"FEDERALIZING" CLASS ACTIONS: THE FUTURE OF THE JURISDICTIONAL REQUIREMENTS FOR DIVERSITY-BASED CLASS ACTIONS

I. INTRODUCTION

The future of the jurisdictional requirements for diversity-based class actions has suddenly become unclear. Legislative and judicial movements threaten to "federalize"[1] class actions by removing the traditional jurisdictional bars[2] that deny access to the federal courts.

Proposed legislation currently before Congress threatens the future existence of the complete diversity requirement as it applies to class actions. The complete diversity requirement has been entrenched in American jurisprudence since the Supreme Court's opinion in *Strawbridge v. Curtis*.[3] This requirement allows a district court to exercise original jurisdiction over a claim only if all of the plaintiffs are from different states than all of the defendants.[4] The Interstate Class Action Jurisdiction Act of 1999[5] and the Class Action Fairness Act of 1999[6] would alter this jurisdictional requirement. Both bills, if enacted, would simply require the presence of minimal diversity to satisfy this first requirement of diversity jurisdiction.

The aforementioned bills and a recent Supreme Court decision[7] also threaten the future existence of the matter in controversy provision as applied to class actions. The matter in controversy provision of 28 U.S.C. § 1332 requires that each plaintiff in a class action have a claim that meets the statutory matter in controversy requirement in order for the federal court to exercise jurisdiction over the claim.[8] The district court must dismiss any class members' claim that does not meet the

1. The term "federalize" is utilized in this Comment simply to signify the increased opportunities for the filing of class actions in federal court once the traditional jurisdictional bars are removed.
2. The two jurisdictional bars for diversity based actions are the complete diversity requirement and the matter in controversy requirement. *See* 28 U.S.C. § 1332 (1994).
3. 7 U.S. (3 Cranch) 267 (1806).
4. *Strawbridge*, 7 U.S. at 267.
5. H.R. 1875, 106th Cong. (1999).
6. S. 353, 106th Cong. (1999).
7. *See* Free v. Abbott Lab., Inc., 176 F.3d 298 (5th Cir. 1999), *aff'd*, 529 U.S. 333 (2000).
8. 28 U.S.C. § 1332 (1994). *See* Zahn v. International Paper Co., 414 U.S. 291, 301 (1973).

matter in controversy requirement.[9] Furthermore, the district court cannot aggregate the separate and distinct claims of the class members to satisfy the requirement.[10]

These requirements, as applied to class actions, have been called into question by the Supreme Court's recent decision in *Free v. Abbott Laboratories, Inc.*[11] and the future enactment of the Interstate Class Action Jurisdiction Act of 1999[12] or the Class Action Fairness Act of 1999.[13] The *Abbott Laboratories* litigation presented the Supreme Court with the opportunity to examine whether 28 U.S.C. § 1367, the supplemental jurisdiction statute, abrogates its holding in *Zahn*, requiring each plaintiff in a class action to satisfy the matter in controversy requirement in order to proceed in the federal action.[14] The proposed bills would also abrogate the traditional matter in controversy requirement because they would allow a district court to aggregate the claims of all the class members to determine whether the matter in controversy requirement has been fulfilled.[15]

This Comment will examine the future effects of these current judicial and legislative movements on the traditional jurisdictional requirements for diversity-based class actions. Part II of this Comment will summarize the key Supreme Court decisions establishing these jurisdictional requirements and will explore the issue the Supreme Court faced in *Abbott Laboratories*. Part III will analyze the key provisions of the proposed pieces of legislation designed to alter the diversity jurisdiction requirements for class actions. Part IV will examine the potential effects of these judicial and legislative movements on the traditional diversity jurisdiction requirements for class actions.

II. JUDICIAL MOVEMENTS

A. The Foundational Cases: Snyder *and* Zahn

In *Snyder v. Harris*,[16] the Supreme Court addressed whether separate and distinct claims could be added together in a diversity-based class action to meet the jurisdictional amount in controversy requirement.[17]

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9. *Zahn*, 414 U.S. at 301.
10. Snyder v. Harris, 394 U.S. 332, 336 (1969).
11. *Abbott Lab.*, 176 F.3d 298.
12. H.R. 1875, 106th Cong. (1999).
13. S. 353, 106th Cong. (1999).
14. *Zahn*, 414 U.S. at 301.
15. H.R. 1875, 106th Cong. § 3 (1999); S. 353, 106th Cong. § 3 (1999).
16. 394 U.S. 332 (1969).
17. *Snyder*, 394 U.S. at 333.

