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Illinois v. City of Milwaukee: A Welcome Alternative to Snyder v. Harris: An Answer to the Anti-Aggregation Problem of Class Suits in Federal Courts

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COMMENTS

ILLINOIS V. CITY OF MILWAUKEE: A WELCOME ALTERNATIVE TO SNYDER V. HARRIS: AN ANSWER TO THE ANTI-AGGREGATION PROBLEM OF CLASS SUITS IN FEDERAL COURTS

I.

In Illinois v. City of Milwaukee, the Supreme Court held that "[t]he considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331(a)." Although the decision has been widely discussed because of its holding that federal question jurisdiction exists in interstate water pollution cases since such controversies present questions of federal common law, its impact on the considerable body of law construing the "matter in controversy" as a necessary prerequisite to the existence of both federal question and diversity of citizenship jurisdiction in federal courts has been wholly overlooked.

Mr. Justice Douglas, writing for a unanimous Court, can certainly be understood to mean that the rule requiring that the jurisdictional amount in both federal question and diversity cases be evaluated solely from the viewpoint of the party plaintiff is effectively abolished.

1 406 U.S. 91 (1972).
2 Id. at 98.
3 Id. at 100.
6 No commentator appears to have mentioned this aspect of the decision. However, the "federal common law" idea has been widely discussed. See, e.g., Carton, State Versus Extra-Territorial Pollution—States' "Environmental Rights" Under Federal Common Law, 2 Ecology L.Q. 318 (1972); Note, Federal Common Law and Interstate Pollution, 85 Harv. L. Rev. 1439 (1972); Note, Invalid Growth of the New Federal Common Law Dictates the Need for a Second Erie, 9 Houston L. Rev. 329 (1971); Note, Federal Courts—Jurisdiction—Federal Question—Federal Common Law Is Proper Basis for District Courts' Exercise of Federal Question Jurisdiction, 40 U. Cinn. L. Rev. 391 (1971); Note, Original Jurisdiction—Interstate Water Pollution: Alternatives to the Original Jurisdiction of the United States Supreme Court, 47 Wash. L. Rev. 533 (1972); Note, Federal Jurisdiction—Environmental Law—Nuisance—State Ecological Rights Arising Under Federal Common Law, 1972 Wis. L. Rev. 597; Comment, 10 Houston L. Rev. 121 (1972).
7 J. MOORE, FEDERAL PRACTICE ¶ 0.97[3], 0.91[1] (2d ed. 1969) [hereinafter cited as MOORE].
8 This conclusion is justified because the authority cited by Justice Douglas abandoned that rule. See text accompanying note 120 infra.
Illinois was not a class action, but its factual basis is typical of class actions in the environmental field and the issue of whether the jurisdictional amount requirement in federal court may be satisfied by aggregating the claims of all members in a class action is closely analogous. Justice Douglas' casual determination of the issue in his Illinois opinion is worth considerable attention, for the Court's
adoption of a “plaintiff or defendant viewpoint” rule would seem to eradicate the prohibition against aggregating the claims of class members in order to meet the monetary requirement for diversity jurisdiction.

In determining the “matter in controversy,” courts must decide initially whether to determine the amount from the defendant’s or plaintiff’s point of view. The traditional and majority rule in federal courts has been to view the amount in terms of the “value of the right” asserted by the plaintiff, while the alternative test is to appraise the “value of the right” as it affects either the plaintiff or defendant, whichever amount is greater. With single party litigants, in only a few cases will the choice of standard be determinative as to the existence of federal jurisdiction. But where there are multiple

(footnote continued from preceding page)


See also 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 569 (C. Wright ed. 1961, Supp. 1969) [hereinafter cited as BARRON & HOLTZOFF]; C. WRIGHT, THE LAW OF FEDERAL COURTS § 36 (2d ed. 1970) [hereinafter cited as WRIGHT]; 1 MOORE §§ 0.80-0.99. (Editor’s note: These citations are listed in strict chronological order for the benefit of the reader who wishes easily to examine the development of critical commentary in this area.)

This rule calls for a common sense inquiry into what is actually involved in the case from the viewpoint of either the plaintiff or defendant. See text accompanying notes 120-44 infra. See generally WRIGHT § 37.


The adoption of the “plaintiff or defendant” viewpoint rule renders the anti-aggregation principle inconclusive since the matter in controversy from the defendant’s view would simply be the composite, or “aggregation,” of the plaintiff parties’ claims.

The first jurisdictional amount requirement was $500, set out in the Judiciary Act of 1789, § 11, 1 Stat. 73. The minimum monetary amount required was raised to $2,000 in 1887 by the Act of March 3, 1887, 24 Stat. 552, again revised upward to $3,000 by the Act of March 3, 1911, 36 Stat. 1091, and again by the Act of July 25, 1958, 72 Stat. 415 to the present level of $10,000.

For a complete history, see 1 MOORE §§ 0.2(1) and 0.90(1).

See 1 MOORE §§ 0.91(1), at 827 and cases cited at n.6 therein. See also Dobie, Jurisdictional Amount in the United States District Court, 38 HARV. L. REV. 735 (1925).

13 See note 14 infra.

14 For example, a plaintiff with $9,000 in alleged damages may seek to permanently enjoin a $1,000,000 a year business as a nuisance. And even after a viewpoint is chosen, serious problems may remain in assessing the “value of the right” to the particular party. Cf. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).
parties to a lawsuit, the choice becomes important indeed and will often be determinative.

II.

The availability and usefulness of the class action device as a tool for effecting private remedies in federal courts for both public and private wrongs are greatly expanded by the adoption of the "plaintiff or defendant" viewpoint rule. In order adequately to appreciate the conceptual and practical problems generated by both the traditional rule and the contrary view applied in Illinois, a review of the history of the anti-aggregation rule and its relationship to federal class action is necessary.

Aggregation rules derived from the common law of joinder.\(^\text{18}\) These rules were carried over intact from early joinder cases and were applied to class actions by the federal courts.\(^\text{19}\) From the outset, the issue was recognized as a fundamental jurisdictional dispute and not merely one involving practicality, efficiency or procedural fairness.\(^\text{20}\) In *Oliver v. Alexander*,\(^\text{21}\) the Supreme Court held that "separate and distinct" claims of plaintiffs could never be aggregated in order to meet the jurisdictional amount.\(^\text{22}\) The Court's rationale was that federal courts would be acting beyond their statutory power if they entertained claims jointly that they could not adjudicate individually. After all, when parties join their claims merely for their own convenience, it was argued, this should have no effect on subject matter jurisdiction—the very power of the court to hear the case. But where the right or claim involved was "individual" and "common" to all joined plaintiffs, aggregation was permitted, the rationale being that when the interest of one party could not be adjudicated without directly affecting the interests of the joined parties it was logical to denominate the matter in controversy as the combined interests of the parties.\(^\text{23}\)

Application of the "separate and distinct" versus the "undivided


\(^{20}\) The Supreme Court has been confronted with this problem for a long time. See *Green v. Liter*, 12 U.S. (8 Cranch) 229 (1814).

\(^{21}\) 31 U.S. (6 Pet.) 143 (1832).

\(^{22}\) The jurisdictional amount required then was $500. For a complete gene-

\(^{23}\) In effect, aggregation was permitted only in modern Federal Rule of Civil Procedure 19 compulsory joinder situations. See Note, *Aggregation of Claims in Class Actions*, supra note 18, at 1556.
and common" dichotomy was precarious at best, often generating merely a conclusory rather than a functional analysis by the courts.\(^{24}\)

To a certain extent the courts exacerbated the confusion by developing alternative and not wholly consistent tests to determine the nature of the interests involved. Early cases seemed to develop a judicial rule providing that if the defendant had an interest in the allocation of the distribution of the judgment among the plaintiffs, the rights of the plaintiffs were “distinct” and aggregation was not permitted.\(^{25}\) In *Pinel v. Pinel*,\(^{26}\) the Supreme Court ratified the rule when it held that parties presenting “separate and distinct” claims in one suit could not aggregate them for jurisdictional purposes. Only when the interest claimed was identical to all the parties—and not merely when the claims presented *identical* features—was aggregation permitted.\(^{27}\) The Court apparently reached this conclusion by deducing that when the interest of one party could not be satisfied without altering the rights of the others it was fair to say that the interest of all the parties constituted the “matter in controversy.”

