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Class Actions--Aggregation of Claims (Zahn v. International Paper Co.)

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CLASS ACTIONS — AGGREGATION OF CLAIMS

Zahn v. International Paper Co.

Class actions are a viable device for obtaining adjudication of multi-party rights in a single lawsuit. The plaintiffs receive the benefits of group consolidation[1] while the court is relieved of hearing each suit separately, thus aiding the efficiency of the judicial system.[2] From their inception in the English courts of equity,[3] class actions have steadily assumed a greater role and have significantly affected the conduct of litigation in this country. The present federal class action provision — Rule 23 of the Federal Rules of Civil Procedure[4] — seeks to maintain the basic utilization of such a procedure by describing "in more practical terms the occasions for maintaining class actions."[5] However, the development of this procedural vehicle has not been without a simultaneous growth of restrictions on its use.

In *Zahn v. International Paper Co.*,[6] the court of appeals considered the issue of whether the members of the potential class would be permitted to sue as a class where some members' claims failed to meet the jurisdictional amount required under the diversity statute.[7] The Second Circuit affirmed the district court's holding which barred a class action and upheld jurisdiction only as to four plaintiffs whose individual claims each exceeded $10,000.[8] The 2-1 decision relied on the recent Supreme Court case, *Snyder v. Harris*,[9] which resurrected the "spurious"

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1 Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 434-35 (1960).

2 Z. CHAFEE, SOME PROBLEMS OF EQUITY 149 (1950). *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968):

> Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.

3 *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.02[1] (2d ed. 1971 [hereinafter J. MOORE]).

4 FED. R. CIV. P. 23.

5 Advisory Note, 39 F.R.D. 69, 99.

6 — F.2d — (2d Cir. 1972). This action was brought by four named riparian landowners on behalf of themselves and 200 other owners and lessees of waterfront property against the defendant for alleged pollution of Lake Champlain. As a result of the untreated waste being dumped into these waters, masses of sludge washed up on plaintiffs' property, causing permanent diminution of value. Plaintiffs sought compensatory as well as punitive damages.

7 28 U.S.C. § 1332(a) (1964).

8 — F.2d at —.

9 394 U.S. 332 (1969). The Court held that the aggregation of separate and distinct claims was not allowed in class actions in federal diversity cases.

class action distinction of old Rule 23[10] and the aggregation restrictions[11] that attached to that abstract category.

According to *Snyder*, separate and distinct claims raised in spurious class actions could not be aggregated to meet the jurisdictional amount required by the diversity statute. The decision resolved a conflict among the Fifth[12] and Eighth[13] Circuits, which limited aggregation, and the Tenth Circuit,[14] which viewed amended Rule 23 as not only abolishing the trichotomic labeling of class actions but as also destroying the barrier prohibiting aggregation for other than true class actions. In supporting the former viewpoint, the Supreme Court found that to allow aggregation in the "spurious" type action would be to expand the jurisdiction of federal courts. Such use of the courts' rule-making power was expressly forbidden by Congress.[15]

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10 Under original Rule 23, class actions were categorized according to the "joint relationships of the members of the class." Three types emerged. The "true" class action involved rights that were joint or common ones among the members; joinder of all parties was essential. The "hybrid" type embraced enforcement of rights that were several and concerned specific property. Several rights were also involved in "spurious" class actions, but a common question of law or fact was also present. There was no jural relationship between the parties, so the "spurious" class action was often equated with a permissive joinder. *See* 3B J. MOORE ¶ 23.08-23.10 (2d ed. 1971).

For examples of utilization of the spurious class action *see* Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331 (2d Cir. 1953); Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947); Sturgeon v. Great Lakes Steel Corp., 143 F.2d 819 (6th Cir. 1944); Oppenheimer v. F. J. Young & Co., 144 F.2d 387 (2d Cir. 1944).

11 Aggregation of claims was allowed only in the "true" class action. Since there was no common or collective right among the parties in a "hybrid" or "spurious" class action, no aggregation was allowed. *See* 3B J. MOORE, ¶ 23.13 (2d ed. 1969). *See* Troup v. McCuit, 238 F.2d 289 (5th Cir. 1957); Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir. 1941), *cert. denied*, 313 U.S. 559 (1941); Central Mexico Light & Power Co. v. Munich, 116 F.2d 85 (2d Cir. 1940); Garfield Local 13-566 v. Heyden Newport Chem. Corp., 172 F. Supp. 230 (D.N.J. 1959).

