

STUDENT COMMENTS

ENVIRONMENTAL CLASS ACTIONS IN THE FEDERAL COURTS—PEERING THROUGH THE ZAHN SMOG

INTRODUCTION: *Zahn v. International Paper*¹

The class action is a procedural device allowing a large number of people who have suffered small individual wrongs to seek redress collectively.² Controversies involving the environment typically involve numerous plaintiffs, difficult questions of fact, and extensive use of expert testimony on complex scientific issues. The damage claims of each injured person are often either of indeterminate amount or of such a small amount as to make the cost of asserting them impractical relative to the possible benefit. Environmental suits, then, are particularly amenable to the class action form of suit.

Either because of the confusion generated by the "true," "hybrid," and "spurious" classifications³ spawned by the original Rule 23 of the Federal Rules of Civil Procedure,⁴ or simply because of the absence of environmental consciousness, class actions were not used to any appreciable extent to enforce environmental rights prior to 1966, the year the new Rule 23⁵ was promulgated. The new Rule

¹ *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), aff'g 469 F.2d 1033 (2d Cir. 1972).

² See Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684 (1941).

³ For a discussion of the difficulties experienced with the classifications established by the original version of Fed. R. Civ. P. 23, see Advisory Comm. Note to Amendments to Fed. R. Civ. P. 23, 39 F.R.D. 69, 98 (1966) [hereinafter cited as *Advisory Comm. Note*].

⁴ When promulgated by the Supreme Court in 1938, Rule 23 provided, in pertinent 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 a 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 affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought

Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645, 689 (1938).

⁵ The Supreme Court deleted the former Rule 23 and replaced it with Fed. R. Civ. P. 23, which provides, in pertinent part:

(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.

attempted to eliminate the classification of class action suits according to the rights sought to be enforced and instead adopted a functional approach, focusing on whether a class action was procedurally appropriate under the given circumstances.⁶ Since environmental complaints particularly lend themselves to class relief, it appeared that the new Rule 23 would open the way to this form of litigation in the environmental area.

It seemed that these hopes were dashed when, in 1973, the Supreme Court affirmed a Second Circuit decision in *Zahn v. International Paper Co.*⁷ and held that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—one plaintiff may not ride in on another's coattails."⁸ The jurisdictional amount referred to is that required by section 1332 of Title 28,⁹ currently \$10,000, which is the amount of damages that must be claimed by the plaintiff in a diversity action in order to gain access to the federal forum for purposes of enforcing state-created rights.¹⁰ The

(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 interests; or

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

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (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.

⁶ Kaplan, A Prefatory Note to the Class Action—A Symposium, 10 B.C. Ind. & Com. L. Rev. 497 (1969).

⁷ 414 U.S. 291 (1973).

⁸ 414 U.S. at 301, quoting 469 F.2d at 1035.

⁹ 28 U.S.C. § 1332(a) (1970) which provides, in pertinent part:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—(1) citizens of different States"

¹⁰ Although the *Zahn* decision is, of course, restricted to diversity actions, the Court strongly implied that the holding would also apply to cases arising under 28 U.S.C. § 1331, the "federal question" domain. 414 U.S. at 302 n.11. 28 U.S.C. § 1331(a) (1970) provides: "(a) The [federal] district courts shall have original jurisdiction of all civil actions wherein the

majority opinion in *Zahn*, written by Justice White, has been strongly criticized,¹¹ with some justification. However, it will be shown that there are approaches to environmental problems, even under Rule 23(b)(3),¹² that are unaffected by the *Zahn* decision.

Across the spectrum of all environmental class actions there is a continuum of claims presented by plaintiffs: on one end are actions seeking only monetary damages, on the other end are those seeking only injunctive relief; in between lie actions wherein plaintiffs seek both monetary damages and injunctive relief. The relative desire for each form of relief varies according to the amount of harm already suffered and the ability of plaintiffs to cope with the pollutant in the future. Those plaintiffs with substantial monetary damage claims can, of course, resort to traditional common law theories and sue as individuals.¹³ Whether such plaintiffs seek only damages or pray for injunctive relief as well, a class action has relatively few advantages from their point of view since the prospect of large damages awards is often a sufficient economic inducement to risk the costs of individual litigation; thus the *Zahn* decision leaves these plaintiffs unaffected. But if individual damages are not substantial, plaintiffs will find it economically impractical to sue as individuals. Divers plaintiffs in an attempted class action seeking only monetary relief under Rule 23(b)(3) or 23(b)(1)(B) actions¹⁴ often suffer widely variant amounts of damage, making it difficult for the class to establish the common and undivided interest, necessary after *Zahn*,¹⁵ to allow aggregation to meet the jurisdictional amount. For plaintiffs in this situation, *Zahn* may have a fatal effect on their claims. If they cannot aggregate their damages to meet the jurisdictional amount, they will be unable to use the class action device. In addition, the individual route to environmental enforcement, because it lacks a sufficient economic inducement, will often remain unpursued.

matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." There are, however, significant reasons why the argument for the exercise of ancillary jurisdiction in a *Zahn*-type fact situation, discussed in text at notes 34-36 *infra*, is even more compelling in a federal question context than in a diversity context. In diversity actions the issue typically is one of state law, which federal courts are not anxious to interpret. On the other hand, federal question actions involve issues of federal law which are better resolved in federal court where there is more expertise in handling federal statutes. Thus the Supreme Court has been less quick to preclude federal jurisdiction whenever a federal question is presented along with a state claim. See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), where plaintiff asserted a claim under the Labor-Management Relations Act, 29 U.S.C. § 141 (1970), and a related claim under state law. The Court concluded that the trial court, having assumed jurisdiction over the federal claim, had power to adjudicate the state claim under the doctrine of pendent jurisdiction, a sub-category of ancillary jurisdiction. 383 U.S. at 725. See text at notes 97-103 *infra*.

¹¹ See, e.g., Note, 10 Idaho L. Rev. 287 (1974); Note, 35 Ohio St. L.J. 190 (1974).

¹² Fed. R. Civ. P. 23(b)(3).

¹³ See, e.g., cases collected at H. Tiffany, *The Modern Law of Real Property* § 519 nn. 7-16, at 520-21 (C. Zollman ed. 1940).

¹⁴ For the full text of Rule 23, see note 5, *supra*.

¹⁵ 414 U.S. at 299.