This formulation of the mutually exclusive categories of “separate and distinct” as opposed to “common and undivided” soon fell into

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\(^{24}\) See Blume, *supra* note 11. Compare *Hawley v. Fairbanks*, 108 U.S. 549 (1883) with *Davies v. Corbin*, 112 U.S. 36 (1884), cited in Note, *Aggregation of Claims in Class Actions, supra* note 18, at 1559 & n.35. Both cases deal with virtually the same fact pattern. Joined judgment-creditor plaintiffs sued debtor-townships to compel the levy and collection of a tax to satisfy their claims. In the former case aggregation was disallowed while in the latter it was permitted.

\(^{25}\) See *Gibsen v. Shufeldt*, 122 U.S. 27 (1887) where the Supreme Court, in disallowing aggregation, expressly formulated such a test:

> When property or money is claimed by several persons suing together, the test is whether they claim it under one common right, the adverse party having no interest in its appointment or distribution among them, or claim it under separate and distinct rights, each of which is contested by the adverse party.


In retrospect, it seems the Court was attempting to say that if the cause of action of the joined plaintiffs involved a specific fund or entity, the matter in controversy was that fund, and aggregation of the individual claims to a portion of it was permitted. This could sometimes place form above substance, since parties could obtain federal jurisdiction by the manner in which their pleadings referred to the amount sought to be recovered. Although the *Hawley* and *Davies* cases are irreconcilable on their facts, they can be explained in terms of this specific fund notion. In *Hawley*, where aggregation was denied, the parties sought the levy of a tax that would precisely compensate the total of the individual plaintiffs’ claims, whereas in *Davies*, where aggregation was permitted, the parties and the court specified the issue as whether or not a specific “special tax” should be levied, the proceeds of which were to be distributed pro rata among the joined plaintiffs.

\(^{26}\) 240 U.S. 594 (1916).

\(^{27}\) Id. at 596. The Supreme Court referred to the doctrine as being settled law, citing *Clay v. Field*, 138 U.S. 464, 479 (1891) and *Troy Bank v. Whitehead & Co.*, 222 U.S. 39 (1911).
disuse. Later, courts began to speak in terms of "essential parties."28 Under this formulation courts transformed the Pinel rationale into a rule of law: aggregation of multiple claims could only occur when none of the joinder plaintiffs could individually adjudicate his case without directly affecting the rights of the other joined plaintiffs. Such a standard narrowed the range of fact situations in which aggregation was allowed, and it provided a concrete test that could be applied uniformly.29 The defendant would have little interest in which plaintiff might be entitled to more or less of the judgment unless the adjudication of one claim would expand or cut off the claims of others.30

Such was the state of the law when class actions began to surface as an effective procedural tool. The class action developed as a method of avoiding the inequities and inadequacies that sometimes resulted from application of joinder principles.31 Initially, class actions were recognized only in equity32 to provide an adequate remedy in situations where mere numbers would otherwise inhibit the right of a group to obtain relief.33 Rule 38 of the Equity Rules of 1912 read:

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impractical to bring them all before the court, one or more may sue or defend for the whole.34

28 See, e.g., Pentland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945) and Knapp v. Banker's Securities Corp., 17 F.R.D. 245 (E.D. Pa. 1954), where the courts felt that employment of the term "essential" would alleviate the difficulties of trying to classify a party as either "necessary" or "indispensable." 
29 Professor Moore had been perhaps the strongest proponent of such a test. See 3A Moore § 23.13, at 3480.
30 A good example is a class action for an antitrust violation claim. Although each member could clearly sue separately, the defendant's only real concern is his liability and not the extent each plaintiff would benefit from it. There is no longer a jurisdictional amount requirement for antitrust claims. See note 90 infra.
31 The class action first developed in England as an exception to the English equity rule of compulsory joinder of all interested parties. See Knight v. Knight, 24 Eng. Rep. 1088 (Ch. 1734). It also was revived as a mere expansion of that rule. See City of London v. Richmond, 25 Eng. Rep. 890 (Ch. 1701), decree aff'd 1 Eng. Rep. 727 (H.C. 1702). Interestingly here, class actions were proper not only where joinder of an interested party was impossible because of jurisdictional requirements, but also where joinder was not mandatory but only desirable to insure judicial efficiency. See, e.g., Sheffield Waterworks Co. v. Yeomans, 7 L.R. 2 Ch. App. 8 (1869). For good discussions of the history and evolution of the class action, see 3B Moore § 23.02[1], and J. Story, Commentaries on Equity Pleading 127-42 (5th ed. 1852).
32 Courts consistently held that class actions were strictly an equitable procedure. See, e.g., Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302 (1853), McNary v. Guaranty Trust Co., 6 F. Supp. 616, 618-19 (N.D. Ohio 1933). However, some actions were allowed at law. See Penny v. Central Coal & Coke Co., 138 F.2d 769 (8th Cir. 1905).
33 See generally 3B Moore § 12.02[1] et. seq.
34 Equity R. 58, 226 U.S. 659 (1912). This in turn emerged from Equity Rule 48 of 1840.
Pursuant to the Rules Enabling Act of 1934, the original Federal Rules of Civil Procedure were promulgated. Rule 23 was referred to in advance of promulgation of the Rules as a "substantial restatement of Equity Rule 38 . . . as that rule has been construed," but it extended the availability of the class action to all applicable causes of action, "whether formerly denominated legal or equitable." Nevertheless, rule 23 created new complexities in class action procedures. Its chief draftsman, Professor Moore, employed a far more technical scheme than was to be found in the comparatively straightforward equity rules. The rule prescribed three types of class actions, defined in terms of the jural relationships of the parties of the class: where the rights or interests of the class were: (1) joint and common, (a true class action); (2) several, but affecting specific property, (hybrid); and (3) several, but having common factual or legal questions (spurious).

Applying the Pinel principle to these classifications, courts adhered to the rule that aggregation of claims of the individual class members was permitted only in "true" class actions. The fact that some

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36 Original Fed. R. Civ. P. 23, 82 L.Ed. 1563, 1582 (1937), provided in relevant part:
   (a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable 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, when the character of the right sought to be enforced for or against the class is
   (1) joint, or common, or secondary in the sense that the owner of the primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
   (2) several, and the object of the action is the adjudication of claims which do or may effect specific property involved in the action; or
   (3) several, and there is a common question of law or fact affecting the rights and a common relief is sought.
37 See 3B Moore ¶ 23.01[2], at 23-17, quoting Advisory Comm. on Rules for Civil Procedure, Report (1932).
38 Id. See also Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).
40 3B Moore ¶ 23.08.
42 For example, the interests of the class members were "joint, common and undivided" in the sense that without the class action device the suit could not be brought at all unless all the members of the proposed class could be compelled to join. See, e.g., Giesecke v. Denver Tramway Corp., 81 F. Supp. 957, 961 (D. Del. 1949).
members of the class who were not named parties failed to meet the diversity or jurisdictional amount requirements was irrelevant. Of course, in a "hybrid" or "spurious" class action, all of the named parties plaintiff had to meet the jurisdictional amount since their claims were "separate and distinct."

As might have been expected, the application of such ambiguous theoretical terms to actual controversies produced confusing and inconsistent results. A rule such as "the action has to be true to permit aggregation" was unhelpful, since whether an action was "true" or whether the right involved was "common" was really the same inquiry. For example, in Clark v. Paul Gray, Inc., the Supreme Court held the action to be spurious where the plaintiff class sued to enjoin a state from unconstitutionally collecting fees from a group of interstate caravanors and dismissed it for want of jurisdictional amount. Yet the same day, the Court held in Gibbs v. Buck that a class suit by the American Society of Composers, Authors and Publishers [an unincorporated association] to enjoin Florida's enforcement of a statute which prohibited the association's price-fixing policies was a "true" one and permitted aggregation to satisfy the jurisdictional amount.

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43 Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). The Supreme Court held that in a class suit only the representative parties of record need fulfill the rule of complete diversity mandated by Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). See 3B Moore 1 23.18, at 23-2951 and Kalvin & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 703-04 & n.66 (1941). Applying the rule of Ben-Hur, it becomes irrelevant that all absent members of the class could not meet the requisite jurisdictional amount in the sense that in no classification of the class action rule could absent parties defeat jurisdiction. For no apparent reason though, once jurisdiction over the representative parties was established, intervention by members of the class who had no independent basis for jurisdiction—neither diversity nor jurisdictional amount—was clearly permitted in "true" and "hybrid" actions, (see, e.g., Gentry v. Hibernia Bank, 154 F. Supp. 62 (N.D. Cal. 1956)). Besides jurisdiction and intervention, other matters such as venue and tolling the statute of limitations varied according to which subclassification was involved.