The Supreme Court granted certiorari to address a conflict between the Eighth and Tenth Circuits regarding the proper use of aggregation in diversity-based class actions.[18]

The conflict arose when the Eighth Circuit held that aggregation of claims would not be allowed to satisfy the section 1332 amount in controversy requirement.[19] The Eighth Circuit had to determine whether aggregation of claims was permissible in a shareholders' derivative suit.[20] The petitioner only sought damages of $8,740, which was below the then applicable amount in controversy requirement of $10,000.[21] The petitioner argued that if the 4,000 potential claims were aggregated the amount in controversy would be $1,200,000.[22] The district court refused to aggregate the claims to meet the statutory amount needed for jurisdiction and the Court of Appeals for the Eighth Circuit affirmed.[23]

The Tenth Circuit reached a contrary conclusion when it addressed this issue.[24] The petitioner claimed a local gas company had illegally collected a city franchise tax from approximately 18,000 customers.[25] Although the petitioner only claimed damages in the amount of $7.81, he argued that the aggregation of the claims would produce damages in excess of the $10,000 statutory requirement.[26] The district court overruled the gas company's motion to dismiss and the Tenth Circuit affirmed.[27] The Tenth Circuit held that Rule 23 of the Federal Rules of Civil Procedure allowed separate and distinct claims to be aggregated in class actions to meet the jurisdictional amount in controversy requirement in diversity cases.[28]

The Supreme Court was not persuaded that Rule 23 intended to change its longstanding rule that separate and distinct claims of two or more plaintiffs could not be aggregated to attain the jurisdictional amount in controversy requirement.[29] Justice Black, writing for the majority, explained that the doctrine that separate and distinct claims could not be aggregated was not based on the old categories of Rule 23 or on any rule of procedure.[30] Rather, the doctrine was based on the Supreme

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18. *Id.* at 334. The Eighth and Tenth Circuits' opinions were consolidated on appeal in *Snyder*. *Id.*
19. *Id.*
20. *Id.*
21. *Snyder*, 394 U.S. at 333.
22. *Id.*
23. *Id.*
24. *Id.* at 334.
25. *Id.*
26. *Snyder*, 394 U.S. at 334.
27. *Id.*
28. *Id.*
29. *Id.* at 336.
30. *Id.*

Court's interpretation of the statutory phrase "matter in controversy."[31] According to Justice Black, the Supreme Court's restrictive interpretation of the phrase "matter in controversy" predated the 1938 Federal Rules of Civil Procedure.[32] Justice Black quoted the Supreme Court's opinion in *Troy Bank v. G.A. Whitehead & Co.*[33] to support this proposition: "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount."[34] Justice Black further explained that the Court subsequently established this rule as a "settled doctrine" in *Pinel v. Pinel*.[35] He even noted the Supreme Court had previously applied the *Pinel* doctrine in the class action context after the enactment of the Federal Rules of Civil Procedure in 1938.[36]

The case Justice Black relied on for this assertion was *Clark v. Paul Gray, Inc.*[37] In *Clark*, various individuals, partnerships and corporations challenged a California statute imposing a $15 fee on each automobile driven into the state.[38] The Court raised the jurisdictional amount question *sua sponte* in *Clark*.[39] According to Justice Black, the Court applied the *Pinel* doctrine and held that since there was no joint and common interest involved the separate and distinct claims of the plaintiffs could not be aggregated to meet the jurisdictional amount.[40]

After this examination of the Supreme Court's traditional interpretation of the phrase "matter in controversy" and its preclusion of aggregation, Justice Black concluded that "[n]othing in the amended Rule 23 changes this doctrine."[41] The majority agreed with Justice Black's assessment that the changes in the categories of Rule 23 class actions could not alter the Court's interpretation of the statutory phrase "matter in controversy."[42] Consequently, the Court held that the "adoption of amended Rule 23 did not and could not have brought about this change in the scope of the congressionally enacted grant of jurisdiction to the district courts."[43]

Four years later, the Supreme Court again examined whether plain-

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31. *Snyder*, 394 U.S. at 336.
32. *Id.*
33. 222 U.S. 39 (1911).
34. *Snyder*, 394 U.S. at 336 (quoting Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40 (1911)).
35. *Id.* at 336 (citing Pinel v. Pinel, 240 U.S. 594 (1916)).
36. *Id.* at 336-37.
37. 306 U.S. 583 (1939).
38. *Snyder*, 394 U.S. at 337.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 338.
43. *Snyder*, 394 U.S. at 336.

tiffs in a diversity-based class action satisfied the jurisdictional amount in controversy requirement. In *Zahn v. International Paper Co.*,[44] Vermont lake-front property owners filed a lawsuit against a New York corporation, alleging that the corporation polluted the waters of Lake Champlain by illegally discharging waste.[45] The named plaintiffs' claims satisfied the $10,000 jurisdictional amount.[46] However, the district court found that the unnamed plaintiffs in the diversity-based class action did not suffer damages "to a legal certainty" surpassing the jurisdictional amount.[47] Therefore, the district court refused to certify a class of plaintiffs because of the Supreme Court's guidance in *Snyder v. Harris*.[48] The district court interpreted *Snyder* to "preclud[e] maintenance of the action by any member of the class whose separate and distinct claim did not individually satisfy the jurisdictional amount and concluding that it would not be feasible to define a class of property owners each of whom had more than a $10,000 claim."[49] A divided Court of Appeals for the Second Circuit affirmed this decision.[50] The Supreme Court began its analysis by reiterating the congressional mandate that diversity-based actions were only maintainable in the district courts if the "matter in controversy" meets the statutorily required amount.[51] Justice White outlined the Court's historic approach of determining when multiple plaintiff suits satisfy this jurisdictional bar.[52] He explained the "firmly rooted" principle regarding the jurisdictional amount in controversy required that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in the federal courts . . . ."[53] Furthermore, this principle required a court to dismiss litigants whose claims did not meet the jurisdictional amount, even when other litigants possessed claims sufficient to qualify for jurisdiction.[54]