More common than cases where plaintiffs enforcing environmental rights seek only monetary damages are those situations in which plaintiffs seek both monetary damages and a cessation of the defendant's conduct by court injunction under Rule 23(b)(1), (2) or (3) class actions. Here, the effect of *Zahn* will depend on the facts involved in each case and the relative desire for each remedy. Those plaintiffs interested in recovering damages and only incidentally interested in obtaining injunctive relief face the greatest difficulty in trying to clear the hurdle of *Zahn*. Each plaintiff's primary interest is his individual damage claim, with only a secondary interest common to all plaintiffs in obtaining injunctive relief. Whether the putative class can establish the *Zahn*-required common and undivided interest and thus be allowed to aggregate its claims is likely to depend on how individualized the damage claims are and how appropriate injunctive relief is, *i.e.*, how well the claim for injunctive relief fits into one of the Rule 23(b) subcategories.¹⁶ An abstract way of appraising the latter factor is that the further along a class moves on the continuum of interests to the predominately injunctive relief side of the spectrum, the greater its chance of successfully establishing the common and undivided interest necessary to allow aggregation for the class action. Where there are many plaintiffs who seek only injunctive relief, it appears that the *Zahn* holding becomes inapplicable since the only interest at issue is the common one of halting the challenged conduct.¹⁷

This comment will explore the Rule 23(b)(3)¹⁸ possibilities for environmental class actions left after *Zahn*, as well as the alternative avenues of Rule 23(b)(1)¹⁹ and (b)(2)²⁰ class actions. It will then focus on the use of the Federal Water Pollution Control Act Amendments of 1972²¹ and the Clean Air Amendments of 1970²² as substitutes for the class action suit as means of resolving certain categories of environmental disputes.

¹⁶ See notes 18-20 *infra*.

¹⁷ In an action seeking only injunctive relief the amount in controversy is the value of the right to be protected or the extent of the injury to be prevented. C. Wright, *Handbook of the Law of Federal Courts* § 33, at 116 (2d ed. 1970). See, e.g., *Pennsylvania R.R. v. City of Girard*, 210 F.2d 437, 439 (6th Cir. 1954). The important point to be drawn from this is that where there is a common and undivided interest, plaintiffs would be allowed to aggregate their claims; and the aggregate value of many plaintiffs' rights to a clean environment should often be greater than \$10,000. Cf. *Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972).

¹⁸ Rule 23(b)(3) provides for a class action where questions of law or fact predominate over any questions affecting only individual members. For the full text of Fed. R. Civ. P. 23(b)(3), see note 5 *supra*.

¹⁹ Rule 23(b)(1) provides for a class action where the prosecution of individual actions would force the defendant into inconsistent acts, or would be dispositive of the interests of others not party to the adjudications. For the full text of Fed. R. Civ. P. 23(b)(1), see note 5 *supra*.

²⁰ Rule 23(b)(2) provides for a class action where injunctive relief with respect to the class as a whole is appropriate. For the full text of Fed. R. Civ. P. 23(b)(2), see note 5 *supra*.

²¹ 33 U.S.C. § 1251-1376 (Supp. II 1972).

²² 42 U.S.C. §§ 1857c-3 to 1858a (1970).

I. THE *Zahn* HOLDING

In *Zahn*, four named plaintiffs alleged that pieces of a sludge mass created by the defendant's paper plant periodically broke off and washed up on plaintiff's property, making it unfit for reasonable use and permanently diminishing its value.²³ On behalf of themselves and some 200 similarly situated owners and lessees of lake-front property on Lake Champlain, plaintiffs brought a class action under Rule 23(b)(3), seeking compensatory and punitive damages totalling \$40,000,000.²⁴ Plaintiffs invoked federal jurisdiction, claiming the requisite diversity of citizenship and amount in controversy.²⁵ The United States District Court for the District of Vermont found that the claims of each of the four named plaintiffs satisfied the \$10,000 jurisdictional amount, but it was convinced to a legal certainty that not every individual owner in the proposed class had suffered pollution damages greater than \$10,000.²⁶ Reading the Supreme Court's 1969 decision in *Snyder v. Harris*²⁷ as precluding participation in the action by any member whose claim was less than \$10,000 and concluding that a joinder of owners with claims greater than \$10,000 would be as advantageous as a class action, the district court refused to permit the suit to go forward as a class action.²⁸ The United States Court of Appeals for the Second Circuit upheld the decision of the trial court in a divided opinion,²⁹ relying principally on the authority of *Snyder*.³⁰ The Supreme Court affirmed, holding that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case. . . ."³¹

The Supreme Court relied heavily on *Snyder*,³² which held that plaintiffs who have separate and distinct claims in a Rule 23 action cannot aggregate the amount of their individual claims to meet the \$10,000 jurisdictional requirement.³³ *Zahn* was clearly distinguishable from *Snyder* in that four of the *Zahn* plaintiffs met the jurisdictional amount, whereas none did in *Snyder*. The *Zahn* Court's reliance on *Snyder* was therefore unnecessary: having jurisdiction over the claims of the four named plaintiffs who met the requisite amount in controversy, the Court could have allowed the district court to exercise ancillary jurisdiction over the claims of the plain-

²³ *Zahn v. International Paper Co.*, 469 F.2d 1033, 1034 (2d Cir. 1972).

²⁴ *Id.*

²⁵ As required by 28 U.S.C. § 1332(a) (1970). See note 9 *supra*.

²⁶ *Zahn v. International Paper Co.*, 53 F.R.D. 430, 431 (D. Vt. 1971).

²⁷ 394 U.S. 332 (1969).

²⁸ 53 F.R.D. at 434.

²⁹ *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972).

³⁰ *Id.* at 1034-36.

³¹ 414 U.S. at 301.

³² *Id.*

³³ 394 U.S. at 336. For an excellent critique of *Snyder* and the court of appeals decision in *Zahn*, see Note, 14 B.C. Ind. & Com. L. Rev. 543 (1973).

tiffs who did not.³⁴ Although at least one lower federal court had exercised ancillary jurisdiction to bring into a class action otherwise non-qualifying plaintiffs,³⁵ the Supreme Court failed to apply the doctrine of ancillary jurisdiction to obtain jurisdiction over individual plaintiffs who did not meet the jurisdictional amount in a Rule 23(b)(3) action.³⁶ Instead, the Court relied solely on the *Snyder* non-aggregation theory to achieve a result apparently contrary to the purpose of the new Rule 23(b)(3).³⁷

The focus under the old Rule 23³⁸ was on the character of the right sought to be enforced. Whether the right was common and undivided determined whether the claims of individual plaintiffs in the class could be aggregated to meet the jurisdictional amount.³⁹ The impetus for the promulgation of the new Rule 23 was a desire to discard this classification according to the nature of the right asserted, and its ensuing difficulties, and to focus instead on the practical question of whether a class action is procedurally appropriate in a given case.⁴⁰ *Zahn*, following closely behind *Snyder*, returns to a focus on the character of the right asserted, and establishes that, if the right is a divided one, a class action will not be permitted.⁴¹ The only exception to this prohibition is in those extremely rare situations wherein each plaintiff will meet the \$10,000 jurisdictional amount. Since the typical environmental suit involves a large number of plaintiffs, the putative class is unlikely to fall within this exception. To gauge the true impact of *Zahn* on environmental litigation, it is necessary to determine whether typical

³⁴ For a historical development of and a strong argument for the use of ancillary jurisdiction, see 414 U.S. at 305-08 (Brennan, J., dissenting).