44 See Note, Aggregation of Claims in Class Actions, supra note 18, at 1558 & n.15.


46 306 U.S. 583 (1939).


48 In neither case did the Court elucidate a functional or even nominal test or standard in determining whether or not an action is "true" or "spurious." Interestingly, the Supreme Court did not deal with the issue in a single case litigated under old rule 23, although the circuits were totally confused as to the "true," "hybrid" and "spurious" trichotomy. Clark and Gibbs were both brought under Equity Rule 38 before old rule 23 became effective. Compare Eresch v. Braecklein, 135 F.2d 12 (10th Cir. 1943) with Sturgeon v. Great Lakes Steel Corp., 149 F.2d 819 (6th Cir. 1945). In Brotherhood of Railroad Trainmen v. Templeton, 181 F.2d 527, 533 (8th Cir. 1950), the court openly admitted that the action was brought (Continued on next page)
Rule 23 was revised in 1966 as part of a general revision of the rules governing parties and joinder of claims.\(^9\) Although the revisers achieved their immediate goals of replacing the former rule's abstractions with pragmatic functional considerations,\(^6\) the format of the new rule parallels that of the old. Actions under revised rule 23(b)(1), (2) and (3) roughly correspond to the old "true", "hybrid" and "spurious" categories respectively.\(^5\) Actually, these labels retain only

(Footnote continued from preceding page)

properly under old rule 23(a) (3) and was thus "spurious," but aggregation was allowed because:

... the common relief sought was protection by injunction from wrongful interference with the common right of all the members of plaintiff's class to the employment they had and depended upon to earn their living.

Clearly the same reasoning would have required aggregation in Gibbs. See Note, Aggregation of Claims In Class Actions, supra note 18, at 1561.

The current rule is FED. R. Civ. P. 23. The pertinent part is:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on the grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory reliefs with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.


\(^5\) At the Eighth Circuit's Judicial Conference in 1967, Judge Marvin Frankel suggested that:

In reshuffled and sharply defined forms, the first two of the new subdivisions, (b)(1) and (b)(2), embrace the old "true" and "hybrid" and a still open-minded range of other forms. New subdivision (b)(3)
historical significance today, except in regard to the issue of aggregation where they have remained outcome-determinative. At any rate, current rule 23 is a far better tool than its predecessors for effectuating its threefold purpose: providing an effective remedy to compensate the "smaller guy" whose claim is negligible when compared with the costs of enforcing it; achieving the procedural goals of best utilizing time, effort and expense, and of attaining uniformity of result; and enforcing standards of social conduct in situations where—without the class action device—the deviating party might never be required to conform. These three policy aims can be termed briefly as "justice, efficiency and prophylaxis."

Today, the minimum prerequisites for maintenance of a class action remain considerable. The standards prescribed by the rule itself are stringent enough, but the "extra-legal" problems a particular course

(Footnote continued from preceding page)

bears many resemblances to the old "spurious" category, but it effects vital changes. . . .


The language is that of Professor Benjamin Kaplan, Reporter of the revised rule, quoted in Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295, 299 (1966). Professors Kalvin and Rosenfield refer to the typical class plaintiff as one who "finds himself inadvertently holding a small stake in a large controversy." Kalvin & Rosenfield, supra note 43, at 684.

Advisory Comm. Note 102-03; Kaplan, supra note 39, at 390.


The standards are extensive. At the very minimum the proponent must:

I. Adequately define the class (See 3B Moore § 23.04 and cases cited therein);

II. Meet all four requirements of subdivision (a), which are: (1) the numerical requirement in terms of the "impacticability of joinder" and not the "impossibility" of it (See 3B Moore § 23.05 and cases cited therein. See Demarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968); (2) the existence of common questions of law or fact (for a unique strategy employed to meet this prerequisite, see SCRAP v. United States, 346 F. Supp. 189 (D.D.C. 1972), application for stay pending appeal denied sub nom. Aberdeen & Rockfish R.R. v. SCRAP, 409 U.S. 1207 (1972). The case involved ICC failure to comply with NEPA regulations in failing to file an environmental impact statement when imposing a surcharge on railroad rates for recyclable refuse. This was held to constitute a common question of law or fact because the issue of whether or not an administrative agency has failed to follow proper procedures is common to all members of the class); (3) the typicality of the class plaintiff's claims or defenses; and, (4) the ability of the named party to adequately represent the interest of the class (the latter two go to the constitutional mandate of adequacy of representation: See Hansberry v. Lee, 311 U.S. 32 (1940). See generally Barron & Holtzoff § 567 and cases cited therein); and

III. Properly fit his case into one of the subclassifications of subdivision (b). For an excellent discussion concerning the problem of determining in which sub-
of action may generate can be just as insurmountable.\textsuperscript{67} Beyond all this, the added obstacle of meeting the jurisdictional amount require-

\textsuperscript{67} "Extra-legal" problems caused by the logistics of mere numbers quickly become legal ones. For an excellent discussion of these "manageability" problems, see \textit{American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure} (1972).
ment must be hurdled by the class plaintiff whose only basis for suing in federal court is the federal question or diversity jurisdiction of the forum.

III.

In Snyder v. Harris68 the Supreme Court refused to hold that the matter in controversy could be satisfied by the total of all claims that could be asserted as a single cause of action in a class suit.69 The plaintiffs had urged that new rule 23, by abandoning the old focus on the "undivided interest" or the "single right" involved, also abolished the anti-aggregation doctrine of Pinel, which through judicial construction, had made the now-abandoned categories outcome-determinative.60 The Supreme Court had granted certiorari to settle a conflict between decisions of the Fifth and Eighth Circuits61 and a decision of the Tenth Circuit62 regarding whether, in a diversity suit, it was permissible to aggregate the claims of all parties to a 23(b)(3) action. In a seven to two decision, the Court held that such aggregation was not warranted.63 They perceived the Pinel doctrine as a jurisdictional requirement that "separate and distinct" claims could not be

69 Id. at 338. The Court actually held that "joint" or "common" claims could be aggregated but claims that are "separate and distinct" could not.
60 There were no Supreme Court cases that decided the issue under the 1938 class action rule (old rule 23). The cases relied upon by the Snyder Court—Clark v. Paul Gray, Inc., 306 U.S. 583 (1939), Buck v. Gallagher, 307 U.S. 95 (1939), and Gibbs v. Buck, 307 U.S. 66 (1939)—were brought under old Equity Rule 83 before the federal civil rules went into effect. Thomson v. Gaskill, 315 U.S. 442, 446 (1942) seemed to approve the anti-aggregation doctrine in dictum, but did not apply it.
63 The decision actually involved companion cases before the Court. Mrs. Snyder, an Arizona citizen and shareholder in a Missouri corporation, sued on behalf of herself and "all those similarly situated." She accused the named defendants of conveying their stock for an exaggerated premium above its fair market value in order to gain control of the company. She claimed that Missouri law entitled all the stockholders to share in this "control premium" and demanded that it be distributed to them. Mrs. Snyder claimed $8,740 for herself and approximately $1,900,900 in damages for the remaining stockholders. The district court dismissed the action for want of jurisdictional amount. Snyder v. Harris, 268 F. Supp. 701 (E.D. Mo. 1967). In the companion case, Gas Serv. Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968), a Kansas plaintiff filed a class action against a foreign corporation selling natural gas in Kansas. He claimed that the defendant corporation collected an illegal franchise tax from him in the amount of $7,501, but added that other illegal collections from the approximately 18,000 class members would certainly meet the jurisdictional amount. The district court's overruling of the defendant's motion to dismiss the action for want of jurisdiction was affirmed.
aggregated to attain the $10,000 matter in controversy requirement. Mr. Justice Black, for the majority, wrote that: "[t]he doctrine that separate and distinct claims could not be aggregated was never, and is not now, based on categories of old rule 23 or of any rule of procedure." 64 In other words, an interpretation of new rule 23 to permit aggregation in subsection (b)(3) situations would be impossible, since inherent limitations on the rule-making power preclude a Federal Rule of Civil Procedure or a judicial interpretation of a rule from expanding the subject-matter jurisdiction of federal courts. 65 Since an amendment to rule 23 could not modify the diversity statute, it could not affect the settled anti-aggregation doctrine. 66

In a strong dissent, Justices Douglas and Fortas adamantly maintained that, although the jurisdictional amount requirement was certainly a statutory one, the anti-aggregation rules were court made and should likewise be judicially harmonized with the spirit of the new rule. The dissent argued particularly that since the new rule extended res judicata effect to all class members, whether absent or party to the action, 67 the claims of the entire class constituted a single matter in controversy.