12 Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967). Plaintiff was the holder of an insurance contract with defendant. He commenced an action on behalf of himself and other Cuban refugees, who were also policyholders, to obtain their rights under this contract. The court held that the claims were essentially separate and distinct ones, and the aggregation principles of old Rule 23 were applicable and not abrogated by the new Rule. Before dismissal, plaintiff showed that one of the members of the class had a contract with the defendant for $25,000. But the court, following Clark v. Paul Grey, Inc., 306 U.S. 583 (1939), held this was no help to the plaintiff or the class action.

13 Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968). A stockholder attempted to add the claims of absent stockholders to her own to reach the $10,000 required amount.

14 Gas Service Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968). Plaintiff filed a class action for himself and other customers of defendant gas company to recover alleged illegal overcharges from the defendant. The class was composed of approximately 18,000 people. Plaintiff's own claim totaled only $7.81. The Tenth Circuit allowed aggregation of the claims, since "[t]o now hold that the former classifications of 'true,' 'hybrid' and 'spurious' must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard." *Id.* at 834. The court followed Gibbs v. Buck, 307 U.S. 66 (1939), in that it held that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value.

15 *See* FED. R. CIV. P. 82 and 28 U.S.C. § 2072 (1964), giving the Supreme Court

Dissenting in *Zahn*, Judge Timbers, in a strong and well reasoned opinion, argued that the majority's reliance on *Snyder* was misplaced and in complete disregard of the growing concept of ancillary jurisdiction. His dissent pointed out that, after a federal court has acquired jurisdiction over a controversy, ancillary jurisdiction allows it to determine matters that are incidental or ancillary to the main action, regardless of the citizenship of the parties, the amount in controversy, or the non-existence of independent grounds for jurisdiction.[16] In so deciding, Judge Timbers correctly recognized the thrust of the recently amended federal rules and the expansion of the concept of ancillary jurisdiction which permit the resolution of multi-party claims in one suit.

In applying the Federal Rules, the courts discovered that the use of ancillary jurisdiction was imperative if the liberal joinder devices were to be used properly. For example, Rule 13(a),[17] governing compulsory counterclaims, raised the question of whether independent jurisdictional grounds were needed to support such a counterclaim. The Supreme Court decided, in *Moore v. New York Cotton Exchange*,[18] that a compulsory counterclaim, being ancillary in nature, required no additional grounds for jurisdiction but was supported by the jurisdiction of the original claim.[19] A similar result was reached in connection with Rule 14, which outlines the procedure of impleader.[20]

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power to promulgate such rules. Both provide that the Federal Rules shall neither extend nor limit the federal courts' jurisdiction.

16 *See* 1 J. MOORE ¶ 0.90 [3] (2d ed. 1972) and 2A J. MOORE ¶ 8.07(5) (2d ed. 1972). Dugas v. American Surety Co., 300 U.S. 414 (1937), *rehearing denied*, 301 U.S. 712 (1937); Glen Falls Indemnity Co. v. United States, 229 F.2d 370 (9th Cir. 1955); United States v. Acord, 209 F.2d 709 (10th Cir.), *cert. denied*, 347 U.S. 975 (1954); National Gas Pipeline Co. v. Federal Power Comm., 128 F.2d 481 (7th Cir. 1942); Ballard v. Mutual Life Ins. Co. of N.Y., 109 F.2d 388 (5th Cir. 1940).

17 FED. R. CIV. P. 13(a) states:

> A pleading shall state as a compulsory counterclaim any claim which at the time of serving the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

18 270 U.S. 593 (1926).

19 *See* Chance v. County Bd. of Sch. Trustees, 332 F.2d 971 (7th Cir. 1964); Great Lakes Rubber Corp. v. Herbert Cooper Co., Inc., 286 F.2d 631 (3d Cir. 1961); General Foods Corp. v. Struthers Scientific & Int'l Corp., 301 F. Supp. 354 (D.Del. 1969); Holsten Import Corp. v. Rheingold Corp., 285 F. Supp. 607 (S.D.N.Y. 1968). It has followed that no independent jurisdictional amount is needed to support a compulsory counterclaim. Home Ins. Co. v. Trotter, 130 F.2d 800 (8th Cir. 1942).

20 FED. R. CIV. P. 14. Rule 14(a) reads in pertinent part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . Any party may move to strike the third-party claim, or for its severance or separate trial.