³⁵ *Alamares v. Wyman*, 453 F.2d 1075, 1085 (2d Cir. 1971). In an action challenging the sufficiency of hearing procedures with respect to review of local agency action terminating Aid to Families with Dependent Children, the Second Circuit held that a district court may hear the ancillary claim of a class consisting of New York State resident-plaintiffs, without requiring a showing that the claim met the jurisdictional amount, after it had obtained jurisdiction over a class consisting of New York City resident-plaintiffs. A full treatment of the issues involved in the use of ancillary jurisdiction to solve jurisdictional problems may be found in Note, 14 B.C. Ind. & Com. L. Rev. 543, 555-59 (1973).

³⁶ 414 U.S. at 307-08. Curiously, the majority failed to even address the question of ancillary jurisdiction. The Court seems to have taken a harder stand in its failure in *Zahn* to recognize ancillary jurisdiction over absent plaintiffs than it took earlier in *Moore v. County of Alameda*, 411 U.S. 693 (1973). There the Court recognized and seemed to approve of the trend in the lower courts to use ancillary jurisdiction in such cases, but stressed that the doctrine is discretionary and that the district court did not exceed its discretion in refusing to exercise it. *Id.* at 714-17. This would seem to imply that if the district court in *Zahn* had allowed the ancillary claims to be brought into the action, the Court would have allowed it.

³⁷ For a brief discussion of how *Snyder's* reaffirmance of the old aggregation theory is inconsistent with the purpose of the new Rule 23, see Kaplan, A Prefatory Note to the Class Action—A Symposium, 10 B.C. Ind. & Com. L. Rev. 497 (1969). See also 414 U.S. at 311 (Brennan, J., dissenting).

³⁸ For the full text of the former Rule 23, see note 4 *supra*.

³⁹ Advisory Comm. Note, *supra* note 3, 39 F.R.D. at 98.

⁴⁰ *Id.*

⁴¹ 414 U.S. at 294.

environmental rights are "common," thus allowing aggregation of claims in a class action to meet the jurisdictional amount under the *Zahn* test, and to consider certain environmental rights that may be better protected by individual litigation under recent federal statutes without resorting to a class action suit.

II. FUTURE RULE 23 POSSIBILITIES

In many class actions, especially those in the environmental area, the precise damages are indeterminate and the absent members of the class are often unknown.⁴² *Zahn's* restrictive interpretation of Rule 23(b)(3) therefore would appear to be a devastating blow to environmental enforcement.⁴³ However, a closer examination reveals that the holding in *Zahn* is actually quite limited: where plaintiffs have separate and distinct claims, aggregation will not be permitted in Rule 23(b)(3) actions, even though some individual members of the putative class meet the jurisdictional amount. This is merely an affirmation of a long line of decisions under the so-called *Pinel* doctrine:⁴⁴

When two or more plaintiffs having separate and distinct demands unite for convenience and economy in a single unit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.⁴⁵

The disappointing feature of the *Zahn* decision, then, is not that it created new barriers to environmental class actions, but that it failed to discard the old ones existing under the *Pinel* doctrine, as the new Rule 23 was clearly intended to do.⁴⁶

Thus, after *Zahn*, the class action device remains available under Rule 23(b)(3) where the plaintiffs' claims are common and undivided. One recent federal district court decision has specifically

⁴² See, e.g., *Philadelphia v. American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971). (class actions by taxicab company on behalf of 550 similar companies in three state area, by contractor on behalf of 10,000 bulk purchasers, and by city and state on behalf of governmental units and bulk purchasers in three states, allowed against gasoline companies for alleged price-fixing in violation of antitrust laws).

⁴³ 414 U.S. at 308 (Brennan, J., dissenting).

⁴⁴ The doctrine draws its name from the case of *Pinel v. Pinel*, 240 U.S. 594 (1916), even though the oft-quoted language from *Pinel* is actually drawn from an earlier case, *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39 (1911). Both cases involved permissive joinder, not a class action. Perhaps the choice of name is due to *Pinel's* holding, on the particular facts before the Court, that aggregation was inappropriate, 240 U.S. at 596, while *Troy Bank* held that it was appropriate, 222 U.S. at 41. For an exhaustive listing of cases following *Pinel*, see 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1756, at 554-55 (1972).

⁴⁵ 222 U.S. at 40.

⁴⁶ *Bangs*, Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount, 10 B.C. Ind. & Com. L. Rev. 601, 604-06 n.17 (1969).

recognized that *Zahn* does not foreclose such claims. In *Cass Clay, Inc. v. Public Service Co.*,⁴⁷ plaintiffs sued to enforce a contract between a public utility and the government whereby the utility agreed to pass on to its customers the savings resulting from purchasing electricity from the government.⁴⁸ The court held that the plaintiffs had a common and undivided interest in the fund generated by these savings, even though the amount of damages would be different for each customer, and therefore concluded that *Zahn* was not applicable.⁴⁹ Thus an aggregation of claims to meet the jurisdictional amount was permitted, and the case was allowed to proceed as a Rule 23(b)(1) action.⁵⁰

The *Pinel* doctrine merely states a rule; it does not provide a guide for how the rule should be applied. *Zahn*, by reaffirming the *Pinel* doctrine without elaborating any guidelines for its application, returns to the old Rule 23 thicket where, in the words of the Advisory Committee, "[i]n practice the terms 'joint,' 'common,' etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain."⁵¹ The courts generally have found that the required common question exists where an alleged antitrust conspiracy is the major issue,⁵² or where fraudulent misrepresentation on a massive scale has been alleged.⁵³ Other than these two general categories, joint or common rights have been found in a wide range of fact situations. Those involved in the earlier cases were such as to fit relatively easily into the common and undivided or separate and distinct⁵⁴ categories.⁵⁵

⁴⁷ 42 U.S.L.W. 2586 (D.S.D. Apr. 26, 1974).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Advisory Comm. Note, *supra* note 3, 39 F.R.D. at 98.

⁵² E.g., *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968); *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968); *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967).

⁵³ E.g., *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969); *Weisman v. MCA Inc.*, 45 F.R.D. 258 (D. Del. 1968); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968); *Fischer v. Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966). But see *Berger v. Purolator Prods., Inc.*, 41 F.R.D. 542 (S.D.N.Y. 1966). For a good discussion on class actions allowed or denied in antitrust and fraudulent misrepresentation areas, see Note, Rule 23: Categories of Subsection (b), 10 B.C. Ind. & Com. L. Rev. 539, 549-50 (1969).

⁵⁴ See, e.g., *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911).