If one makes a purely legal analysis, it cannot be argued that rules of procedure, promulgated by the judiciary, can alter the statutorily-conferring jurisdiction of a court, despite the fact that there is "a long history of changes in jurisdictional requirements effected by the rules." 68 The Rules Enabling Act of 1934, 69 by which Congress delegated its rule-making power to the Supreme Court, states that "... rules shall not abridge, enlarge or modify and substantive right..." 70 In fact, civil rule 82 provides that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts..." 71 Since the anti-aggregation doctrine of Pinel is based upon the Supreme Court’s interpretation of the substantive law generated by a jurisdictional statute—and not compelled by any procedural rule—the fundamental doctrine of rule 82 clearly

65 This principle has been reiterated on many occasions. See Sibbach v. Wilson & Co., 312 U.S. 10 (1941); United States v. Sherwood, 312 U.S. 584, 591 (1941); and Meek v. Centre County Banking Co., 263 U.S. 426, 434 (1925).
67 See FED. R. CIV. P. 23(c)(3).
68 J. MOORE, A. VESTAL & P. KIRLAND, MOORE'S MANUAL 14.07[6], at 989 (1968). For a forceful argument along similar lines, see Kaplan, supra note 39, at 400. For two examples, see text accompanying note 162 infra.
70 Id.
71 FED. R. CIV. P. 82.
prevents the conclusion that new rule 23 could have an effect on the Pinel doctrine. In its earlier form rule 23 was based upon the same conceptual relationships that the Pinel Court had relied upon when it mandated that aggregation could only occur when the claims asserted were “true” rather than “spurious.” But former rule 23 did not define these relationships for jurisdictional purposes.

Under new rule 23, however, the extension of res judicata to class members does permit a forceful legal argument that blanket aggregation of all class members’ claims is a reasonable interpretation of the jurisdiction statute. Since the legal efficacy of each of the claims presented is adjudicated at the same time and becomes final in one judgment, is it not accurate to state that the totality of all the claims is the matter in controversy? In the most literal sense, a claim has to be in controversy before it can be bound by a judgment. Thus, while the Pinel anti-aggregation rule may have been clearly appropriate under old rule 23, since no interpretation of the jurisdiction statute could permit a court to maintain that a particular claim was in controversy if the judgment did not even affect it, the same rule is clearly inappropriate under the new rule 23 and should no longer apply. Despite this logical claim to validity, the argument remains that mere rules of procedure cannot expand the power of courts to hear certain cases and thus that new rule 23 simply cannot produce this result. Otherwise, the extension of res judicata effect to the claims of all class members by the new rule violates the fundamental principle of rule 82.

72 In Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1940), the Supreme Court foresaw the argument. The majority stated:

There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute.

Cited in Note, Aggregation of Claims in Class Actions, supra note 18, at 1563 & n.56.

73 In addition to the Fortas dissent in Snyder, some commentators lend support to this proposition. See, e.g., 2 Barron & Holtzoff § 569.

74 This precise issue is examined in Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1219 (1966);

The new rule poses the dilemma that despite the express disclaimer of expansion of jurisdiction in rule 82, a literal adherence to the commands of rule 23 would extend jurisdiction to citizens not previously within the court’s power. That is, inclusion of all members of the former spurious class in the judgment—the clear mandate of rule 23—could be construed as changing the manner of meeting the requirements of diversity and jurisdictional amount.

In 1937 the framers of old rule 23 explicitly declined to incorporate a section offered by Professor Moore on the effects of judgments in the three types of class actions because they felt that it was beyond the scope of the rules. See Advisory Committee on Rules for Civil Procedure, Report 60 (1937), cited in Note, (Continued on next page)
Obviously courts developed the Pinel doctrine without regard to the effect of res judicata. If the res judicata effect of the judgment were dispositive on the issue of aggregation, parties who utilize the permissive joinder procedure of rule 20 would be permitted to aggregate their claims since each such party is bound by the judgment. But aggregation was not permitted in permissive joinder cases when the anti-aggregation rationale became a formal rule of statutory construction in Pinel. The syllogism is faulty, however, because many claims which can be litigated in a single permissive joinder suit may involve totally separate legal and factual questions; they may not be proper cases for a class action and thus an argument for aggregation would not apply. At least one court has departed from the former rule on permissive joinder cases by holding that parties with “separate” claims or liabilities less than the jurisdictional amount may join under rule 20 with others who do meet the requirement.

Neither res judicata nor the “separateness or distinctiveness” of the claims is an issue in regard to rule 18, which provides at present, that all of one party’s claims against another may be joined. Under this rule a kind of aggregation is automatic. If the anti-aggregation doctrine of Pinel, as applied in Snyder, were held to apply to rule 18 cases, as it logically should, it would disallow aggregation in situations where it is now permitted. This, of course, would be an equally flagrant violation of rule 82. That parties asserting claims based upon completely different causes of action, questions of law and fact, and occurrences or transactions enjoy automatic aggregation of their claims for jurisdictional purposes while multiple members of a single, clearly definable class, asserting claims which involve a single cause of action containing common questions of law and fact arising from the same occurrences and transactions are barred from aggregating their claims because they are somehow “separate and distinct” seems to be an unwarranted and unnecessary anomaly. The Supreme Court’s holding in Snyder must be viewed as the result of a sincere belief that if the matter in controversy were to be interpreted to include the

(Footnote continued from preceding page)
Aggregation of Claims in Class Actions, supra note 18, at 1564 & n.63. See also Comment, The Mumbo Jumbo of Class Actions—An Attempt to Alleviate, 19 Wyo. L.J. 232, 235 (1965).
77 See Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966), noted in Comment, 81 Harv. L. Rev. 490 (1967).
78 Fed. R. Civ. P. 18. See 2 BARRON & HOLTZOFF § 503 and 1 Moore § 0.97[1].
79 The allowance of aggregation of wholly inconsistent claims under rule 18 could be indicted as permitting the mere convenience of a party to be the basis of the court’s power to hear the case.
composite of all claims that happened to be brought together and litigated in one action, the jurisdictional amount statute would be rendered meaningless. The line had to be drawn somewhere.\textsuperscript{79}

Notwithstanding the fact that a rule of procedure cannot compel a particular construction of a jurisdictional statute, new rule 23 does present a different context in which the statute must be applied. Courts ought at least to consider the possibility of interpreting the statute congruously with the procedural context in which the issue arises.\textsuperscript{80} They are not compelled to follow a principle conceived in different circumstances, but in fact have a duty to overrule previous interpretations if the result is anomalous in the new context in which the principle must be applied.\textsuperscript{81}

In Snyder,\textsuperscript{82} Justice Black concluded that congressional reenactment of the jurisdictional amount statute as previously worded amounted to an implicit adoption of the judicial anti-aggregation doctrine of Pinel. The dissent maintained that Congress had not even considered the Pinel doctrine.\textsuperscript{83} The fact is that the issue was not specifically discussed in the entire legislative history of the statute—which pre-dates the first Judiciary Act of 1789.\textsuperscript{84} Even though the statutory language has changed somewhat over the years,\textsuperscript{85} it has never included any “separate and distinct” requirement.\textsuperscript{86} At any rate, it is unreasonable to assume that congressional reenactment without explicit consider-

\textsuperscript{79} This is a prime example of the wisdom of the proposition that lines are to be drawn on blackboards and not in judicial opinions. The problem here is not merely a matter of degree where lines can properly be drawn as principles of substantive law; e.g., “proximate cause.” Involved here is a functional distinction between the nature of joinder suits and the nature of class actions. In the former the judgment can be in favor of some of the claimants on some of their claims and for or against others on some of their other claims. In the latter, the claims of the class succeed or fail as a unit. To allow aggregation in rule 18 cases where some of the claims need not have been asserted in that suit to begin with and where the success or failure of any one claim may or may not bear any relationship to the success or failure of another while aggregation is denied in a procedure where all claims are literally adjudicated as one claim is to deny “matter in controversy” its common-sense meaning.