If there was jurisdiction over the original claim, ancillary jurisdiction would extend to a third-party claim.[21]

Rule 24(a)[22] provides for intervention as of right by a person who is not adequately represented by the parties and who has some interest which, as a practical matter, would be adversely affected by the outcome of the litigation before the court. Under the former rule,[23] intervention as of right was permitted only where the prospective intervenor would have been bound by res judicata or where he had some interest in the property or *res* being distributed by the court.[24] The amended rule has been read more liberally, so that the stare decisis effect of the judgment can warrant intervention as of right when practical considerations so demand.[25]

If the plaintiffs in the *Zahn* case had not brought a class action, but instead had sued as individuals, it is arguable that each individual could have intervened as of right. These parties had a legal interest as riparian land owners whose property was being polluted by defendant. Such an interest, sufficient to act as a predicate for an independent suit, would be sufficient to permit intervention in a pending suit, especially against the same defendant.[26] These parties would then be entitled to

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21 *See* Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970); Stemler v. Burke, 344 F.2d 393 (6th Cir. 1965); Pennsylvania R. R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

22 FED. R. CIV. P. 24(a) provides for intervention as of right as follows:

Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

23 Before the 1966 amendment Rule 24(a) read as follows:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in custody or subject to the control or disposition of the court or an officer thereof.

24 Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); Sutphen Estates, Inc. v. United States, 342 U.S. 19 (1951); Fox v. Glickman Corp., 355 F.2d 161 (2d Cir. 1965), *cert. denied*, 384 U.S. 960 (1966); Hurd v. Illinois Bell Tel. Co., 234 F.2d 942 (7th Cir), *cert. denied*, 352 U.S. 918 (1956).

25 Martin v. Travelers Indem. Co., 450 F.2d 542 (5th Cir. 1971); Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967); Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967); *contra*, Ionian Shipping Co. v. British Law Ins. Co., Ltd., 426 F.2d 186 (2d Cir. 1970).

26 *See* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132-36 (1967); Smuck v. Hobson, 408 F.2d 175, 178-80 (D.C. Cir. 1969); Bass v. Richardson, 338 F. Supp. 478 (S.D.N.Y. 1971); Teamsters Local 542 v. Ace Enterprises, Inc., 332 F. Supp. 36 (S.D. Cal. 1971). The *Cascade* case was the first case to interpret the requirement of

have their claims heard in the same lawsuit as the original plaintiffs.[27] Ancillary jurisdiction is available for a court to entertain the claim of such an intervenor[28] and it would follow, a fortiori, that the court in *Zahn* could just as easily have invoked ancillary jurisdiction at the outset.

Judge Timbers also noted that ancillary jurisdiction is still being extended in the areas covered by the Federal Rules. Rule 20, which concerns permissive joinder of parties, has traditionally not received the benefits on ancillary jurisdiction with respect to claims that are separate and distinct.[29] However, some recent decisions have departed from this concept with respect to amount in controversy.[30] As one case pointed out, if ancillary jurisdiction were not applied to the co-plaintiff's claim, which was less than the jurisdictional amount,

> separate trials in separate courts involving common questions of law and fact arising out of the same transaction and directed against the same defendant would result. Such a result runs contrary to the judicial economy, convenience and fairness to litigants rationale supporting ancillary jurisdiction decisions.[31]

Just such an argument was recognized and supported by the Second Circuit, in a case interpreting class actions under Rule 23.[32]

Another theory to consider in reviewing extensions of federal jurisdiction is the doctrine of pendent jurisdiction. Promulgated in *Hurn v. Oursler*,[33] this concept was broadened in *United Mine Work-*

"interest" under the new rule. The Court found a mere "economic" interest sufficient to sustain intervention as of right.

[27] *See* 3B J. MOORE ¶ 24.09-1 [1] (2d ed. 1971):

> . . . [A]s the absolute right of intervention is expanded, the interests of judicial administration are served to the extent that the substitution of a more complex litigation now, for what would otherwise probably be two or more separate lawsuits, furthers efficiency, consistency, and accuracy.

[28] Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 540 (8th Cir. 1970); Formulabs, Inc. v. Hartley Pen Co., 318 F.2d 485 (9th Cir.), *cert. denied*, 375 U.S. 945 (1963); Lenz v. Wagner, 240 F.2d 666 (5th Cir. 1957); *see generally* 3B J. MOORE ¶ 24.18 [1] (2d ed. 1971).

[29] Pinel v. Pinel, 240 U.S. 594 (1916).