⁵⁵ The earlier cases were actually actions seeking permissive joinder of parties, and not class actions; but the aggregation test is the same. See *Snyder*, 394 U.S. at 397. Where seamen joined in a suit for wages, since each plaintiff had a separate contract and since the recovery of each did not affect the rights of others, it was clear that the plaintiffs' interests were separate and distinct. *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143 (1832). See also *Rich v. Lambert*, 53 U.S. (12 How.) 347 (1851); *Stratton v. Jarvis*, 33 U.S. (8 Pet.) 4 (1834). Where the plaintiffs claim under a single title or right, so that the adjudication of the claim of any one plaintiff necessarily involves the validity of the title or right affecting all, it is equally clear that their interests are common and undivided. Thus, where plaintiffs jointly enter into a contract with a single defendant, the matter in controversy is the amount of the contract, so that aggregation will be allowed. *The Connemara*, 103 U.S. 754 (1880); *Shields v. Thomas*, 58 U.S. (17 How.) 3 (1854). Where the beneficiaries of an estate sue the administrator for

In the older cases, a frequently used rule to test whether a right or interest was common, turned on whether it was material *to the defendant* how any damages would be distributed among the plaintiffs.⁵⁶ The reasoning underlying this rule apparently is that if the defendant is unconcerned with how damages would be distributed, but is only concerned with whether damages should be given at all, he is relating to the plaintiffs as a single unit. In such cases the plaintiffs should be allowed to present their claims accordingly, as a single unit with a common and undivided interest.

Another similar rule occasionally encountered is that plaintiffs have a common and undivided interest if the interest of any one plaintiff is not antagonistic to, but is wholly compatible with, the interests of those he would represent.⁵⁷ This is just another way of saying that the common goal of the plaintiffs, the right or title they seek to vindicate, overrides the interest each individual plaintiff may have by way of damages.

Unfortunately, since the late 1800's, no Supreme Court case has discussed these guidelines or any others relative to determining whether a right is common or distinct. In each case on point the Court has simply cited the *Pinel* doctrine, which merely holds that aggregation will be allowed if the right is common, and summarily placed the right into one of the categories.⁵⁸

Another issue not adequately dealt with by the courts is how these tests apply to plaintiffs seeking injunctive relief. However, it is

converting the estate property to his own use, they all claim under the will controlling the estate. The validity of the will is the common interest and the matter in controversy will be the aggregate value of the plaintiffs' claims, normally the value of the estate. *Id.* See also *Overby v. Gordon*, 177 U.S. 214 (1899). But where each plaintiff seeks to reform the will to include himself as an additional beneficiary, their rights are separate and distinct, since the question of whether one plaintiff should be included has no effect on whether another will be. *Pinel v. Pinel*, 240 U.S. 594, 596 (1916). Also, where several mortgagees claim under one mortgage title it is the amount of the mortgage, which is the aggregate of their claims, that controls. *Rodd v. Heartt*, 84 U.S. (17 Wall.) 354 (1872). See *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Troy Bank v. Whitehead & Co.*, 222 U.S. 39 (1911); *New Orleans Pac. Ry. v. Parker*, 143 U.S. 42 (1892); *Ex parte Baltimore & O. R.R.*, 106 U.S. 5 (1882). However, if the mortgagees claim under separate mortgages, they no longer have a joint interest. Thus, each must satisfy the jurisdictional amount. *Davis v. Schwartz*, 155 U.S. 631 (1895). But see *Clay v. Field*, 138 U.S. 464 (1890). Where plaintiff-relatives jointly sue in a wrongful death action, their right to compensation is joint, even though the amounts collected by each may be different. *Texas & Pac. Ry. v. Gentry*, 163 U.S. 353 (1896); cf. *The "Mamie"*, 105 U.S. 773 (1881).

⁵⁶ E.g., *Texas & Pac. Ry. v. Gentry*, 163 U.S. 353, 362 (1896); *Handley v. Stutz*, 137 U.S. 366, 369 (1890); *Gibson v. Schufeldt*, 122 U.S. 27, 32 (1887); *Davies v. Corbin*, 112 U.S. 36, 40 (1884).

⁵⁷ See, e.g., *Advertising Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108, 119 (1st Cir. 1956).

⁵⁸ See, e.g., *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973); *Snyder v. Harris*, 394 U.S. 332, 336 (1969); *Gibbs v. Buck*, 307 U.S. 66, 74 (1939); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588 (1939); *Lion Bonding Co. & Surety v. Karatz*, 262 U.S. 77, 85-86 (1923); *Scott v. Frazier*, 253 U.S. 243, 244 (1920); *Title Guaranty & Surety Co. v. Allen*, 240 U.S. 136, 140 (1916); *Rogers v. Hennepin County*, 239 U.S. 621, 622 (1916); *McDaniel v. Traylor*, 196 U.S. 415, 431 (1905); *Wheless v. St. Louis*, 180 U.S. 379, 383 (1901); *Clay v. Field*, 138 U.S. 464, 480 (1890).

difficult to imagine a situation where plaintiffs seeking injunctive relief would fail to pass the above tests. A defendant has no concern over how much each individual plaintiff will benefit from a court order forcing the defendant to act or cease to act in a certain way. His only concern is whether injunctive relief will be given. Similarly, each plaintiff, even though he may have suffered a different amount of damage than the others, has an interest in obtaining the same injunctive relief. Thus his interest is wholly compatible with and not antagonistic to those of the other plaintiffs.

Upon a superficial analysis, then, it would seem clear that wherever plaintiffs seek injunctive relief the interest or right involved should be denominated as common, and aggregation should be allowed. The case law, however, is divided on the issue, with no clear guidance as to why an interest in receiving injunctive relief is determined to be common or not.⁵⁹ Especially with regard to injunctive relief, the confusion is best described by Professor Chaffee: "Perhaps I am color-blind with respect to class suits, but I often have as much perplexity in telling a 'common' right from a 'several' right as in deciding whether some ties and dresses are green or blue."⁶⁰ As is true with respect to class actions generally, there appears to be no case law that develops guidelines to determine which environmental rights may be denominated common and undivided. It appears, however, that many such rights will so qualify, especially when injunctive relief is sought.