\textsuperscript{80} In his dissent in Snyder, Mr. Justice Fortas argued this proposition. See text accompanying note 67 supra.


\textsuperscript{82} Snyder v. Harris, 394 U.S. 332, 340 (1969).

\textsuperscript{83} Id. at 350 (Fortas, J., dissenting).


\textsuperscript{86} That a purely semantic analysis of the statute provides virtually no insight to the question was observed by one writer in Note, Aggregation of Claims in Class Actions, supra note 18, at 1568.
tion of the issue implicitly adopts or rejects the particular judicial construction of the statute. As Justice Black himself has noted, such a canon of construction would impose an immense burden on Congress to reexamine all judicial interpretations of a statute before enacting it. At the very least, Congressional silence with respect to the Pinel anti-aggregation doctrine ought to be considered "as consistent with a desire to leave the problem as fluid as . . . with an adoption." Policy considerations aside, there is certainly no conclusive answer in either the language or the legislative history of the statute as to whether Congress intended to incorporate the Pinel doctrine.

IV.

Notwithstanding Snyder, several factors may combine to mitigate the harshness of the anti-aggregation principle. Many federal statutes expressly provide jurisdiction independent of the amount in controversy. The vast majority of public lawsuits (a common sense alternative to the class action if it were not for the inherent difficulty of pursuing an attorney general to commence a particular suit) can be brought by relying on specific federal laws which contain detailed review provisions, or by incorporating parts of the Administrative Procedure Act. Several courts have viewed the APA as a legitimate jurisdictional statute upon which environmentalists and consumer advocates can rely. That the class action is a particularly effective procedural tool to enforce standards of conduct is well documented by its extensive employment in these areas. Other strategies may be employed if at least one party plaintiff has a claim in excess of

89 Policy arguments both for and against the application of the Pinel rule in the class action context of new rule 23 are discussed in the text accompanying notes 117-25 infra.
91 See, e.g., Federal Power Act § 313(b), 16 U.S.C. § 825(b) (1970), which was the basis of jurisdiction to challenge the proposed location of a power plant in Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972).
94 For a contrary view, as might well be expected from two recent appointees to the Justice Department who believe in the superiority of a governmental administrative agency's ability to handle problems in these areas, see Crompton & Boyer, Citizen Suits in the Environmental Field: Peril or Promise?, 2 ECOLOGY L. REV. 407 (1972).
Permissive intervention might be allowed to accommodate class members who do not meet the jurisdictional amount by permitting them to join as parties of record with the party who does. Rule 42(a) may be used, *inter alia*, to effect consolidation. If this is not feasible or is denied, convenience procedures or quasi-consolidation may be of aid. These latter considerations can be said to merge with the non-exhaustive considerations of the superiority of the class action format to these alternatives as required by rule 23(b)(3).

Before one considers alternative procedural options available where at least one member of the class has the requisite $10,000 claim, it should not be mistakenly believed that *Snyder* necessarily compels each and every class member to meet the jurisdictional amount requirement. Although some courts have so held, it is still an open question. In *Zahn v. International Paper Co.*, plaintiffs filed a 23(b)(3) class action based on diversity jurisdiction for impairment of their rights caused by defendant's alleged pollution of Lake

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85 This is only a theory because under old rule 23 intervention by class members whose claims fell short of the monetary requirement was allowed in "true" and "hybrid" actions, but the courts were split as to its appropriateness in "spurious" ones. See generally 2 BABBON & HOLTZOFF § 569 and 3B MOORE ¶ 23.12. But since the trend is to allow permissive joinder of parties who lack the minimum monetary claim permissible (see text accompanying note 76 *supra*), it is but a short step to allow class members the same, especially since they are bound by the judgment pursuant to new rule 23.

86 The Supreme Court had made it clear that under Fed. R. Civ. P. 2, 18-20, and 42 the impulse should be toward entertaining the broadest possible scope of action so as to avoid a multiplicity of suits. Without compromising basic fairness to the parties, joinder of claims, parties and remedies is strongly encouraged. See, e.g., United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

87 For example, by employing 28 U.S.C. § 1404 (1970) a district court may transfer any civil action "to any other district or division where it might have been brought" for "the convenience of the parties and witnesses, in the interests of justice."

88 28 U.S.C. § 1407(a) (1970) provides:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multi-district litigation upon its determination that transfers for such proceedings will promote the just and efficient conduct of such actions.

89 See the brief expose of the manageability problems that could arise, *supra* note 57.


91 See the brief expose of the manageability problems that could arise, *supra* note 57.
Champlain. The class, defined as "all lakefront landowners and lessees in the towns of Orwell, Shoreham, and Bridgeport, Vermont," consisted of about 200 members. The court agreed with the defendant's argument that jurisdiction was wanting since it was "not credible" that every owner had suffered pollution damages in excess of $10,000. The court refused to permit the suit to proceed as a class action because, in its view, the Supreme Court had "clearly and unambiguously" held that each class plaintiff must be able to claim the requisite jurisdictional amount. However, the court did concede that:

We reach our decision today with great reluctance... [t]he requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23(b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable. The Second Circuit sympathized with such concerns but agreed with the result because it felt that the policy of the jurisdictional amount statute—that of checking the rising caseload in federal courts—must take precedence over the policies favoring class suits.

In City of Inglewood v. Los Angeles, the Ninth Circuit held that each class member had to establish the jurisdictional amount, but it granted a compromise measure that the Zahn court explicitly refused to allow. Believing it objectionable to dismiss the representative action in an entirely preemptive manner merely because the complaint averred the existence of the required jurisdictional amount for an indeterminant number of class members, the court held:

Rather the court should decide for the individual plaintiffs which can recover and which cannot. Once these matters are resolved the court can begin seeking a more substantial showing from the plaintiffs as to the type of proof they will be able to present. Whenever appropriate the court can dismiss the complaints as to those parties who are clearly shown to be unable to meet the requirements of jurisdictional amount.

Thus, the case was remanded to determine which members could not meet their burden of providing sufficient evidence of a claim amounting

103 Id. at 431-32.
104 Id. at 433.
105 469 F.2d 1033, 1035 (1972).
106 Id. The validity of such an argument is discussed in the text accompanying note 163 infra.
107 451 F.2d 948 (9th Cir. 1971).
108 Id. at 954.
to at least $10,000 in property damages allegedly incurred from the operations of the Los Angeles International Airport. The court ordered dismissal as to those plaintiffs only.\textsuperscript{109}

Certainly the result in Inglewood is preferable to that in Zahn, but the extra burden of conducting pretrial examinations on the extent of damages and proofs of claims of all class members would be a very considerable one. At the very least it would greatly minimize any advantages of proceeding with a class action. The tragedy is that Snyder does not necessarily compel such results. Both the dissent in Snyder\textsuperscript{110} and commentators on the case\textsuperscript{111} predicted that such dire consequences could result, although the Snyder holding was not entirely dispositive of the then hypothetical issue.

In a few recent non-damage cases, plaintiffs have experienced success in avoiding problems with meeting the jurisdictional amount requirement by persuading the court to measure the amount from the defendant's view rather than their own.\textsuperscript{112} This is reasonable, for example, where an injunction is called for rather than damages. An individual plaintiff may receive only a small benefit compared to the cost to the defendant of either remedying the nuisance or shutting down a profitable business. Beyond this, at least one court has found it convenient to avoid completely a determination of the amount of monetary damages involved, and thus to evade any anti-aggregation problems, by simply valuing each class member's claim at more than $10,000.\textsuperscript{113} Of course, such an approach is only possible where the claims involve an intangible right of the class members.

The anti-aggregation mandate of Snyder might also be avoided because of an absence of clarity as to the requirements of rule 23(b). Subtle definitional anomalies between subdivisions (b)(1) and (b)(3) are susceptible to various interpretations.\textsuperscript{114} The class actions under new rule 23 are not wholly coterminous with the “true,” “hybrid,” and “spurious” claims of former rule 23. Thus, while it is true that all

\textsuperscript{109} Id. at 953.