[30] Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968); General Research, Inc. v. American Employers' Ins. Co., 289 F. Supp. 735 (W.D. Mich. 1968); Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967); Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966). *See* Note, *The Federal Jurisdictional Amount and Rule 20 Joinder of Parties: Aggregation of Claims*, 53 MINN. L. REV. 94 (1968).

[31] Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905, 907 (N.D. Ill. 1966).

[32] Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

[33] 289 U.S. 238 (1933). The federal cause of action was infringement of a copyright, to which the plaintiff had added a claim of unfair competition based on this infringement. The Supreme Court held that if plaintiff's claim presented "two distinct grounds," one state and one federal, "in support of a single cause of action," the federal court had

ers v. Gibbs,[34] which emphasized the scope of federal judicial "power" over a claim involving a federal question and claims derived "from a common nucleus of operative fact."[35] Judge Timbers would apply the principles[36] of the *Gibbs* case to class action situations such as *Zahn*, since

> judicial authority over the ancillary claims exists if the relationship between the claims having independent jurisdictional grounds and the pendent claim 'permits the conclusion that the entire action before the court comprises but one constitutional case.'[37]

Recent cases have appeared to follow this trend of extending the pendent jurisdiction doctrine in areas touching admiralty,[38] federal securities law,[39] and welfare payments.[40]

Following the rationale expounded by Judge Timbers, the holding in the *Zahn* case not only places an unnecessary restriction on class actions under Federal Rule 23(b)(3), but is an unwarranted extension of the decision in *Snyder v. Harris*.[41] In *Snyder*, the Court denied class action status where *none* of the class met the jurisdictional amount. The Court refused to use the class rule to expand federal subject matter jurisdiction. In *Zahn*, four plaintiffs had claims exceeding $10,000 and thus the subject matter jurisdiction of the court over the controversy was established.[42] The question of aggregation, present in *Snyder*, was not present in *Zahn* and the affirmance of class status would not have yielded federal subject matter jurisdiction where none theretofore existed. As noted above, the judicial and legislative thrust is to allow a court to exercise jurisdiction over a claim which in itself does not exceed $10,000, if it is coupled with a claim, arising out of the

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jurisdiction over the entire claim. But, if the claim was "two separate and distinct causes of action," there was only jurisdiction of the federal cause of action. *Id.* at 245-46.

34 383 U.S. 715 (1966).

35 *Id.* at 725. The Court asserted that there was federal power to hear plaintiff's claims if he would ordinarily be expected to try them in one lawsuit, assuming there was a valid federal issue.

36 *Id.* at 724-25.

37 — F.2d at —.

38 Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809-11 (2d Cir. 1971).

39 Ryan v. J. Walter Thompson Co., 453 F.2d 444, 446 (2d Cir. 1971).

40 Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972).

41 394 U.S. 332 (1969). *But see* C. A. WRIGHT, FEDERAL COURTS at 316 n.86 (2d ed. 1970).

42 The majority in *Zahn* admitted this distinction but instead of examining its implication, it merely referred to dictum in Judge Fortas' dissent to *Snyder*, to support its rejection of any such distinction being made. — F.2d at —.

Moreover, this decision also placed great emphasis as did the majority in *Snyder*, on Clark v. Paul Grey, Inc., 306 U.S. 583 (1939) as holding that separate and distinct claims in class actions could not be aggregated. The case itself, however, does not make it clear whether permissive joinder or class action was involved. Many commentators had believed that, in keeping with the spirit and purpose of the amendment, aggregation

same facts, that evokes the court's jurisdiction.[43] If judicial efficiency is truly a goal of the courts, it would best be served by following the mandates of these trends, and resolving all related claims where the court must entertain some of the claims anyway.

EN BANC PETITION — DECISIVE PRESENCE OF A DISQUALIFIED JUDGE

In addition to presenting a novel question as to the propriety of a class action under the diversity statute where the claims of some of the class members failed to meet the jurisdictional amount, *Zahn v. International Paper Co.*[44] provided the setting for a unique interpretation of the en banc procedures contained in the Federal Judicial Code.[45]

After affirmance by a three judge panel[46] dismissing the suit as a class action with respect to those plaintiffs who did not meet the requisite monetary amount,[47] a petition for a rehearing containing a suggestion that the case be considered en banc was made by plaintiff-appellants. Section 46(c) of the Judicial Code provides that normally a case shall be heard by three circuit judges, "unless a hearing or rehearing before the court en banc is ordered by a *majority of the circuit judges of the circuit who are in regular active service.*"[48]

The court of appeals denied the petition for a rehearing en banc by a vote of only three of the seven judges[49] who sat to entertain the petition. This anomalous result, in which the minority (hereinafter the decisive-minority) overruled the four-judge majority, occurred be-

should be allowed in all of the newly defined class actions. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 399-400 (1967); Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 601 (1969); Note, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment* 52 MINN. L. REV. 509, 514-15 (1967); 43 TUL. L. REV. 360 (1969). However, not all commentators have taken this position. *See, e.g.*, Note, *Aggregation of Claims in Class Actions*, 68 COLUM. L. REV. 1554 (1968).