In the typical environmental class action suit, each plaintiff, no matter how large or small his claim for damages, primarily seeks to stop the conduct of the defendant. Thus, if each plaintiff were to sue separately, there would be at least one claim common to the complaints of all: the prayer for injunctive relief to end the defendant's conduct. So far as reparation for past harm is concerned, the damage claim of one plaintiff may be distinct from the claims of other plaintiffs, since each may have suffered separate harms of varying degrees; but his equitable claim, usually his predominant interest, is not. Seeking injunctive relief in the typical environmental action would thus establish the common interest of the class members. This common interest is wholly compatible with, and not in the least antagonistic to, the interest of all the other plaintiffs. This is especially true in those class actions where injunctive relief is the sole remedy sought. In such cases, plaintiffs would seem to meet the common and undivided interest test almost by definition, and thus

⁵⁹ Cases allowing aggregation include *Gibbs v. Buck*, 307 U.S. 66, 72 (1939); *New Orleans Pac. Ry. v. Parker*, 143 U.S. 42, 52 (1892); *Davies v. Corbin*, 112 U.S. 36, 41 (1884); *The "Mamie"*, 105 U.S. 773, 774 (1881); *Market Co. v. Hoffman*, 101 U.S. 112, 114 (1879). Cases in which aggregation was not allowed include *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 590 (1939); *Scott v. Frazier*, 253 U.S. 243, 244 (1920); *Title Guar. & Sur. Co. v. Allen*, 240 U.S. 136, 140 (1916); *Rogers v. Hennepin County*, 239 U.S. 621, 622 (1916); *Wheless v. St. Louis*, 180 U.S. 379, 383 (1901).

⁶⁰ Z. Chaffee, *Some Problems of Equity* 257 (1950).

be able to form a Rule 23 class. The trend in environmental class suits today appears to be in the direction of those situations where injunctive relief is the only appropriate remedy. For this reason, *Zahn* may therefore have less impact on future environmental class actions than on other types of class actions.⁶¹

Since most environmental class action plaintiffs will seek some form of injunctive relief and since Rule 23(b)(1) and (b)(2) provide for such relief, 23(b)(3) is not the only category available. Because *Zahn* requires an examination of the nature of the right asserted at the outset of litigation, regardless of the subcategory of Rule 23(b) claimed under, plaintiffs will be forced to establish a common interest in the asserted right before aggregation will be permitted. Thus, the other subcategories of Rule 23(b) should be examined in light of *Zahn*.

A Rule 23(b)(2) class action exists when the requirements of 23(a) have been met and in addition, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."⁶² If injunctive or declaratory relief is the only remedy sought, the action is clearly a proper one under the specific language of Rule 23(b)(2).⁶³ If monetary damages are also sought, the action risks not being allowed under 23(b)(2). One authority has suggested that "[i]f the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). Those aspects of the case not falling within Rule 23(b)(2) should be treated as incidental."⁶⁴ However, most courts have not treated the mere request for equitable relief, where damages are also involved, as enough to qualify an action under 23(b)(2).⁶⁵

The prevailing view today is that expressed by the Advisory Committee: Rule 23(b)(2) actions do "not extend to cases in which the appropriate final relief relates exclusively or predominately to monetary damages."⁶⁶ Not only must the predominate relief sought be equitable but it must be "final," that is, temporary injunctions or conditional decrees are excluded.⁶⁷ Where the relief sought is predominately equitable and where there is a choice to proceed under Rule 23(b)(2) or (b)(3), the court should allow the action to go

⁶¹ Thus, it appears that the downfall of the *Zahn* plaintiffs was that, in seeking monetary damages only (the amount being different for each individual plaintiff) and failing to express a common interest by way of a prayer for injunctive relief, their claims fell into the separate and distinct mire. 414 U.S. at 300.

⁶² Fed. R. Civ. P. 23(b)(2).

⁶³ For the full text of Rule 23, see note 5 *supra*.

⁶⁴ C. Wright & A. Miller, *Federal Practice and Procedure*, Civil § 1775, at 23 (1972).

⁶⁵ See, e.g., *Graybeal v. American Sav. & Loan Ass'n*, 59 F.R.D. 7, 15 (1973).

⁶⁶ Advisory Comm. Note, *supra* note 3, 39 F.R.D. at 102.

⁶⁷ See *Morse-Starrett Prods. Co. v. Steccone*, 205 F.2d 244, 249 (9th Cir. 1953).

forward under 23(b)(2).⁶⁸ In fact, since 23(b)(2) has more stringent requirements than 23(b)(3) in that final injunctive relief must be appropriate, virtually every class action qualifying under 23(b)(2) will also qualify as a 23(b)(3) action. When this is the case, 23(b)(3) has been held to be inappropriate.⁶⁹

Since final injunctive relief would appear to be the primary relief sought in many environmental actions, 23(b)(2) would seem to be a most useful category for environmental class suits. However, it is not yet clear that mere appropriateness of injunctive relief will fulfill the *Zahn* requirement of a common and undivided interest among the members of the class. Thus, there remains the question of whether aggregation of claims to meet the jurisdictional amount will be allowed in a 23(b)(2) action. Judge Frankel suggested, soon after the promulgation of the new Rule 23, that in cases cognizable under 23(b)(1) or (b)(2), aggregation should be permitted, but not under 23(b)(3).⁷⁰ Although the case law has not yet adopted this hard and fast view, it is a view consistent with the argument that plaintiffs seeking predominately equitable relief in an environmental suit will typically have a common interest that allows aggregation.

Since equitable relief is a remedy available under Rule 23(b)(1), that section is another avenue open for environmental class suits. A Rule 23(b)(1) class action exists when the requirements of Rule 23(a) have been met 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 party to the adjudications or substantially impair their ability to protect their interests;⁷¹

Actions which seek only damages are not appropriate Rule 23(b)(1)(A) actions. The fact that the defendant may have to pay some plaintiffs and not others is not the inconsistency referred to in the Rule.⁷² Rather, 23(b)(1)(A) actions are appropriate wherever equitable relief is sought and qualifies as the type likely to force the defendant to do inconsistent acts. The Advisory Committee gives

⁶⁸ See, e.g., *Zachary v. Chase Manhattan Bank*, 52 F.R.D. 532 (S.D.N.Y. 1971).

⁶⁹ See, e.g., *Mungin v. Florida E. Coast Ry.*, 318 F. Supp. 720, 730 (M.D. Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir. 1971).

⁷⁰ Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 48-53 (1968).

⁷¹ Fed. R. Civ. P. 23(b)(1).

⁷² See Advisory Comm. Note, *supra* note 3, 39 F.R.D. at 100.

the example of separate actions by individuals seeking declaratory and injunctive relief relative to a municipal bond issue.⁷³ One plaintiff may seek to declare the issue invalid, another to condition it, a third to limit it. The issuer of the bond could be called on to withdraw the offer, to continue the offer at a different interest rate, or to limit the offer to state residents. Thus the defendant opposing the class of those attacking the issue would be ordered by different courts to act in inconsistent ways.⁷⁴

In the environmental area for example, suppose municipality X is burning its refuse in an outmoded incinerator, causing soot to fall on neighbors A, B and C. A sues to stop all incineration immediately, B to force a scheduled incineration depending on atmospheric conditions, and C to force X to install particulate traps in the stack. X cannot be ordered to do all three since they are inconsistent. Add to the situation a hundred more plaintiff-neighbors and it is clear that a class action is the only practical way to settle the dispute.