\textsuperscript{111} See, e.g., Wachten, § 72.


\textsuperscript{113} See Bieckele v. Nolfolk & W. Ry., 309 F. Supp. 554 (N.D. Ohio 1969) where the court held that “the right of each member of the class to live in an environment free from excessive coal dust” exceeds $10,000. The court also held that defendant’s fight to continue operating its coal loading facilities was worth more than $10,000. Id. at 355.

\textsuperscript{114} See generally 3B Moore ¶ 23.51 et seq.
suits arising under (b)(3) would be clearly "spurious" and aggregation would be denied, courts would not merely deny aggregation in all (b)(3) actions and permit it in all (b)(1) and (b)(2) suits. However, courts would be likely to construe (b)(1) claims as "joint" in nature and to permit aggregation because of the definitional criteria within the subdivision itself. In other words, since it may prove difficult to distinguish whether a particular case is either a (b)(1) or (b)(3) action, a successful molding of the facts into the (b)(1) category might well avoid the effect of Snyder. For example, Snyder itself could be considered a (b)(1)(B) situation. Is there any rational distinction between the "typical claim for monetary relief" in a securities fraud case brought under 23(b)(3) and a class taxpayer's suit under 23(b)(1)(A) to invalidate a municipal bond issue or a suit under 23(b)(1)(B) by stockholders to compel the declaration of a dividend rightfully due them but wrongfully withheld? Is there such a thing as recoverable refund as opposed to "true damages?" Both are functionally compensatory. Considering the extreme difficulty of delineating the "nature of the interest" in many cases and the possibility of "subdivision (b) shopping," an enterprising lawyer might do well by exploiting the situation.

VI.

It is submitted that all this conjecture is rendered moot by the Supreme Court's determination of the issue in Illinois v. City of Milwaukee. A joinder case, Illinois seems to avoid completely if not overrule Pinel. The unanimous opinion, written by Mr. Justice Douglas, had been brought as a class action. Since the suit would cause tax monies to be rerouted from the illegal appropriations, the suit could arguably have been either a (b)(1)(A) or a (b)(3) action. According to the Court in Snyder, unless a citizen had paid a sufficient amount in taxes that $10,000 of his share had been included in the illegal appropriation (totally impossible of course), the suit could not have been entertained. Luckily, everyone was so excited about "standing" that the issue was never introduced by the plaintiff, the defendant or the judges.

115 See Advisory Comm. Note 100-04; Kaplan, supra note 39, at 395 & n.150, 396-97.
118 An interesting dilemma is posed by Note, Taxpayer Suits and the Aggregation of Claims: The Vitiation of Flast by Snyder, 79 YALE L.J. 1577 (1970). Suppose Flast v. Cohen, 392 U.S. 83, 105-06 (1968) with its famous holding that: [a] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.
cites three cases and two secondary authorities describing the adoption of the "Defendant's View" doctrine. As one authority has noted, "This case effectively abolishes the plaintiff only viewpoint rule." The Illinois Court, in holding that the jurisdictional amount requirement for an original proceeding in federal district court was satisfied by relying on cases which employed the "Defendant's View" doctrine, established as a rule of law that the "matter in controversy" as used in 28 U.S.C. § 1331(a) (because Illinois was a federal question case) and § 1332(a) (because some of the cases relied upon were diversity actions) is to be construed to mean that the jurisdictional amount may be satisfied by the effect of the judgment on either the plaintiff or the defendant. Thus, Illinois replaces the rule of Pinel as the controlling interpretation of the jurisdictional statutes where the subject matter jurisdiction of the court is challenged because the matter in controversy does not exceed $10,000.

Substituting the rule of Illinois for that of Pinel, what remains of Snyder? Since Snyder was a mere application of the Pinel anti-aggregation doctrine to class actions, does Snyder remain good law now that Pinel has been displaced? Obviously, whether or not the claims of individual class members are "separate and distinct" and thus cannot be aggregated for jurisdictional purposes is no longer dispositive when the nature of the plaintiffs' claims need not even be considered in determining the amount in controversy. The court need only inquire whether either party stands to lose $10,000 or more by an adverse judgment in the case.

Ronzio v. Denver & Rio Grande Western, cited by the Court in Illinois as authority for construing the jurisdictional amount statute as it did, was the first case expressly to enunciate the "Defendant's View" doctrine. Judge Phillips formulated the rule as follows:

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122 See Fortune, supra note 13.

Considering such an effect it is wondered whether certain members of the Court were consciously aware of their assent to this aspect of the case. Certainly one is justified in feeling that Chief Justice Burger, who is understandably eager to protect the federal court system from an already bulging caseload (see Burger, The State of the Federal Judiciary-1972, 58 A.B.A.J. 1048 (1972), may have misconstrued the ultimate effect the decision could have.

123 See cases cited note 120 supra.

124 116 F.2d 604 (10th Cir. 1940).

125 406 U.S. at 91, 98.
In determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiff's complaint. The test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce.\textsuperscript{126}

While the Supreme Court had never indicated, until \textit{Illinois}, which test was proper for the determination of the jurisdictional amount, there is not a single decision of the Court in which a controversy involving single party litigants was denied jurisdiction because the monetary amount requirement was satisfied from the defendant's viewpoint but not from the plaintiff's. The Court has treated the issue tangentially on occasion. A principle case, also relied upon by Douglas in \textit{Illinois},\textsuperscript{127} is \textit{Mississippi & Missouri Railroad v. Ward},\textsuperscript{128} which involved an action for the abatement of a bridge as a nuisance. The Court held that the removal of the bridge was the matter in controversy and "the value of the object must govern."\textsuperscript{129} Later, in \textit{Adam v. Smith},\textsuperscript{130} a case challenging the validity of an election to determine the situs of a county seat in the Territory of Dakota, the Supreme Court offered some support to the "Defendant's View" rule by indicating:

\begin{quote}
[t]he pecuniary value of the matter in dispute may be determined not only by the money judgment prayed . . . but in some cases . . . by the pecuniary result of one of the parties immediately from the judgment.\textsuperscript{131}
\end{quote}

The Court deviated, however, in \textit{St. Paul Co. v. Red Cab Co.},\textsuperscript{132} where it surmised that "the sum claimed by the plaintiff controls if the claim apparently is made in good faith."\textsuperscript{133}

Even if it were argued that \textit{Illinois} does not "effectively abolish" \textit{Snyder}, the strongest position that could be taken is that the principle is now unsettled and the courts are therefore free to choose either

\begin{footnotes}
\item[127] 67 U.S. (2 Black) 485 (1862).
\item[128] \textit{Id.} at 487. Such a "test," if it could be euphemistically so termed, was unclear if not wholly unascertainable. \textit{Waggoner} \S 34, at 117 explains: "The leading case is so cryptic as to shed little, if any, light on the direction in which it leads," Judge Learned Hand unsuccessfully attempted to determine just what the "object" was that governed the value of the case in \textit{M & M Transp. Co. v. City of N.Y.}, 186 F.2d 157, 158 (2d Cir. 1950).
\item[130] 303 U.S. 283 (1937). The suit, which entailed an action on an insurance contract, evidently had been removed from state court.
\item[131] \textit{Id.} at 288.
\end{footnotes}
Given a choice, courts ought to apply the rule of Illinois, for in class actions the defendant's "interest" is certainly a more rational basis for determining the "matter in controversy" than is the amount of an individual class member's claim. It makes no difference that Illinois is a joinder case while Snyder was a class action. The impact of a judgment on the defendant is the same regardless of the number of plaintiffs suing. Additionally, in a class action, a single party may institute the suit as a "private attorney general" for others able to assert the same right. Functionally there is no difference between this type of class suit and one involving single party litigants.

Since the decision in Snyder, some courts have indicated a desire to apply the "Defendant's View" doctrine to class actions, but have been reluctant to do so in the face of that decision. Berman v. Narragansett Racing Association was a class action against a race track for wrongfully withholding distribution of purses to winners of races pursuant to an alleged agreement. The contract called for the racing association to pay the horseowners a certain percentage of profits. Each horseowner's claim was for a different amount and was less than the jurisdictional requirement. The First Circuit held that the claim was not barred by the jurisdictional amount requirement for two reasons: the plaintiff class had a "common and undivided right of interest" in their claims as a whole, permitting aggregation under the holding in Snyder; and,

[The pecuniary result which the judgment would directly produce would be the awarding of a fund of several millions to the class. We think it is the entire fund, and not what each pursewinner's individual share will eventually be, that determines the amount in controversy here.]

