowed to omit one or more of the *Miranda* guidelines, the effect would be constitutionally debilitating.

The Court's reasoning in *Tucker* was not only unsound but if followed in future decisions, will prove to be erosive of an accused's Fifth and Sixth Amendment rights as guaranteed by the Constitution.

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Class Actions and the Amount In Controversy

The question raised by *Zahn v. International Paper Company*[1] has important effects upon the future of class actions under the Federal Rules of Civil Procedure, specifically those grounded upon diversity jurisdiction. The central issue in the case is whether or not every person represented as plaintiffs in a Rule 23(b)(3) class action must meet

1. Zahn v. International Paper Company, 404 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 505 (1973).

the jurisdictional amount of $10,000 as required by 28 U.S.C. § 1332(a).[2] The Supreme Court in *Zahn* affirmed the determination of the district court that each plaintiff in the action, whether named or unnamed, must meet the requisite jurisdictional amount. In *Zahn* only the four named plaintiffs prosecuting the action claimed damages in excess of the $10,000 amount. Accordingly, the district court "refused to permit the suit to proceed as a class action."[3]

The plaintiffs in *Zahn* were lake front property owners, on Lake Champlain, Orwell, Vermont, who brought suit against International Paper Company for alleged pollution of the Lake. The Company's pulp and paper-making operation had discharged plant-waste into Ticonderoga Creek which empties into Lake Champlain. The waste created a "massive sludge blanket on the bottom of the Lake [which] . . . break off periodically to wash up on . . . [Plaintiffs'] property."[4]

There were over 200 members of the injured class, all lake front property owners and lessees. The four named plaintiffs who instituted the class action, each claimed damages in excess of $10,000. In addition, the entire class sought forty million dollars in compensatory and punitive damages.[5] However, the district court did not find that each property owner's damages were certain to the extent of the $10,000 requirement of 28 U.S.C. § 1332(a) and refused to allow the suit to proceed as a class action.[6] This decision was prompted by interpretation of § 1332(a) as applied to class actions. Such requirement mandated that the *matter in controversy* be in excess of $10,000 as to each plaintiff represented in the class action.

In cases prior to *Zahn*, it has been held that when several plaintiffs with separate claims join their claims in a single suit, each must satisfy the jurisdictional amount.[7] Aggregation of separate and distinct claims by different plaintiffs has not been permitted for the purpose of conferring federal jurisdiction.[8] Those plaintiffs who have not met the jurisdictional amount have been dismissed.[9] Finally, following the Supreme Court's recent ruling in *Snyder v. Harris*,[10] a class action in

2. 28 U.S.C. § 1332(a), 72 STAT. 415 (1958):
(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. . . .
3. 94 S. Ct. at 507.
4. 469 F.2d 1033, 1034.
5. *Id.*
6. 53 F.R.D. 430.
7. Troy Bank v. Whitehead & Company, 222 U.S. 39, 32 S. Ct. 9, 56 L. Ed. 81 (1911).
8. Clark v. Paul Grey, 306 U.S. 583, 59 S. Ct. 744, 83 L. Ed. 1001 (1939).
9. *Id.* at 590.
10. 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969).

which none of the plaintiffs could claim the requisite amount in controversy, the Supreme Court concluded there could be no aggregation of claims by plaintiffs in a 23(b)(3) action based on diversity of citizenship. The same rationale precludes aggregation of claims in civil actions brought in federal district court on federal question jurisdiction.[11]

The result of the *Zahn* decision was forecast by the holding of the Supreme Court in *Snyder.* In fact the district court, in *Zahn,* relied heavily on the holding of *Snyder* and the Supreme Court reaffirmed its position. There could never be aggregation of separate and distinct claims for the purpose of conferring diversity jurisdiction on the federal district courts.[12]

The reasoning behind *Zahn* appears by viewing three general propositions. First, there is a general policy, that is directed toward reducing the case load on the federal district courts. Secondly, there is the judicial policy of careful adherence to the rules governing class actions and the Advisory Committee's Notes on class actions.[13] And thirdly, as originally stated by the Supreme Court in *Snyder,* there is a policy that "local controversies involving claims to be settled on the basis of state law can often be most appropriately tried in state courts."[14]

The question in *Zahn* and in the prior cases cited reflected several theories of aggregation of claims and determination of the amount in controversy. The "classic dichtomy," as quoted in the decision was described in the following manner:

> 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 interest collectively equal the jurisdictional amount.[15]