After announcing these general principles, Justice White focused on their application to class action lawsuits.[55] Justice White addressed the Supreme Court's recent decision in *Snyder v. Harris* to explain how the statutory phrase "matter in controversy" had been interpreted in the class action context.[56] In *Snyder*, a case in which none of the class plaintiffs had claims exceeding the jurisdictional amount, the Court applied

44. 414 U.S. 291 (1973).
45. *Zahn*, 414 U.S. at 292.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Zahn*, 414 U.S. at 292.
51. *Id.* at 292-93.
52. *Id.* at 294-95.
53. *Id.* at 294.
54. *Id.* at 295.
55. *Zahn*, 414 U.S. at 295.
56. *Id.* at 298.

the traditional principle that multiple plaintiffs alleging separate and distinct claims must each satisfy the jurisdictional amount requirement in order to invoke the district court's jurisdiction.[57] Furthermore, the Court announced that aggregation of claims would not be allowed in Rule 23 actions and any plaintiff not meeting the jurisdictional amount must be dismissed from the action.[58]

Although the named plaintiffs in *Zahn* had claims satisfying the statutorily required amount, Justice White concluded in light of *Snyder* that "there is no doubt that the rationale of that case controls this one."[59] Accordingly, the majority held "[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."[60]

Justice Brennan, in a strong dissent, found the fact that the named petitioners in *Zahn* each had claims meeting the jurisdictional amount provided a significant distinction from the situation addressed in *Snyder*.[61] He agreed with the petitioners' contention that the doctrine of ancillary jurisdiction supported a finding that the claims of the unnamed class members not meeting the jurisdictional amount could be entertained.[62] According to Justice Brennan, the principle of utilizing ancillary jurisdiction to determine claims that could not be reconciled within the aggregation rules had long been acknowledged by courts.[63] Courts had applied ancillary jurisdiction over compulsory counterclaims under Rule 13(a), cross-claims permitted by Rule 13(g), claims by impleaded defendants under Rule 14, and over defendants interpleaded under Rule 22.[64] Justice Brennan argued that class actions under Rule 23(b)(3) were "equally appropriate for such treatment" because the requirements of Rule 23(b)(3) assured "that 'the question of law or fact common to the members of the class [must] predominate over any questions affecting only members,' to guarantee that ancillary jurisdiction will not become a facade hiding attempts to secure federal adjudication of nondiverse parties' disputes over unrelated claims."[65]

Justice Brennan also suggested that providing for ancillary jurisdiction over the unnamed petitioners' claims had a practical advantage of promoting judicial economy.[66] By refusing to certify the class and allowing ancillary jurisdiction to attach to the jurisdictionally insufficient

57. *Id.* at 300.
58. *Id.*
59. *Id.*
60. *Zahn*, 414 U.S. at 301.
61. *Id.* at 305.
62. *Id.*
63. *Id.*
64. *Id.* at 306.
65. *Zahn*, 414 U.S. at 306-07.
66. *Id.* at 307.

claims, a court forces the individual litigants to engage in "redundant litigation of common issues."[67] This course of action would create a greater burden on the state and federal judiciary as a whole because of the various individual claims that would be pursued.[68]

In concluding, Justice Brennan asserted that ancillary jurisdiction should have been allowed because of the Court's decisions sustaining "ancillary jurisdiction over the nonappearing members in a class action who do not meet the requirements of traditional rule of complete diversity laid down in *Strawbridge v. Curtis*."[69] Under the Court's benchmark decision in *Supreme Tribe of Ben Hur v. Cauble*,[70] only the originally named plaintiff and defendant had to be diverse parties to satisfy the diversity requirement.[71] The *Cauble* Court also explained that the intervention of nondiverse class members would not invalidate the district court's jurisdiction.[72] Justice Brennan simply could not understand why *Cauble*'s practical approach of examining the qualifications of the named plaintiffs for determining diversity could not be applied to determining whether the statutory amount in controversy had been established.[73]

With *Snyder* and *Zahn*, two principles regarding federal jurisdiction pertaining to diversity-based class actions emerged. First, a district court could not aggregate the separate and distinct claims of the class members to satisfy the jurisdictionally required amount in controversy.[74] Second, the district court must dismiss any class member's claim not meeting the jurisdictional amount in controversy requirement.[75] These two principles remained unscathed until an unwitting statute changed the jurisdictional landscape for diversity-based class actions.

B. Finley *and the Judicial Improvements Act of 1990*

The next major movements in this federal jurisdiction drama involved the Supreme Court's controversial decision in *Finley v. United States*[76] and Congress' response in the Judicial Improvements Act of 1990. In *Finley*, the Supreme Court addressed whether the Federal Tort Claims Act ("FTCA") allowed an assertion of pendent jurisdiction over

67. *Id.*
68. *Id.* at 308.
69. *Id.* at 309.
70. 255 U.S. 356 (1921).
71. *Zahn*, 414 U.S. at 309 (Brennan, J., dissenting).
72. *Id.* at 309 (citing *Cauble*, 255 U.S. at 366).
73. *Zahn*, 414 U.S. at 309.
74. *Snyder*, 394 U.S. at 338.
75. *Zahn*, 414 U.S. at 301.
76. 490 U.S. 545 (1989).

additional parties.[77] Although *Finley* did not involve a class action, its significance to this Comment's analysis of the potential lifting of the jurisdictional requirements for diversity-based class actions lies in its prompting of Congress to enact the supplemental jurisdiction statute.