The threat of individual suits compelling inconsistent acts is specious unless there is in fact a possibility that individual suits will be brought.⁷⁵ For example, if the class is small and the individual claims miniscule, individual suits would be so unlikely as to preclude the use of 23(b)(1)(A). What, then, is the practical difference between an action brought under Rule 23(b)(1)(A) and one brought under 23(b)(2)? In any situation where final injunctive relief is appropriate there is always the possibility that a defendant will be forced into inconsistent actions if the injured parties sue individually. Thus it would appear that every 23(b)(2) action might also qualify under the terms of (b)(1). The converse, however, is not necessarily true. There may be actions seeking declaratory or injunctive relief wherein final relief is not requested or appropriate. These actions would be foreclosed from the 23(b)(2) category,⁷⁶ but might still qualify under 23(b)(1), since even temporary equitable judgments can place inconsistent demands on a party.

There is little precedent under Rule 23(b)(1)(A) in the environmental area to serve as a guide to future possibilities. Nevertheless, since environmental abuses are particularly susceptible to attacks framed in terms of declaratory or injunctive relief, the Rule 23(b)(1)(A) category should not be overlooked by strategists. Its usefulness, however, will depend in large part on whether aggregation of claims to meet the jurisdictional amount will be permitted. But where there are many individuals seeking identical injunctive relief, a common and undivided interest usually exists,⁷⁷ and aggregation should be allowed.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968).

⁷⁶ See discussion in text at note 66 *supra*.

⁷⁷ See discussion in text at notes 58-61 *supra*.

The focus in Rule 23(b)(1)(B) actions is not so much on the effects of inconsistent adjudications, but rather on whether one or more individual adjudications would effectively prejudice the ability of other members of a putative class to seek redress. Suppose, for example, an inventor alleges that a hundred different corporations have infringed his patent. The issues in a patent infringement case are often so technically complex that the outcome in a hundred different suits is not likely to be uniform. If one corporation brought suit seeking a declaratory judgment that the patent was invalid, a result favorable to the plaintiff could well be dispositive of the interests of the other ninety-nine companies, and in this way impair their rights. A Rule 23(b)(1)(B) class action on behalf of all one hundred companies would then be appropriate.⁷⁸ Suppose plaintiff B in the incineration example succeeds in obtaining a court order forcing X to burn only on days when the wind velocity is at least 10 mph. He has certainly prejudiced the rights of those neighbors whose homes lie in the dispersal area created by the prevailing 10 mph winds, especially if the court's decree was premised on a finding that soot deposits are insignificant when discharge occurs into 10 mph winds.

Whenever injunctive relief is the primary remedy sought under Rule 23(b)(1)(B) it is particularly necessary to allow the action to proceed as a class action, because injunctive relief obtained by an individual is more likely to impair the rights of absent plaintiffs than would a successful individual suit for damages. The extent of damages that plaintiff A may obtain in an individual suit has little effect on the damage claim asserted by B in another action. However, the extent of injunctive relief obtained by A, as in the incineration example, is more likely to prejudice the rights of B. Although A and B may have separate interests so far as their respective damage claims are concerned, since each claim is grounded in past harms suffered individually, they share a common and undivided interest with respect to the future in their desire to restrain the polluter. Furthermore, the damages suffered by one individual may be so insignificant as to not, as a practical matter, convince a court to grant injunctive relief. However, the common interest of hundreds of plaintiffs may well be sufficient to permit such relief. In such situations a suit by an individual plaintiff may as a practical matter be dispositive of the rights of the other plaintiffs, and so a class action under Rule 23(b)(1)(B) should be permitted.

Actions which seek only damages are appropriate under Rule 23(b)(1)(B), but presumably they would face the same barrier to aggregation that the *Zahn* plaintiffs faced. Again, if injunctive or declaratory relief is the primary remedy sought, this establishes the plaintiffs' interests as common and undivided and also makes for a

⁷⁸ See *Research Corp. v. Pfister Associated Growers*, 301 F. Supp. 497 (N.D. Ill. 1969) (patent holder sued over 400 seed companies as a class, alleging patent infringement).

convincing argument that the rights of absent members will be impaired should a class action not be allowed.⁷⁹

III. STATUTORY RELIEF

There has been significant congressional action relative to environmental issues since the *Zahn* case entered litigation. The two statutes discussed below specifically grant federal jurisdiction without regard to the \$10,000 amount,⁸⁰ allowing individuals with small claims to sue in federal court, and so may obviate the necessity for class actions in solving the environmental problems covered therein.

A. Federal Water Pollution Control Act

The Federal Water Pollution Control Act Amendments of 1972⁸¹ establish effluent standards for any individual or corporation dumping effluent into any navigable stream or body of water. It specifically grants the federal district courts jurisdiction, without regard to the amount in controversy or the citizenship of the parties, over suits instituted by citizens.⁸² The statute defines a citizen as one or more "persons having an interest which is or may be affected."⁸³ The wording of the statute clearly applies few barriers to environmental suits. The *Zahn* plaintiffs could not have obtained jurisdiction under this Act because the pre-1972 version had no provision for citizen suits.⁸⁴ However, in the future, *Zahn*-type plaintiffs possessing the applicable substantive claims should be able to assert federal jurisdiction under this Act and append their claims for damages.⁸⁵

⁷⁹ But at least one court has refused to allow aggregation in a Rule 23(b)(1)(B) action. *Beckerman v. Sands*, 364 F. Supp. 1197, 1200 (S.D.N.Y. 1973).

⁸⁰ 33 U.S.C. § 1365(a) (Supp. II 1972). For the text of the relevant portions see note 82 infra; 42 U.S.C. § 1857h-2(a) (1970). For the text of the relevant portions see discussion in text at note 110 infra.

⁸¹ 33 U.S.C. § 1251 et seq. (Supp. II 1972).

⁸² 33 U.S.C. § 1365(a) (Supp. II 1972) which provides:

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action *on his own behalf*—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act, or (B) an order issued by the Administrator [of the Environmental Protection Agency] or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, *without regard to the amount in controversy or the citizenship of the parties*, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties. [Emphasis added.]

⁸³ 33 U.S.C. § 1365(g) (Supp. II 1972).

⁸⁴ See 33 U.S.C. §§ 1151-75 (1970).

⁸⁵ See discussion in text at notes 96-103 infra.