Under the pre-1966 Federal Rules, Rule 23 class actions were divided along the lines of the rights involved.[16] That is, if the action was a true class action then the rights involved were joint or undivided and aggregation of claims was allowed. But if the action was a so-called "spurious" class action, the rights involved were "several" or individual, united only by common questions of law or fact, and aggregation was not permitted. "In practice the terms . . . proved obscure

11. 28 U.S.C. 2 1331(a) provides:
(a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the constitution, laws, or treaties of the United States.
12. 94 S. Ct. at 507.
13. 39 F.R.D. 69 (1966).
14. 394 U.S. at 341.
15. 222 U.S. at 40-41.
16. 39 F.R.D. at 98.

and uncertain."[17] The amendments to Rule 23 did away with the old categories of 'true,' 'hybrid' and 'spurious' actions. The new Rule was to be a "functional approach" to the maintenance of class actions.

With the amended rule came the challenge in *Snyder*, where none of the plaintiffs met the jurisdictional requirement, but claimed that with amendment of the rules, which did away with the distinctions between 'true' and 'spurious' it could be argued that aggregation of independent claims was permissible, as it had been for the old 'true' class action. The answer by the Court in *Snyder* to this proposal was the admonition that

> [T]he doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this court's interpretation of the statutory phrase 'matter in controversy'.[18]

A further reason for rejecting aggregation, or any change in the definition of *matter in controversy* was the command of Rule 82 that "these rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ."[19]

Thus, aggregation of claims remained improper under the Amended Rules. Of importance were the amendments providing for notice and the extent to which the jurisdiction of the court reached to all class members who did not opt out. Notice is sent to all identifiable members of a potential class and a judgment in the lawsuit is binding on all members of the (b)(3) action unless they request exclusion.[20] Thus the court obtains jurisdiction over each proposed class member and its jurisdictional requirement must be met by each member. Under the old rule the judgment in a "spurious class action" did not bind an individual not a party, the judgment now in a 23(b)(3) action, whether favorable or unfavorable binds those to whom notice was directed and who did not request exclusion.[21]

The impact of *Eisen v. Carlisle & Jacquelin* was to further restrict the usefulness of a Rule 23(b)(3) action. Not only must each litigant claim damages in excess of $10,000, but also the original representatives of the class must be prepared to bear the costly burden of notification of all the identifiable members of the class. The cost of such a

17. *Id.*
18. 394 U.S. at 336.
19. *Id.* at 337.
20. *See* Eisen v. Carlisle & Jacquelin, — U.S. —, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974). The holding in Eisen literally applies section (c)(2) in requiring the plaintiff to send individual notice to all the identifiable class members, an almost overwhelming burden and a financially disastrous one.
21. 39 F.R.D. at 105.

suit, represented in terms of litigants' claims in damages, by the cost of individual notice to all identifiable members as well as the cost of the litigation itself, is clearly prohibitive. Under *Eisen*, at the outset of litigation, a plaintiff is forced to incur substantial expenditures for purposes related solely to the institution of his suit. The cost saving factor, a major purpose of the class action device, has been eroded beyond repair.

The Statutes governing amount in controversy requirements for district court jurisdiction have progressively been amended upwards.[22] The purpose as stated by the Court of Appeals in *Zahn* was "to check the rising caseload in the federal courts."[23] Thus the answer affirmed by the Supreme Court in their *Zahn* holding is satisfactory. Unless some specific mention had been made in the amended Federal Rules, there was no reason to change positions, to break with precedent. And further, the difficulties inherent in allowing a case such as *Zahn* to proceed as a class action, where only four members met the jurisdictional requirement would raise new problems.

One difficulty would lie in determining how many named plaintiffs would be needed to establish a proper class, under which all unnamed plaintiffs would not be required to show the requisite jurisdictional amount. In an often quoted comment by the Advisory Committee, it points out another area of confusion. The committee noted that a suit based on a

> mass accident resulting in injuries to numerous persons is ordinarily . . . not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defense to liability, would be present affecting the individuals in different ways.[24]

This suggests that in a mass accident, the plaintiffs are precluded from proceeding with a class action. Yet this presents one of the few imaginable situations where each member of the proposed class could meet the amount in controversy requirement. Few of the environmental cases, such as *Zahn*, could hope to satisfy necessary damage claims in the case of each individual. Many such suits seem perfectly constructed for a class action procedure meeting all the prerequisites of a 23(b)(3) action, but fail for this reason alone.