In *Finley*, the petitioner had lost her husband and two of her children when their plane struck electric transmission lines during its approach toward an airfield in San Diego.[78] The petitioner brought a claim against the Federal Aviation Administration ("FAA") under the FTCA asserting the FAA was negligent in its operation and "maintenance of the runway lights and performance of air traffic control functions."[79] Approximately a year later, the petitioner attempted to amend her federal complaint to contain a state law tort claim against the City of San Diego and the San Diego Gas and Electric Company.[80] Although no independent basis for federal jurisdiction existed,[81] the district court allowed the addition of these defendants under the pendent jurisdiction doctrine established by the Supreme Court in *United Mine Workers of America v. Gibbs*.[82] An interlocutory appeal was certified in the Court of Appeals for the Ninth Circuit.[83] The Ninth Circuit reversed the district court's decision and the Supreme Court granted certiorari.[84]

In analyzing the issue presented, Justice Scalia distinguished the Supreme Court's application of pendent claim and pendent party jurisdiction.[85] Under the Supreme Court's holding in *Gibbs*, federal courts have "pendent claim jurisdiction—that is, jurisdiction over nonfederal claims between parties litigating other matters properly before the court—to the full extent permitted by the Constitution."[86] However, Justice Scalia explained that the Supreme Court's decisions involving pendent party claims reflected the Court's preference for not assuming that the full constitutional power has been authorized by Congress.[87] To support this assertion, Justice Scalia cited the Supreme Court's decision in *Aldinger v. Howard*.[88] In *Aldinger*, the Supreme Court refused to allow a plaintiff to append a state claim against a county to the federal claim

77. *Finley*, 490 U.S. at 547.
78. *Id.* at 546.
79. *Id.*
80. *Id.*
81. *Id.* at 547. Federal jurisdiction did not exist as to the state law claims brought against the City of San Diego and the San Diego Gas and Electric Company because no federal question was alleged and the complete diversity requirement was not satisfied. *See* 28 U.S.C. §§ 1331-1332 (1994).
82. *Finley*, 490 U.S. at 547 (citing United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966)).
83. *Id.* at 547.
84. *Id.*
85. *Id.* at 548-49.
86. *Id.* at 548.
87. *Finley*, 490 U.S. at 549.
88. *Id.* at 550 (citing Aldinger v. Howard, 427 U.S. 1 (1976)).

brought under 42 U.S.C. § 1983 against individual defendants.[89] The Supreme Court explained that "the addition of a completely new party . . . would run counter to the well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress."[90] According to Justice Scalia, the *Aldinger* opinion indicated that the Supreme Court would not extend *Gibbs'* pendent claim approach to the pendent party field.[91]

In light of this analysis, Justice Scalia emphasized that the Court must examine the text of the jurisdictional statute at issue to determine whether the statute would allow pendent party jurisdiction.[92] Under the FTCA, section 1346(b) conferred jurisdiction over "claims against the United States."[93] The majority was not persuaded to read this language to provide jurisdiction for "civil actions on claims against the United States."[94] Consequently, the majority announced that the FTCA does not allow the federal courts to exercise jurisdiction over parties other than the government of the United States.[95] In his conclusion, Justice Scalia extended a clear invitation to Congress to give the Supreme Court guidance concerning the scope of the federal courts' jurisdiction in this area: "Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress."[96] Congress accepted this invitation and the fruit of its labor manifested itself in the Judicial Improvements Act of 1990.

In the Judicial Improvements Act of 1990, Congress codified as "supplemental jurisdiction" the judicially created doctrines of pendent and ancillary jurisdiction.[97] The supplemental jurisdiction statute, 28 U.S.C. § 1367, is divided into three subsections. Subsection (a) allows a district court to have supplemental jurisdiction over related claims forming part of the same case or controversy under Article III as the claims within the original jurisdiction of the court.[98] Subsection (b) limits the

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89. *Id.*
90. *Id.* at 550 (quoting *Aldinger*, 427 U.S. at 15 (internal citations omitted)).
91. *Id.* at 556.
92. *Finley*, 490 U.S. at 551.
93. *Id.*
94. *Id.* at 554.
95. *Id.* at 555.
96. *Id.* at 556.
97. Mark C. Cawley, *The Right Result for the Wrong Reasons: Permitting Aggregation of Claims Under 28 U.S.C. § 1367 in Multi-Plaintiff Diversity Litigation*, 73 NOTRE DAME L. REV. 1045, 1045 (1998).
98. 28 U.S.C. § 1367(a) (1994) provides in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

broad authority granted in subsection (a) by prohibiting supplemental jurisdiction over certain diversity actions.[99] Subsection (c) enunciates discretionary factors the district court may consider when determining whether to exercise supplemental jurisdiction.[100]