43 *See* Hartridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968); Wilson v. American Chain and Cable Co., 364 F.2d 558 (3d Cir. 1966).

44 — F.2d — (—), *petition for rehearing denied*, — F.2d — (2d Cir. 1972).

45 28 U.S.C. § 46(c) (1970).

46 The panel's decision was rendered by Judges Moore, Smith, and Timbers.

47 In the main action plaintiffs (riparian land owners) brought a class suit against defendant who allegedly polluted the waterfront and thus decreased the value of their property. The class action was dismissed as to the unnamed plaintiffs who did not have a claim in excess of $10,000 in accordance with the diversity statute, 28 U.S.C. § 1332(a) (1964).

48 28 U.S.C. § 46(c) (1970) (emphasis added).

49 The seven who sat to consider the petition where Judges Kaufman, Mansfield, Hays, Feinberg, Oakes, Mulligan, and Timbers. Chief Judge Friendly had disqualified himself. Judges Kaufman, Mansfield, and Mulligan voted to deny the petition. Judges Kaufman and Mansfield filed opinions in which Judge Mulligan concurred; Judge Timbers filed a dissent in which Judge Oakes concurred.

cause the phrase "regular active service" was interpreted to include Chief Judge Friendly who had disqualified himself. Although four judges voted to rehear the petition en banc this number fell short of a majority of five required when the vote was based on an eight-man court.

The decisive issue presented to the court was whether or not the disqualification of a judge affects the number of judges required to affirmatively en banc a case. On this issue five judges[50] agreed that Chief Judge Friendly must be included in the count and, therefore, the court consisted of eight as opposed to seven regular active members. This position seems logical since the disqualified Chief Judge is in fact a regular active judge as that term has been defined by the Supreme Court.[51] Nevertheless, an argument can be made that the vote should have been based on seven judges and, thus, the majority of four should have compelled the court to en banc.

In one of two opinions filed for denying en banc reconsideration, Judge Mansfield noted that the purpose of Congress in providing for a majority vote was to ensure that a majority of the judges of a circuit had a hand in determining the law of the circuit:

> The issue here is whether four judges of a court with a nine-judge complement may force an en banc reconsideration that could result in the law of the circuit being determined by less than a majority of the court.[52]

Judge Mansfield's concern, however, that four judges could ultimately pronounce the law of the circuit overlooks the obvious fact that, absent en banc considerations, the law of the circuit on the issues presented by *Zahn* has been decided by a *three* judge panel, two of whom are not even in regular active service.[53] Moreover, it does not follow that the vote of the judges to hear a case en banc is tantamount to a vote on the merits of the appeal. Even if the entire eight man court were counted in determining what majority would be needed to reverse, a vote of a lesser number on the issue of *whether to en banc at all* has no untoward or preemptive effect on the "law of the circuit." Thus,

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50 Although Judges Hays and Feinberg voted to hear the petition they must have concurred in the "minority's" interpretation of 28 U.S.C. § 46(c) (1970) so as to require an affirmative vote of five judges to en banc the case.

51 United States v. American-Foreign S.S. Corp., 363 U.S. 685 (1960). Justice Stewart, speaking for the majority, defined a judge on "regular active service" as one who "has not retired." *Id.* at 688.

52 — F.2d at —.

53 Judges Smith and Moore are senior judges who heard the case in the panel consideration. As such they could not vote to en banc but, if the case were en banced, they could vote on the merits in the rehearing. 28 U.S.C. § 46(c) (1964).

Judge Mansfield's overriding concern with putting the determination of the law of the circuit in the hands of a majority of the entire court has no bearing on the issue of whether a lesser number can put a case before the entire bench.

The decisive-minority's holding is based upon another unsupportable premise, found in the opinion filed by Judge Kaufman. Judge Kaufman felt that the dissent was, for practical purposes, academic because even if the case were en banced the four judges voting for a rehearing would be overridden by five judges, the three judge decisive-minority plus the two senior judges who sat on the original panel and who found against plaintiff-appellants in the first instance.