The court went to great lengths to permit the suit to continue in class form in federal court regardless of the Snyder holding. Although the court held that "a common and undivided right of interest" was shared by the individual class members in each others claims, it could just as easily have determined that those claims were "separate and distinct," as indeed they were. Obviously, the court was paying mere lip service to Snyder while actually speaking in terms of Illinois.

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134 See Kennedy, Valuating Federal Matter in Controversy: An Hofeldian Analysis in Symbolic Logic, 35 Tenn. L. Rev. 423 (1968), in which the author attempts to fix the status of the rule through the use of symbolic logic. He fails.
135 That he might do so is expected as the "prophylaxis" function of a class action is recognized by the authorities. See text accompanying note 54 supra.
137 Id. at 314, cited in Strausberg, supra note 131, at 105.
The opposite result was reached in *Lonquist v. J.C. Penny Co.*, a class action by credit account holders alleging that defendant's department stores enacted usurious interest rates from them, ranging from $.41 to $189.69. While the aggregate amount claimed far exceeded $10,000, the Tenth Circuit relied on *Snyder* and dismissed the action. The court expressly distinguished *Berman* by stating that there the claims involved a "common and undivided right," while in *Lonquist* the claims were "separate and distinct." The conclusion that claims based on an alleged contract to distribute percentages of a pari-mutual pool to purse winners is somehow less separate and distinct than claims for the refunding of usurious interest to possessors of charge accounts makes it clear that nearly two centuries of experience in attempting to apply "the character of the interest" test to multiparty claims does not necessarily make one proficient at the task.

The *Lonquist* court weakly attempted to distinguish *Berman* by observing that *Berman* relied on *Ronzio*, a case involving only a single plaintiff and a single defendant. Such a distinction is untenable.

Finally, in *Massachusetts State Pharmaceutical Association v. Federal Prescription Service*, a class suit brought by Massachusetts pharmacists seeking to enjoin the defendant Iowa Drug Company from ignoring a Massachusetts state court injunction that was issued to restrain the defendant from soliciting business within Massachusetts, the Eighth Circuit dismissed the action for failure to satisfy the jurisdictional amount. The court correctly based its decision on a finding that "the plaintiffs have failed to establish that the requisite jurisdictional amount would be present [even] if aggregation is allowed." While reciting *Snyder's* rule that separate claims could not be aggregated, the court went on to acknowledge that:

... there is some authority for the proposition that the amount in controversy is valued by the thing to be accomplished by the action as to either the plaintiff or the defendant, whichever is higher...  

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138 451 F.2d 597 (10th Cir. 1970).
139 The "character of the interest" of the plaintiffs in the two cases is even more similar than that involved in *Hawkley* and *Davis*, discussed at note 25 supra, where the metaphysical distinction between "the fund" and "the claims to the fund" was outcome-determinative. See text accompanying notes 21-31 supra. Professor Chaffee may have said it best when he remarked that he usually had as much trouble telling a common right from a separate one as he had in telling whether some ties were blue or green. See Z. CHAFFEE, SOME PROBLEMS OF EQUITY 257 (1950). To this day the courts are still unable to determine when a single right is sought to be enforced by plaintiffs with common and undivided interests. The cases are set out in Annot., 8 A.L.R. FED. 372 (1970).
140 See text accompanying notes 134-35 supra.
141 431 F.2d 130 (8th Cir. 1970).
142 Id. at 132 n.1.
The court continued to explain why it would not apply "the defendant's standpoint test" in the future:

[1] In light of Snyder ... the plaintiff's viewpoint rule is the only valid rule. ... To hold otherwise would in effect permit aggregation of claims contrary to the teaching in Snyder.144

Exactly. And now that Illinois is available, courts may validly shed the inhibitions created by Snyder.

VII.

While Illinois does obviate the necessity of applying the anti-aggregation principle, whether or not courts will do so may still depend upon their own analysis of the effect of such a decision on the policies embodied in the jurisdictional amount requirement statutes. Diversity cases present the conflict because nearly all federal question cases have been specifically excepted from the requirement of a minimum jurisdictional amount.145 Moreover, Snyder, and the case upon which it relied, Pinel, were both diversity cases and it is doubtful whether the majority in Snyder believed their holding would affect federal question cases as it has.146

In Snyder, Mr. Justice Black relied on two often asserted purposes of the jurisdictional amount requirement in diversity cases to support the Court's decision on policy grounds: preservation of the independent authority of state courts147 and limitation of the federal caseload.148 The first purpose is interrelated with the total concept of comity,149

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143 Id.
144 Id.
145 Examples of these specific exemptions are listed in note 90 supra and accompanying text.
146 In fact, the majority opinion is silent on the matter. Its basic concern was the opening of federal courts to suits that could otherwise be maintained in state courts. See text accompanying notes 147-51 infra. Of course, such a consideration does not concern federal question cases.
147 394 U.S. at 341.
149 The independent authority of state courts is truly the basis of the doctrine. Comity is merely the term employed by courts and scholars to describe the policy consideration that branches of the federal government, especially its judiciary, ought to avoid any needless conflict with a particular state in the administration of that state's own affairs. Comity has been the primary outcome-determinative factor in at least two major notions limiting federal jurisdiction, the abstention doctrine (where it underlies a federal court's obligation to withhold its exercise of equity jurisdiction to permit state courts to initially interpret their own state laws) and the Erie doctrine (where it is manifested in the requirement that in a diversity case a federal court must apply the substantive law of the state in which it sits). Congress employed the same concept as a basis of the Anti-Injunction Act, 28 U.S.C. § 2283 (1970), which forbids proceedings except in exceptional, specific situations. See generally Hufstedler, Comity and the Constitution: the Changing Role of the Federal Judiciary, 47 N.Y.U.L. Rev. 241 (1972).
which has been instrumental in the evolution of the parameters of federal jurisdiction. But the allowance of a class action in federal court, which may entail millions of dollars, can hardly be indicted as a grating intrusion into a state’s domain. The fundamental purpose of federal diversity jurisdiction is to provide an alternative forum for suits involving state law and out-of-state courts. If Congress really intended that the jurisdictional amount statute should exist merely to insure that all cases of primarily local interest be maintainable only in state courts, then abolition of diversity jurisdiction would be the proper remedy. Congress has decreed that out-of-state litigants could be relieved of any possible local prejudice only when the matter in controversy is in excess of $10,000. Snyder denies that privilege to those foreign members of a class whose claims happen to be labeled as “separate and distinct.” Illinois restores it.

On the other hand, limiting the federal caseload to insure efficient judicial administration is a cogent rationale for the restrictive interpretation of the jurisdictional amount statute in Snyder. Certainly a court is justified in relieving an already crowded docket of the added burden of deciding a great number of small claims. But in adjudicating claims where the defendant stands to lose in excess of $10,000, courts are not “frittering away their time in petty controversies.” They are deciding major controversies for which Congress clearly intended to provide a federal forum. That policy is readily evident in cases arising in states that provide for class action procedures. The class action anti-aggregation rule of Snyder would fore-

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150 See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). The need for providing an alternative forum is premised on the traditional theory that foreign plaintiffs or defendants might suffer from local prejudice if forced into state courts.

151 Whether or not diversity jurisdiction itself ought to be modified or abolished is certainly beyond the scope of this paper. See generally Note, Analysis of the ALI’s Approach to the State Federal Jurisdictional Dilemma, 21 Am. U.L. Rev. 287 (1972). However, it is clear that the fear of local prejudice is one of the few remaining arguments for diversity jurisdiction. Two obvious arguments contra are: (1) the most significant prejudices remaining alive in America today are along racial, ethnic, religious or sexual lines, and (2) even if prejudice does exist along local geographical lines, diversity jurisdiction does little to defeat it because the judges and juries in federal courts come from the same area as their counterparts in state systems.