After the statute's enactment, legal scholars debated whether the text of 28 U.S.C. § 1367 overruled *Zahn*.[101] A plain reading of the text leaves the reader with the impression that *Zahn*'s amount in controversy rule had been abrogated. Once original jurisdiction attaches to the claim of a named class representative, subsection (a) "provides supplemental jurisdiction over the jurisdictionally insufficient but related claims of the additional class members."[102] Furthermore, subsection (b) "does not specify an exception for claims joined under Rule 23."[103] Consequently, the broad grant of jurisdiction in subsection (a) appears to allow the district courts to exercise supplemental jurisdiction over diversity-based class actions when at least one diverse plaintiff has a jurisdictionally sufficient claim.[104] This conclusion produced an interpretational rift in the circuit courts of appeal.[105]

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99. 28 U.S.C. § 1367(b) provides in relevant part:

> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

100. 28 U.S.C. § 1367(c) provides in relevant part:

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -- (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

101. *See generally* Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 485 (1991) *and* Thomas D. Rowe, Jr. et al., *Compounding Confusion or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 960 (1991).

102. *See* James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. Rev. 109, 123 (1999).

103. *Id.*

104. Several commentators have reached this conclusion. *See* Pfander, *supra* note 102, at 123; Joel E. Tasca, *Judicial Interpretation of the Effect of the Supplemental Jurisdiction Statute on the Complete Amount in Controversy Rule: A Case for Plain Meaning Statutory Construction*, 46 EMORY L.J. 435, 449-50 (1997).

105. *Compare In re* Abbott Lab., 51 F.3d 524, 529 (5th Cir. 1995) (finding that under section 1367 a district court can exercise supplemental jurisdiction over members of a class even though their claims did not meet the amount in controversy requirement) *with* Leonhardt v. Western Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998) (finding that enactment of section 1367 was not intended to overrule *Zahn*).

C. Abbott Laboratories *and the Judicial Response*

The Fifth Circuit Court of Appeals was the first circuit court to interpret whether the Judicial Improvements Act of 1990 overruled the Supreme Court's decision in *Zahn v. International Paper Company*. In *In re Abbott Laboratories*,[106] the Fifth Circuit held that a federal district court had jurisdiction over a diversity-based class action in which only the named plaintiffs met the jurisdictional amount in light of the supplemental jurisdiction provision created in the Judicial Improvements Act of 1990.[107]

Abbott Laboratories began as a class action filed in the State of Louisiana under its antitrust laws.[108] The plaintiffs alleged Abbott Laboratories, Bristol-Meyers Squibb Company, Inc., and Mead Johnson & Company had conspired to fix prices on infant formula products.[109] The defendants removed the action to federal court.[110] The plaintiffs moved to remand and the district court granted the remand.[111] The district court held that it only had diversity jurisdiction over the named plaintiffs' claims and declined to exercise supplemental jurisdiction over the unnamed plaintiffs' claims because they raised "novel issues of state law."[112] The defendants appealed the decision to remand the action to the state court.[113]

The Fifth Circuit panel first examined whether the district court correctly held that it had jurisdiction over the named plaintiffs.[114] The named plaintiffs only asserted claims of $20,000 in damages, which was far below the required amount of $50,000 in effect at that time.[115] The district court examined a Louisiana law applying all of a class attorney's fees to the named plaintiffs and found this statute increased the named plaintiffs' claims to an amount satisfying the $50,000 requirement.[116] The Fifth Circuit affirmed this interpretation of the statute and announced that the individual claims of the named class representatives met the jurisdictional amount.[117]

The Fifth Circuit next analyzed whether the supplemental jurisdiction statute would allow the district court to exercise jurisdiction over

106. 51 F.3d 524 (5th Cir. 1995), *aff'd*, 529 U.S. 333 (2000).
107. *Abbott Lab.*, 51 F.3d at 527.
108. *Id.* at 525.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Abbott Lab.*, 51 F.3d at 525.
113. *Id.*
114. *Id.* at 526.
115. *Id.*
116. *Id.*
117. *Abbott Lab.*, 51 F.3d at 527.

the unnamed class members' claims.[118] The defendants argued that 28 U.S.C. § 1367, the supplemental jurisdiction statute, was Congress' effort to "change[] the jurisdictional landscape in 1990."[119] Their argument was based on a plain reading of the statute.[120] First, section 1367(a) states "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."[121] Second, section 1367(b) follows and carves out exceptions for diversity-based actions.[122] Finally, the panel noted that Rule 23 class actions were conspicuously missing from these enumerated exceptions.[123]

The Fifth Circuit panel recognized that the district courts which had addressed this issue were split on whether *Zahn* survived the enactment of section 1367.[124] The panel also acknowledged plaintiffs' argument that there was some legislative history that could lead to a finding that Congress did not intend the Judicial Improvements Act of 1990 to overrule *Zahn*.[125] However, the panel refused to give any weight to the legislative history surrounding the Judicial Improvements Act.[126] Judge Patrick Higginbotham, writing for the panel, explained its refusal to probe the legislative history in an effort to uncover legislative intent: "We cannot search legislative history for congressional intent unless we find the statute unclear or ambiguous. Here, it is neither."[127] According to Judge Higginbotham, the statute "is the sole repository of congressional intent where the statute is clear and does not demand an absurd result."[128] Stating that the destruction of the restrictions established in *Zahn* was not an "absurd" result,[129] the panel held that under section 1367 a district court could exercise supplemental jurisdiction over members of a class even though they did not meet the jurisdictional amount in controversy requirement.[130] Consequently, the panel found that the