The dissent in *Zahn* was based on a theory of ancillary jurisdiction.[25] Following a line of cases wherein ancillary or pendent jurisdiction has obtained results, such as over "compulsory counter claims under Rule 13(a) . . . cross claims permitted by 13(g), over impleaded defend-

22. 94 S. Ct. at 505, n.1.
23. 469 F.2d at 1035.
24. 39 F.R.D. at 103.
25. 94 S. Ct. at 512.

ants under Rule 14", the dissent concludes that class actions "under Rule 23(b)(3) are equally appropriate for such treatment."[26] That is it would be equally consistent to base federal jurisdiction on the plaintiffs originally named. Such was done with a diversity issue in *Supreme Tribe of Ben-Hur v. Cauble*[27] where the original parties were diverse as to citizenship. There it was held that "the intervention of nondiverse members of the class would not destroy the District Court's jurisdiction."[28] It is very unlikely that diversity class actions would ever be maintained if every named and unnamed plaintiff had to meet the diversity requirement. Practically speaking this theory should also apply to the jurisdictional amount requirements. However the dissent fails to understand why such a practical approach as taken in *Supreme Tribe of Ben-Hur* must be abandoned where the purely statutory *matter in controversy* requirement is concerned.[29]

Inherent in the majority's opinion and equally stressed by the dissent, are the difficulties in determining from the pleadings whether or not each member of a proposed class does in fact meet the jurisdictional requirement and whether intervention by the parties will be required for the purposes "of establishing jurisdiction . . ."[30]

Was it inevitable after *Snyder* that every "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 . . ."?[31] The Court in *Zahn* expressed the idea that "one plaintiff may not ride in on another's coatails."[32]

The basis for granting *certiorari* in *Snyder* arose from the conflict in decisions in the several Circuit Courts. The first case from the Eighth Circuit, was brought by Ms. Snyder individually and on behalf of "all others similarly situated" with jurisdiction predicated on diversity of citizenship. Though Ms. Snyder sought for herself only $8,740 in damages, she represented over 4,000 shareholders of the Missouri Fidelity Union Trust Life Insurance Company. If aggregated the damages would approach $1,200,000. The district court held and the Circuit Court subsequently affirmed that the separate claims could not be aggregated to satisfy the jurisdictional amount.[33] This followed a similar decision in the Fifth Circuit.[34]

26. *Id.* at 514.
27. 255 U.S. 356, 41 S. Ct. 338, 65 L. Ed. 673 (1921).
28. 41 S. Ct. at 342.
29. 94 S. Ct. at 516.
30. *Id.* at 517.
31. *Id.*
32. 469 F.2d at 1035.
33. 394 U.S. at 333.
34. Alvarez v. Pan American Life Insurance Company, 375 F.2d 992, *cert. denied*, 389 U.S. 827 (1967).

At the same time, however, the Court of Appeals for the Tenth Circuit reached the opposite conclusion. It held

> that because of a 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure relating to class actions, separate and distinct claims brought together in a class action could now be aggregated for the purpose of establishing the jurisdictional amount in diversity cases.[35]

The plaintiff, Otto Coburn, had brought the suit against the Gas Service Company in district court, personally alleging only $7.91 in damages. Yet, he was attempting to represent in his class action 18,000 other customers whose claims, when aggregated would be well in excess of the $10,000 jurisdictional amount requirement.[36] Thus the facts in *Snyder* can be differentiated from those presented in *Zahn*, and the latter case is distinguishable in that each of the four named plaintiffs had claims in excess of the requisite amount and were properly before the district court. The distinction that some plaintiffs meet the jurisdictional amount and others do not was not enough to change the interpretation of *matter in controversy*. Noting that the rules against aggregation have never been based upon a rule of procedure, the Court in *Snyder* stated that the relevant limitation on the *matter in controversy* substantially predate[d] the 1938 Federal Rules of Civil Procedure."[37]

The argument that those

> include(d) in the judgment . . . (will be) all members of the class who do not ask to be out by a certain date, the *matter in controversy* now encompasses all the claims of the entire class

was rejected by the Court in *Snyder*. Pointing out the opposite result in the case of joinder, the Court said that

> . . .judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions is certainly no reason to treat them *differently* from joined actions for purposes of aggregation.[38]

As has been noted, aggregation of separate, distinct claims has not been permitted in cases of joinder of plaintiffs. Though a different fact situation was present the case could not have been decided otherwise without overruling *Snyder* and its precedents.