Since there is as yet no reported case law where an injured party has sued a private individual or corporation under section 1365(a)(1) of the Federal Water Pollution Control Act Amendments of 1972,⁸⁶ one must look to its legislative history to determine what limitations, if any, the statute imposed on citizen's suits. The Senate Public Works Committee emphasized that citizens should be encouraged to bring suit in the district courts against anyone violating effluent standards and against the EPA administrator for not enforcing those standards.⁸⁷ The Committee also encouraged enforcement actions against government agencies, with specific reference to the Department of Defense, an agency which has been lax in abating pollution within its control.⁸⁸ It is clear that Congress, intended few restraints on citizen suits.⁸⁹ It was the intent of Congress however, not to authorize class action suits under this Act.⁹⁰ The only restriction appearing in the statute to this effect is the language stating that "any citizen may commence a civil action *on his own behalf* . . ."⁹¹ A recent federal district court decision, in refusing to allow a class action to proceed under the Act, cited the legislative history as clear evidence that the statute was not intended to authorize class actions, and concluded that the phrase "on his own behalf" constitutes a specific statutory exclusion of class action suits.⁹²

Although this interpretation of the Federal Water Pollution Control Act Amendments of 1972 closes the door to class actions suits, it is still possible under the Act for an individual to achieve many of the same objectives and benefits that a class action would obtain. First, a typical water pollution environmental class action would have as a primary goal the enjoining of further pollution. To the extent that the challenged pollution exceeds an established effluent standard, this end will be accomplished just as effectively

⁸⁶ 33 U.S.C. § 1365(a) (Supp. II 1972).

⁸⁷ S. Rep. No. 92-414, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 3668, 3677.

⁸⁸ Id. at 3746.

⁸⁹ "It is the Committee's intent that enforcement of these control provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them." Id.

⁹⁰ The section is drawn to avoid problems raised by class action provisions of the Federal civil rules of procedure, specifically by Rule 23. Section 505 does not authorize a "class action." Instead, it would authorize a private action by any citizen or citizens acting on their own behalf. Questions with respect to traditional "class" actions often involve: (1) identifying a group of people whose interests have been damaged; (2) identifying the amount of total damage to determine jurisdictional qualification; and (3) allocating any damages recovered. None of these points is appropriate in citizens suits seeking abatement of violations of water pollution control requirements. It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available.

Id.

⁹¹ 33 U.S.C. § 1365(a) (Supp. II 1972) [emphasis added].

⁹² Brown v. Ruckelshaus, 364 F. Supp. 258, 264-65 (C.D. Cal. 1973).

by an individual suit prosecuted under the Act.⁹³ Second, without the use of the class action approach, an individual plaintiff cannot share the costs of litigation with others similarly situated, and to this extent an individual suit under the Act is less advantageous than a class suit, especially for those plaintiffs with small individual damages. However, this is mitigated where the plaintiff is successful in forcing the Administrator to issue an abatement order to the polluter, as he is entitled to reimbursement of all costs, expenses, and attorney fees.⁹⁴ In addition, if he brings suit and succeeds in obtaining a final court order, the court may award the costs of litigation, including attorney fees, whenever appropriate.⁹⁵ This puts the plaintiff who brings the suit in virtually as good a position as if he had brought a class action suit.

A more complicated question arises when a plaintiff is interested not only in putting and end to the pollution, but also in recovering damages for harm suffered as a result of violation of the Act. Since there are specific statutory provisions for fines,⁹⁶ it might be argued that these fines are the only monetary liabilities Congress contemplated imposing on violators prosecuted under the provisions of the Act.⁹⁷ This position, however, does not take into account Congress's intent that the section authorizing citizen's suits "would specifically preserve any rights or remedies under any other law"⁹⁸ and how the doctrine of pendent jurisdiction would effect claims for damages under such laws.

The basis of plaintiff's action would then consist of a federal claim of violation of an effluent standard under the Act and a state claim for monetary damages due to the pollution. Unlike the plaintiffs in *Zahn*, who tried to use the federal jurisdiction over the claims of the four named plaintiffs as a basis to extend jurisdiction over the claims of the absent plaintiffs, a plaintiff under the Act could, under the doctrine of pendant jurisdiction, use the federal court's jurisdiction over his federal claim as a basis for extending federal jurisdiction over his state claim.⁹⁹ In *Zahn*, both the plaintiffs and the claims would be different had a class action been allowed. Under pendent jurisdiction, additional claims rather than

⁹³ Since the Act rests on effluent standards established by the EPA Administrator, if no standard is yet prescribed for the specific alleged pollutant, no action will obtain under the Act. Compare cases cited at note 111 *infra*, decided under the 1970 Clean Air Amendments.

⁹⁴ See 28 U.S.C. § 1367(c) (Supp. II 1972). For a discussion of the computation of awards of attorney's fees see, Comment, 16 B.C. Ind. & Com. L. Rev. xxx (1975).

⁹⁵ 28 U.S.C. § 1365(d) (Supp. II 1972). For a discussion of awards of attorney's fees when not authorized by statute, see, Liability For Attorney's Fees in the Federal Courts—The Private Attorney General Exception, 16 B.C. Ind. & Com. L. Rev. 201 (1975).

⁹⁶ See, e.g., 33 U.S.C. § 1319(d) (Supp. II 1972).

⁹⁷ "It should be noted that any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant." S. Rep. No. 92-414, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 3668, 3745.

⁹⁸ *Id.* at 3677.

⁹⁹ Cf. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

new plaintiffs are admitted. In order to exercise pendent jurisdiction:

The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.¹⁰⁰

Where the state claim is closely tied to questions of federal policy, it is appropriate, although discretionary, for the federal courts to exercise pendent jurisdiction over it.¹⁰¹ A plaintiff's damage claims under the Act clearly derive from the common nucleus of the operative fact of defendant's pollution in excess of an effluent standard, and such pollution is contrary to the federal policy established by the Act. Since his federal claim is substantial and since the imposition of liability necessary to assess damages will require the identical findings of fact as the imposition of liability under the Act, he would be expected to bring his damage claims into the same proceeding. In the typical case the facts and issues will be identical so that plaintiff's damage claim is merely an additional remedy sought. Since the subject matter jurisdiction of the court has already been established by his primary claim, there is no need to meet the requisite amount in controversy for the pendent claim.¹⁰² "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."¹⁰³

Once one plaintiff has obtained injunctive relief under the Act, other plaintiffs who seek monetary damages and who did not join the original action are certainly not in as good a position as if the entire controversy were heard in a class action. After one plaintiff has used the Act to obtain injunctive relief, identical actions by other plaintiffs for the same injunctive relief would be moot. Thus these other plaintiffs cannot use the Act as a vehicle for their damage claims. They must either seek to institute a class action, which would be difficult in federal courts since it would be unlikely they could aggregate their damage claims in an action for only damages, or they must proceed with individual damage suits under common law in the state courts. The only consolation is that the defendant-polluter may be more vulnerable to damage claims of other plaintiffs once he has been found guilty, but even this may not

¹⁰⁰ Id.

¹⁰¹ Id. at 727.

¹⁰² See id. at 725.

¹⁰³ Bell v. Hood, 327 U.S. 678, 684 (1946).

be true if the state has different substantive law than that defined by the Act.