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at n.4.
122. *Abbott Lab.*, 51 F.3d at 527 n.4.
123. *Id* at 527.
124. *Id.* at 528.
125. *Id.* The panel conceded that some statements in the legislative history supported a finding that the statute was not intended to overrule *Zahn*: "The House Committee on the Judiciary considered the bill that became § 1367 to be a 'noncontroversial' collection of 'relatively modest proposals,' not the sort of legislative action that would upset any long-established precedent like *Zahn*." *Id.* (citing H.R. REP. NO. 734, 101ST CONG. at 27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6860-61).
126. *Abbott Lab.*, 51 F.3d at 528.
127. *Id.*
128. *Id.* at 529.
129. *Id.*
130. *Id.*

district court had diversity jurisdiction over the named class representatives and that section 1367 granted supplemental jurisdiction over the claims of the unnamed class members.[131]

One of the next circuits to address this issue was the Tenth Circuit. In *Leonhardt v. Western Sugar Co.*,[132] the Tenth Circuit held that section 1367 did not alter the requirement that each plaintiff in a diversity-based class action meet the $75,000 amount in controversy requirement.[133]

The plaintiffs in *Leonhardt* brought a class action against the defendant alleging a violation of the Agricultural Fair Practices Act ("AFPA") and certain state laws.[134] The district court dismissed the federal AFPA claim for failure to state a claim.[135] The district court further found that no plaintiff met the required $75,000 amount in controversy necessary for the exercise of diversity jurisdiction.[136] It made this finding even though a motion was pending to amend the complaint to add a request for punitive damages to one of the state claims that would increase a claim of one of the plaintiffs over the $75,000 jurisdictional bar.[137] The plaintiffs appealed the dismissal of the state law claims.[138]

On appeal, the Tenth Circuit framed the issue as "whether the enactment of 28 U.S.C. § 1367, concerning supplemental jurisdiction, altered the historical aggregation rules under section 1332 for class actions."[139] The plaintiffs asserted that since one class member met the jurisdictional amount in controversy, the plain language of section 1367(a) allowed the district court to exercise supplemental jurisdiction over the entire class of plaintiffs.[140] The Tenth Circuit did not agree. The panel acknowledged that in determining whether section 1367 permits the exercise of supplemental jurisdiction in class actions it must first examine the statutory language to determine if Congress has spoken clearly.[141] If the language of the statute is not clear, the panel noted, it could then examine the legislative history surrounding the statute to aid in its determination of legislative intent.[142]

The panel examined the text of section 1367 and came to a conclusion opposite that of the Fifth Circuit's opinion in *Abbott Laborato-*

131. *Abbott Lab.*, 51 F.3d at 530; *see also* Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996) (holding section 1367 overruled *Zahn*).
132. 160 F.3d 631 (10th Cir. 1998).
133. *Leonhardt*, 160 F.3d at 641.
134. *Id.* at 633.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Leonhardt*, 160 F.3d at 633.
139. *Id.* at 638.
140. *Id.*
141. *Id.*
142. *Id.*

ries.[143] According to the panel, section 1367(a) only addresses "any civil action of which the district courts have original jurisdiction."[144] In the present case, section 1332 conferred original jurisdiction on the district court and it "expressly requires that the 'matter in controversy exceed[] the sum or value of $75,000.'"[145] Since the district court must have original jurisdiction before it can exercise supplemental jurisdiction, the district court must apply the traditional rule regarding aggregation of claims when it determines if the matter in controversy meets the jurisdictional amount in controversy requirement.[146] Therefore, according to the Tenth Circuit panel, section 1367(a) and (b) could be "read literally, and unambiguously, to require each plaintiff in a class action diversity case to satisfy the *Zahn* definition of 'matter in controversy' and to individually meet the $75,000 requirement."[147]

The Tenth Circuit panel did not end its analysis at this point. Since the panel came to an opposite conclusion from the Fifth Circuit, it argued the statute was therefore ambiguous and it could examine the legislative history to clear up the ambiguity.[148] It examined the legislative history and concluded that it supported its opinion that section 1367(a) and (b) were not intended by Congress to overrule *Zahn*.[149] Consequently, the panel concluded that its analysis of the language of section 1367 and the relevant legislative history supported its conclusion that the enactment of section 1367 did not overrule *Zahn*'s holding that each plaintiff in a diversity-based class action must meet the statutory amount in controversy under section 1332.[150]

D. Abbott Laboratories *and the Supreme Court's Reply*

Thus, a clear split among the circuits had emerged regarding whether 28 U.S.C. § 1367 abrogated *Zahn*'s amount in controversy requirement. On November 29, 1999, the Supreme Court reacted to this split by granting certiorari to the plaintiffs in the *Abbott Laboratories* litigation.[151] The issue presented before the Supreme Court was

143. *Leonhardt*, 160 F.3d at 640.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Leonhardt*, 160 F.3d at 640.