Judge Timbers pointed out in his dissent that it could not be presumed that the senior panelists who would be qualified to hear the merits en banc would adhere to their original views.[54] The flaw with Judge Kaufman's opinion is more blatant, however, in its assumption that the three judges who ruled against rehearing would also rule against petitioners had the case been en banced anyway. The issue in deciding whether to en banc, *i.e.*, whether the question is extraordinary so as to warrant the entire court's consideration, is patently different from the issue on the merits, *i.e.*, whether all members of a class meet the jurisdictional amount in a diversity case where there are some named class members who do not meet this requirement. Judge Kaufman's opinion is based on an unsupportable presumption and, therefore, can provide no basis for including the disqualified chief judge in the count of the court.

The faulty reasoning found in the decisive-minority's opinion undercuts its holding that Chief Judge Friendly should be included in the count of the judges in regular active service. Moreover, a positive argument exists for excluding him. Had the Chief Judge not disqualified himself the count of the court would have been eight and a majority of five would have been needed to en banc the case. Since four judges voted to en banc, Chief Judge Friendly's vote would have been decisive. A "no" vote would leave a 4-4 tie and the petition would be denied. A "yes" vote would have resulted in a 5-4 decision to en banc. The decisive-minority's position to include a disqualified judge in the count of the court and thus to require a vote of five to en banc has the effect of equating Chief Judge Friendly's disqualification with a "no" vote. This flies in the face of section 47 of the Judicial Code which provides that "No [disqualified] judge shall hear or *determine* an ap-

54 — F.2d at —.

peal. . . ."[55] The purpose of this statute is to ensure that the court consist of only impartial judges.[56] Under predecessor statutes[57] a disqualified judge could cast no vote and if he sat with another judge as a circuit court, the decision of the court was that of the other judge.

If a majority vote were needed to reverse and the disqualified judge were included in the count of the above two-man court, a majority could never be reached and any appeal would have been automatically affirmed. This result was negated by the clear wording of the statute.

By including Chief Judge Friendly in the count of the court, the decisive-minority increased the number of votes needed to en banc as if the Chief Judge had voted against en bancing the case. Such a procedure flies in the face of the clear mandate of the Judicial Code which exempts a disqualified judge from "determining" a case. Upon disqualification, the Chief Judge should have properly been accorded no weight; his vote should have been neutralized by reducing the count of the regular active bench to seven and, thus, the four judges who voted for en banc reconsideration of *Zahn* should have carried the day.

Class Action as a Pendent Claim

Almenares v. Wyman

Almenares v. Wyman[58] is the first federal court of appeals decision to uphold the extension of pendent jurisdiction to a class action wherein the subject class did not qualify as a plaintiff in the primary suit.[59] Although the holding was "severely limited,"[60] the doors to the

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55 28 U.S.C. § 47 (1970).

56 *Cf.* Moran v. Dillingham, 174 U.S. 153, 157 (1899).

57 Act of Sept. 24, 1789, c. 20, § 4, 1 Stat. 74 and Act of Apr. 29, 1802, c. 31, § 5, 2 Stat. 153.

58 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972). *Almenares* was a direct result of the landmark decision in Goldberg v. Kelly, 397 U.S. 254 (1970), which mandated due process hearings for recipients of welfare benefits prior to termination of said benefits. The plaintiffs in *Almenares* contended that the *Goldberg* hearing requirements were equally applicable to reductions in and suspensions of their welfare benefits. Two causes of action were stated. The first and primary claim alleged a violation of due process rights enunciated in *Goldberg* in that benefits to the three women plaintiffs had been reduced, suspended or terminated prior to a fair hearing. The secondary claim, which was the subject of the district court's pendent jurisdiction, averred that the New York State fair hearing procedures, modified after *Goldberg*, did not comply with HEW regulations. Additional plaintiffs were permitted to intervene. The complaint was lodged against both the New York State and New York City Commissioners of Social Services as a class action in which all New York welfare recipients under the AFDC and AABD (*see* notes 75 & 76 *infra*) programs were sought to be represented. 453 F.2d at 1080.

59 *Id.* at 1083. Chief Judge Friendly expressed some uncertainty as to whether the primary claim had been allowed as a class action in the court below. However, the opinion noted that the novelty of the situation presented was not dependent on whether the primary claim was afforded class action treatment since, in any event, the two