154 See Professor Wright’s discussion in 1 BARRON & HOLTZOFF § 24, at 47.
close a defendant's opportunity to remove his case to federal court even though he may be subject to a judgment in excess of the federal jurisdictional amount requirement. Irrespective of the defendant's opportunity to remove his case to federal court even though the suit may have been otherwise brought in federal court, in some states, such as New York, the plaintiff class members remain without an effective remedy. Although the civil procedure of most states contains some form of class action, these state remedies are generally inadequate, inefficient, ineffective and inappropriate. Understandably, the use of the class action device in state courts has been relatively rare. Moreover, where the development of substantive federal policy is a prime consideration in a case, it is important that a federal forum be afforded. In addition, where the magnitude of a potential class action is national in scope, a state-by-state adjudication of the matter is not as efficient or effective as a single litigation in federal court. Thus, the unwarranted denial by Snyder of federal jurisdiction over many class actions is unfortunate, especially since federal courts have

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157 Nineteen states still have class action provisions adopted from old federal rule 23. Others have similar provisions grounded upon general terms and imprecise criteria. See, e.g., Ala. Code Ann. tit. 7, § 128 (1960), which provides: [W]hen the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impractical to bring them all before the court, one or more may sue or defend for the benefit of all.
159 F. JAMES, CIVIL PROCEDURE § 10.18, at 495 (1965).
160 This is the other aspect of Illinois v. City of Milwaukee which was heralded by commentators (see the articles listed note 6 supra). In areas where Congress has demonstrated federal concern by legislative enactments, but which do not expressly create a private right of action in a particular situation, federal courts are now empowered to develop substantive federal policy in the form of federal common law under the federal question statute. As the Illinois Court said:
[T]he remedies which congress provides are not necessarily the only federal remedies available. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." 406 U.S. 91, 103 (1972).
161 "It is basically the access to the Federal Court System for national class action abuses that is at issue." Hearings on S. 3201 Before the Consumer Subcomm. on Consumer Protection of the Senate Comm. on Commerce, 91st Cong., 1st & 2d Sess., ser. 91-48, at 213 (1970) (statement of Ralph Nader). Senator Magnuson, Chairman of the Senate Committee on Commerce, stated:
[Without access to a class action, there can be no law and order for vast numbers of deceived, cheated and swindled Americans.
often interpreted jurisdictional requirements in the light reflected by the policies of the civil rules.\textsuperscript{162}

A valid distinction can be made between the proposition of limiting the workload of overcrowded federal courts by preventing petty claims from inundating the federal system and the proposition of barring access to a federal forum to meritorious class claims involving very substantial sums of money and possibly substantive federal policies. It is one thing to construe strictly a jurisdictional requirement in deference to the federal caseload, but quite another to deny the substantive statutory right of access to a federal forum on that basis. The sole, clear and consistent purpose of the jurisdictional amount requirement is the prevention of petty claims from flooding federal courts.\textsuperscript{163} If the case is not a petty one, then the availability of a federal forum in diversity of citizenship situations is guaranteed. The Supreme Court provides in \textit{Illinois} a clear method for determining whether or not a case is petty. Where the value of the dispute exceeds $10,000 from either the plaintiff's or defendant's view, then the consequence that the federal caseload might increase is no reason to deny access to the system. Just as the mere convenience of the parties is not a suitable premise to grant it.

In addition to the purposes of the jurisdictional amount statute, courts must also consider the purposes of civil rule 23. Of the three major public policy aims of the modern class action,\textsuperscript{164} that of protecting the rights of small individual claimants against a more powerful adversary is the single one which can only be effectuated by applying the rule of \textit{Illinois}. The other goals, achieving judicial economies with uniformity of result and providing a standard of behavior upon which all parties could rely to be legally sufficient in the future, are sought to be accomplished by the criteria catalogued within the rule itself.\textsuperscript{165} Once the propriety of the class action device


The federal courts have employed the concept of ancillary jurisdiction in an effort to balance federal jurisdictional requirements with the liberal provisions of the Rules as to additional parties.

Id. at 370.

\textsuperscript{163}See H.R. Rep. No. 1706, 85th Cong., 2d Sess. 3 (1958); \textit{Wright} § 32.

\textsuperscript{164}See text accompanying notes 52-55 \textit{supra}.

\textsuperscript{165}See \textit{Fed. R. Civ. P.} 23.
as a procedural tool is established, as determined by the prerequisites of the rule, the accomplishment of these ambitions is solely attributable to the adjudication of the suit in the form of a class action. The several considerations that determine the very availability of rule 23 in a particular fact situation are those which determine whether judicial economies, with uniformity of result and enforceable standards of conduct, will be insured by utilization of the class form. They are the same question. A correct preliminary determination that the case is a proper one to be pursued in class form is to achieve these goals. If they would not result, then the court is incorrect in allowing the case to proceed as a class action. In counterperspective, the aim of "taking care of the smaller guy" is not a condition precedent to the availability of rule 23. However, its employment to do so inheres in the nature of the class action concept. The Advisory Committee which drafted the new rule, lower courts, and commentators have stipulated that rule 23 is necessary to assure an adequate legal mode of protecting small but similar claims of many plaintiffs against one defendant or of one plaintiff against many defendants. While this policy goal is generally extraneous to both interpreting the jurisdictional amount statutes and determining the propriety of rule 23's utilization in a particular fact situation, it remains an intrinsic notion of rule 23's raison d'etre. Aiding the small claimant is not merely one of a whole new range of possible uses of the class action format under new rule 23, it is a fundamental premise upon which the rule was promulgated.

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168 Some of the problems involving these prerequisites are discussed in notes 56 and 57 supra.

167 Theoretically, the preliminary determination that the case is a proper one to be maintained in class form is to achieve these two goals. If they would not result, then the court is incorrect in permitting the case to proceed as a class action to begin with. In reality, courts often compromise conflicting considerations in determining if common questions of fact and law predominate and if the class form is the superior method of adjudicating the claims. It is submitted that if the two goals would not be accomplished by hearing the action in class form, then neither predominance nor superiority is established and the suit should not be allowed to continue as a class action.

168 See, Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295, 298 (1966).

169 Advisory Comm. Note 104. See also Kaplan, A Prefatory Note to the Class Action—A Symposium, 10 B.C. Ind. & Com. L. Rev. 497 (1969).

170 See, e.g., Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 556 (2d Cir. 1968).


172 See Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968), rev'd on other grounds, 438 F.2d 825 (2d Cir. 1971), in which the court stated:

To assert that the minute interests of the parties before the court is a factor which militates against allowing a class action is to ignore the spirit (Continued on next page)
Until the rule of *Illinois* is forcefully employed the *Snyder* prohibition against aggregation of claims will continue to prevent innumerable aggrieved "small fellow" consumers from bringing a class action in federal court. Alas, "*Snyder* has already provided the altar for the sacrifices of its progeny."  

Since "[t]he 'promise' of the federal class action was nipped in the bud by the unfortunate decision in *Snyder v. Harris*," Congress has unsuccessfully attempted to respond by proposing special legislation specifically providing for the maintenance of consumer class actions in federal courts. As a judicial measure, one commentator has suggested that the concept of "protective jurisdiction" should be adopted to justify federal jurisdiction over all consumer class actions. The Supreme Court has offered in *Illinois* what the drafters of these measures hoped to provide. While the *Snyder* decision continues to impede the development of the federal class action as an efficient means of vindicating the substantive rights of consumers, environ-

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(Footnote continued from preceding page)

of Rule 23 since, as we have seen, if the plaintiff's claim is very large a class action is rendered unnecessary, the main purpose of the class action is to provide a means of vindicating small claims. It would be anomalous to hold that only major financial interests can make use of it.

*Id.* at 495.


174 Strausberg, *supra* note 131, at 97.


177 See also Note, *Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Action, 69 Mich. L. Rev. 710 (1971).*
mentalists and others, the rationale of *Illinois v. City of Milwaukee* stands ready to accommodate their interests. While the advent of a new rule of procedure cannot itself modify the meaning of a jurisdictional statute, a Supreme Court decision certainly does. While some courts may still persist in playing “character of interest roulette,” they need not do so. Courts may feel uninhibited in “taking care of the smaller guy” by opting for the rule of *Illinois*.

*Gerald F. Dusing*

Editor's Note: As this issue went to final printing, the Supreme Court of the United States decided *Zahn v. International Paper Company*, the complete effect of which is not certain, since the United States Law Week Summary was not received by the printing deadline. An addendum to Mr. Dusing's Comment, if necessary, will appear in Volume 62, No. 2.