149. *Id.* The panel's survey of the legislative history led it to conclude that Congress did not intend to alter traditional jurisdictional requirements for diversity jurisdiction: "The House Report also states that the statute provides that 'in diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirement of the diversity statute.'" *Id.* (citing H.R. REP. NO. 101-734, *supra* note 125, at 6874).

150. *Id.*; *see also* Meritcare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999) (holding section 1367 did not overrule *Zahn*).

151. Brief for Petitioners at *i, Free v. Abbott Lab., Inc., 2000 WL 35848 (No. 99-391).

"[w]hether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts to exercise supplemental jurisdiction over the claims of absent class members where, as here, those courts have original jurisdiction over the claims of the named plaintiffs."[152] The petitioners and respondents' major contention was whether the language of the statute was clear and unambiguous.[153]

The petitioners, Robin and Renee Free, argued Congress intended the supplemental jurisdiction statute, 28 U.S.C. § 1367, to "preserve the well-established rule that federal courts do not have original jurisdiction over state-law multi-plaintiff actions (including class actions) unless each and every plaintiff in the action has claims that satisfy the matter-in-controversy requirement of 28 U.S.C. § 1332(a)."[154] According to the petitioners, section 1367(a) only grants supplemental jurisdiction when there is first a "'civil action of which the district courts have original jurisdiction.'"[155] In their estimation, Congress did not intend to alter the original jurisdiction requirements established by the Supreme Court.[156] They explained Congress did not intend to change the Supreme Court's traditional interpretation that the phrase "matter in controversy" to mean that each and every plaintiff's claim in a class action must satisfy the jurisdictional amount in controversy requirement.[157] Consequently, they contended that if the Supreme Court applies its traditional "matter in controversy" rule it should hold the matter in controversy requirement of diversity was not satisfied because none of the absent class members have claims satisfying the jurisdictional minimum.[158] Since this element of diversity jurisdiction is not fulfilled, petitioners argued that the Court should hold that the district court does not have original jurisdiction over the class action and, consequently, the district court may not exercise supplemental jurisdiction under 28 U.S.C. § 1367.[159]

Naturally, the respondents disagreed with the petitioners' characterization of how the Court should apply 28 U.S.C. § 1367. They explained that the petitioners' argument that the "statute requires original jurisdiction over all claims in a particular 'civil action' as a predicate for exercising supplemental jurisdiction" simply "makes no sense."[160] According to the respondents, the entire purpose of the supplemental jurisdiction statute is to allow the district court to exercise jurisdiction over claims

152. Brief for Respondents at *i, Free v. Abbott Lab., Inc., 2000 WL 177169 (No. 99-391).
153. Brief for Petitioners at *6, *Abbott Lab.* (No. 99-391); Brief for Respondents at *6-*7, *Abbott Lab.* (No. 99-391).
154. Brief for Petitioners at *6, *Abbott Lab.* (No. 99-391).
155. *Id.* (quoting 28 U.S.C. § 1367(a) (1994)).
156. *Id.*
157. *Id.* *6-*7.
158. *Id.* at *7.
159. Brief for Petitioners at *8, *Abbott Lab.* (No. 99-391).
160. Brief for Respondents at *6, Free v. Abbott Lab., Inc., 2000 WL 177169 (No. 99-391).

not otherwise within their original jurisdiction.[161] Their position was that the application of the statute should be a fairly straightforward process.[162] The claims of the unnamed class members fall within the scope of section 1367(a) because they "form part of the same Article III case or controversy as the named plaintiffs' claims, which are within the federal courts' original jurisdiction."[163] Furthermore, these claims are not carved out by section 1367(b) because that subsection does not include claims brought under Rule 23 of the Federal Rules of Civil Procedure.[164] Consequently, the respondents urged the Court to find that a textual interpretation of 28 U.S.C. § 1367 has the "result of superseding the implicit holding in" *Zahn*.[165]

Although the Court appeared to be ready to settle the split among the circuits when it granted certiorari, the judgment rendered by the Court allows the issue to survive another day. The Court affirmed the Fifth Circuit's opinion by an equally divided court.[166] Consequently, lower federal courts are free to decide whether Congress intended for section 1367 to implicitly abrogate the Supreme Court's holding in *Zahn*. The courts can follow the Fifth Circuit's decision in *Abbott Laboratories* and hold that section 1367 abrogates *Zahn*.[167] On the other hand, courts can follow the Tenth Circuit's guidance in *Leonhardt* and hold that section 1367 does not alter the historic aggregation rules under section 1332 for class actions.[168]

III. LEGISLATIVE MOVEMENTS

A. The Interstate Class Action Jurisdiction Act of 1999

On May 19, 1999, Representative Bob Goodlatte (R.-Va.) introduced the Interstate Class Action Jurisdiction Act of 1999 in the House of Representatives.[169] The sponsors of the bill introduced it to "correct a

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161. Brief for Respondents at *6, *Abbott Lab.* (No. 99-391).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at *7.

166. The Court was equally divided because Justice O'Connor took no part in the consideration or decision. *Abbott Lab.*, 529 U.S. at 333.

167. *See supra* Part II.C.