B. 1970 Clean Air Amendments

The 1970 Clean Air Amendments¹⁰⁴ were passed with the belief that deteriorated air quality posed a serious threat to the public health that could only be successfully overcome by swift and effective action.¹⁰⁵ The Act requires the Administrator of the EPA to establish national air quality standards for various contaminants¹⁰⁶ and to obtain from and approve plans of the states for meeting these standards.¹⁰⁷ The Administrator may resort to the federal courts to force compliance from any source in violation of emission standards.¹⁰⁸ Congress wished to encourage enforcement of these standards by individual citizens as a supplement to federal and state enforcement.¹⁰⁹ The Amendments provide that:

[A]ny person may commence a civil action on his own behalf—(1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this chapter The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order¹¹⁰

There are limitations to possible court actions by citizens: if there is no final pollution standard set by the EPA, an action under this Act will not lie.¹¹¹ Also, if the plaintiff wishes to charge the Administrator with abuse of discretion in approving a state plan, he is restricted to the circuit courts.¹¹² Although these restrictions do not speak to the availability of class actions under the Act, the words "on his own behalf," identical to the corresponding provision under the Water Pollution Control Act,¹¹³ would preclude class action suits.¹¹⁴

¹⁰⁴ 42 U.S.C. § 1857 et seq. (1970). For a discussion on the use of the courts to enforce the provisions of this Act, see Lunenberg & Roselle, *Judicial Review Under the Clean Air Amendments of 1970*, 15 B.C. Ind. & Com. L. Rev. 667 (1974).

¹⁰⁵ See, e.g., H.R. Rep. No. 1146, 91st Cong., 2d Sess. 1, 5 (1970); S. Rep., No. 1196, 91st Cong., 2d Sess. 1, 3 (1970).

¹⁰⁶ 42 U.S.C. § 1857c-4 (1970).

¹⁰⁷ 42 U.S.C. § 1857c-5(a)(1) (1970).

¹⁰⁸ 42 U.S.C. § 1857c-8(b) (1970).

¹⁰⁹ S. Rep. No. 1196, 91st Cong., 2d Sess. 1, 3 (1970).

¹¹⁰ 42 U.S.C. § 1857h-2(a) (1970).

¹¹¹ *Citizens Ass'n v. Washington*, 370 F. Supp. 1101 (D.D.C. 1974); *Wuillamey v. Werblin*, 364 F. Supp. 237 (D.N.J. 1973).

¹¹² 42 U.S.C. § 1857h-5(b)(1) (1970). See *Ely v. Veld*, 451 F.2d 1130 (4th Cir. 1971); *Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co.*, 367 F. Supp. 1040 (D. Del. 1973). Similar actions under the Water Pollution Control Amendments of 1972 may be brought in federal district court. 33 U.S.C. § 1365(a) (Supp. II 1972).

¹¹³ 33 U.S.C. § 1365(a) (Supp. II 1972).

¹¹⁴ See text at notes 91-92 *supra*.

As far as appending individual damage claims to actions under the Act, the same arguments discussed relative to the Water Pollution Control Act are applicable to the Clean Air Amendments. And since costs can be similarly awarded to successful plaintiffs under this Act,¹¹⁵ a plaintiff alleging damages less than \$10,000 resulting from air pollution in excess of federal standards may proceed under the Act as a reasonable alternative to a class action suit.

IV. CONCLUSION

The *Zahn* decision was unfortunate, both for its improper reliance on *Snyder* and its failure to adopt ancillary jurisdiction to bring in parties who do not meet the \$10,000 jurisdictional amount. It is a disappointing decision in that it reverts back to the old Rule 23 aggregation principles based on common and undivided interests. Although *Zahn* involved an environmental class action, it is submitted that the holding will have little impact of future environmental class actions since most environmental class actions seek to enforce public rights typically involving insignificant individual damages. The primary relief ordinarily sought is injunctive. Injunctive relief is a common interest of all the plaintiffs in a putative class in an environmental suit, and since plaintiffs have this common and undivided interest, they will be more likely to be permitted to aggregate their damage claims to meet the jurisdictional amount. Thus the majority of environmental class actions should be able to avoid the *Zahn* jurisdictional problem by requesting solely injunctive relief, or requesting such relief in combination with damages as a secondary remedy, and presenting the case as a Rule 23(b)(1), (b)(2) or (b)(3) action. In addition, jurisdiction specifically granted to citizens under the Water Pollution Control Act¹¹⁶ and the Clean Air Amendments of 1970,¹¹⁷ although restricted to individual actions, should avoid the *Zahn* jurisdictional dispute and will be an acceptable alternative in most situations covered by those acts.¹¹⁸ The net

¹¹⁵ 42 U.S.C. § 1857h-2(d) (1970).

¹¹⁶ 33 U.S.C. § 1365(a) (Supp. II 1972).

¹¹⁷ 42 U.S.C. § 1857h-2(a) (1970).

¹¹⁸ Two additional theories for avoiding the *Zahn* jurisdictional problem are too speculative to merit lengthy discussion. The first involves the use of one of the acts discussed as a basis for federal jurisdiction under 28 U.S.C. § 1331 (1970)—a federal common law concept. The argument is that the act creates a federal right and any alleged violation of that right is a federal question. This approach was taken in *Wuillamey v. Werblin*, 364 F. Supp. 237 (D.N.J. 1973), and in *Citizens Ass'n v. Washington*, 370 F. Supp. 1102 (D.D.C. 1974), but in light of the limitations on the development of federal common law laid down in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the theory would seem to have little future.

The second theory is that there is a federal constitutional guarantee to a clean environment, under the Fifth or Fourteenth Amendment protection against the deprivation of life without due process, or under the Ninth Amendment, as a right retained by the people. Disputes involving the environment would then be federal questions and could claim jurisdic-

effect of the available alternative is to lessen substantially the impact of the *Zahn* holding upon future environmental enforcement.

KENNETH G. BOUCHARD

tion under 28 U.S.C. § 1331. This approach has been urged by commentators. See e.g., Roberts, *The Right to a Decent Environment*; $E = MC^2$: *Environment Equals Man Times Courts Redoubling Their Efforts*, 55 Cornell L. Rev. 674 (1970); Klipsch, *Aspects of a Constitutional Right to a Habitable Environment*, 49 Ind. L.J. 49 (1974); Note, *Toward a Constitutionally Protected Environment*, 56 Va. L. Rev. 458 (1970). However, its reception in the courts has been cool. See, e.g., *Ely v. Veld*, 451 F.2d 1130 (4th Cir. 1971). But see *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972) (Fifth Amendment "protects health"); *Environmental Defense Fund v. Waldorf*, 1 E.R.C. 1640 (D. Mont. 1970) (individuals protected in their "natural state of life and health").

These two approaches could avoid the *Zahn* amount-in-controversy problem only by claiming that the right to clean air, water or environment is worth at least \$10,000 to each plaintiff. Although reasonable arguments can be made for such a valuation, the cool reception accorded both of these theories by the courts indicates that their usefulness is merely academic, at least for the present.