The *Zahn* ruling has had a considerable impact on 23(b)(3) class actions, thus far. It has been interpreted by the district courts strictly so that no class action, whether jurisdiction was predicated on 28 U.S.C.

35. 394 U.S. at 334.
36. *Id.*
37. *Id.* at 336.
38. *Id.* at 337.

§ 1331 or § 1332, can be maintained unless all members, or a sufficient number to constitute a class within the meaning of 23(b)(3), meet the jurisdictional amount of $10,000.

In a recent North Carolina case, residents of Bogue Bank, Emerald Isle sought to enjoin construction of a pier and marina because of alleged environmental destruction.[39] The named plaintiffs, who were adjoining landlowners of the building site, alleged as damages claims sufficient to establish jurisdiction for themselves, but

> no such allegation [was] made with respect to any of the unnamed members . . .and all persons who live and travel upon Bogue Banks . . . who have interests in the preservation and enhancement of the natural environment of the area.[40]

The decision in the district court, based on *Zahn*, found the class action procedure improper.

Any environmental suit brought as a class action under Rule 23(b)(3) may have an enormous impact on the set of all industrial defendants as the potential number of defendants involved in such suits is large. But, it is unlikely that enough individuals will be damaged to the extent of $10,000. Though many potential plaintiffs may be injured and the total damage claims may run into the millions of dollars, it is clear that *Zahn* has created a roadblock to class actions so that such individuals might be unable to vindicate their damages.

Recently an attempt to evade the strict rule of *Zahn* based on the theory of pendent or ancillary jurisdiction, was defeated. In *United Pacific Reliance Insurance Companies v. City of Lewiston*,[41] the insurance companies joined their claims arising out of a single fire against the city. Several of the companies had damages of less than $10,000. Arguing against dismissal of their claims, the petitioners sought to convince the court that since the damages claimed all resulted from a single factual situation, ancillary jurisdiction would be proper. Similar to *Zahn*, only state law claims for damages were asserted, and the petitioners who did not meet the jurisdictional requirement of amount in controversy were dismissed. It should be noted however that the district court expressed the view that if "this case (were) . . . . to be decided on practicalities, the result would seem to point to the exercise of jurisdiction."[42]

The purpose of the class action device is to meet the problems inherent in multiple litigation with practical solutions to save time, energy and money. It is impossible to say that either *Zahn* or *Eisen* moved

39. Rucker v. Willis, 358 F. Supp. 425 (E.D.N.C. 1973).
40. *Id.* at 426.
41. 372 F. Supp. 700 (D. Idaho 1974).
42. *Id.* at 704.

toward fulfilling these goals. Thus a grave paradox exists. A single claimant with several distinct, independent claims against a defendant will find it possible to aggregate his claims to invoke federal jurisdiction while two or more claimants with substantially similar claims are in the awkward position of having to litigate such claims against the same individual separately, if unable to meet the jurisdictional amount in controversy requirements. The logic behind such a dichotomy is certainly debilitating to even the keenest procedural stalwart. Though plaintiff's seeking to vindicate their injuries in a federal court will find themselves forumless, the results of *Zahn* will be less harsh in those states that have provisions for class actions.[43] It should be noted that the plaintiffs in *Zahn* intended to continue their suit separately if their class action status was terminated.[44] When asked why the suit was not brought in state court originally, the reply was that the alternative did not exist at that time.

In retrospect, with the decision in *Zahn* followed by the result reached in *Eisen*, there appears to be little hope for the large scale class actions once envisioned. Perhaps such a class action procedure was never meant to be. But, as it stands now clearly the price tag on such actions is beyond the reach of most litigants. Consequently small claims will go unvindicated unless potential plaintiffs do their forum shopping in state courts.

MARY C. TOLTON

Friscia to Scarola:

Changing New York Case Law on Insurable Interest in Stolen Automobiles

INTRODUCTION

In view of the incidence of car theft in the United States, it is apparent that many automobile theft insurance policies are purchased by bonafide purchasers of stolen cars. If such an automobile is subsequently stolen from the innocent purchaser and the insurer discovers that the insured buyer possessed a stolen vehicle, a troublesome ques-

43. N.C. GEN. STATS. 1A-1, Rule 23, provides in part:
(a) Representation—If persons constituting a class are so numerous as to make it impractical to bring them all before the court, such of them one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.
44. 42 U.S.L.W. 4233 (October 1973).