168. *Id.* Early signs demonstrate that the circuits are aligning themselves with the Tenth Circuit on this issue. *See* Del Vecchio v. Conseco, 230 F.3d 974 (7th Cir. 2000) (holding that insureds could not aggregate claims of class members to satisfy amount in controversy requirement); Morrison v. Allstate Indem. Co., 228 F.3d 1255 (11th Cir. 2000) (holding that claims for compensatory damages, punitive damages, and attorneys fees in a putative class action could not be aggregated to meet the matter in controversy requirement).

169. 145 CONG. REC. E1026-01 (daily ed. May 19, 1999) (statement of Rep. Goodlatte).

serious flaw in our federal jurisdictional statutes."[170] In their estimation, this "serious flaw" has led to a dramatic increase in the number of class actions brought in state courts.[171] According to the sponsors, there are several reasons why class actions are "flooding into certain state courts."[172] First, there is a perception that state courts favor local lawyers over out-of-state corporations.[173] Second, attorneys take advantage of "major loopholes" in federal jurisdiction statutes thereby preventing the removal of class actions that, in the sponsors' opinion, belong in federal court.[174] These attorneys achieve this result by naming parties as defendants not pertinent to the class claims in order to defeat the complete diversity requirement of section 1332.[175] They also can waive federal law claims or reduce the amount in controversy to prevent removal to federal court.[176] Finally, the sponsors of the bill claimed that some state courts utilize very lenient certification requirements which allow most controversies to be subject to class treatment.[177] In concluding his remarks during his introduction of the bill, Representative Goodlatte suggested the bill "merely closes the loophole" preventing interstate disputes involving substantial sums of money from being filed as class actions in federal courts.[178]

The Interstate Class Action Jurisdiction Act of 1999 contains three significant provisions altering the traditional jurisdictional requirements of diversity-based class actions. First, the bill allows a federal district court to exercise original jurisdiction over a diversity-based class action if there is "minimal diversity."[179] Second, the district court can also aggregate the claims of the potential class members to reach the necessary amount in controversy requirement.[180] Finally, the bill provides a liberal removal provision that applies to both the unnamed plaintiff class members or any defendant.[181]

First, the bill will alter federal jurisdiction requirements for diversity-based class actions by eliminating the complete diversity requirement. Section 3 of the bill eliminates the traditional requirement of

170. *Id.*

171. *Id.* The sponsors cite a 1999 survey that indicated that the "number of state court class actions pending against surveyed companies ha[d] increased by 1,042 percent over the ten-year period 1988-1998." *Id.*

172. *Id.*

173. *Id.*

174. 145 CONG. REC. E1026-01 (daily ed. May 19, 1999) (statement of Rep. Goodlatte).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. H.R. 1875, 106th Cong. § 3 (1999).

180. *Id.*

181. *Id.*

complete diversity[182] by allowing federal district courts to exercise original jurisdiction over class actions when there is only minimal diversity.[183] The bill would amend 28 U.S.C. § 1332 to allow the district court to exercise original jurisdiction over a class action if any plaintiff class member and defendant are from different states.[184] This provision will prevent plaintiffs' counsel from keeping certain class actions in state courts by naming a nominal in-state defendant who is not the true target of the litigation.[185] Although the district court can exercise original jurisdiction if there is minimal diversity, the bill provides three major exceptions in which the district court cannot exercise jurisdiction. The district court cannot exercise jurisdiction over a civil action if the action is an (1) intrastate action,[186](2) a limited scope case,[187] or (3) a state action case.[188]

Second, the bill will alter federal jurisdiction requirements for class actions by allowing the district court to aggregate the plaintiffs' claims to meet the amount in controversy needed to avoid the exception for a "limited scope case."[189] This provision would abrogate the Supreme

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182. In *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), the Supreme Court explained that the complete diversity rule applied to class actions. However, complete diversity was only to be determined by examining the domicile of the named class representatives and the named defendants. *Cauble*, 255 U.S. at 364-67.

183. H.R. 1875.

184. Section 3 of the Act provides in relevant part:

> (b)(1) The district courts shall have original jurisdiction of any civil action which is brought as a class action and in which--
>
> (A) any member of a proposed plaintiff class is a citizen of a State different from any defendant;
>
> (B) any member of a proposed plaintiff class is a foreign state and any defendant is a citizen of a State or;
>
> (C) any member of a proposed plaintiff class is a citizen of a State and any defendant is a citizen or subject of a foreign state.

185. Harvey Berkman, *Tort Reform Measures, Facing Stiff Opposition, Unlikely to Become Law*, NAT'L L.J., Oct. 4, 1999, at A5.

186. The term "intrastate case" is defined in the Act as a class action in which the record ignore that:

> (I) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed; and
>
> (II) the substantial majority of the members of all proposed plaintiff classes, and the primary defendants, are citizens of the State in which the action was originally filed . . . .

H.R. 1875, § 3.

187. The term "limited scope case" is defined in the Act as a class action:

> in which the record indicates that all matters in controversy asserted by all members of all proposed plaintiff classes do not in the aggregate exceed the sum or value of $1,000,000, exclusive of interest and costs, or a class action in which the number of members of all proposed plaintiff classes in the aggregate is less than 100 . . . .

Id.

188. The term "State action case" is defined in the Act as a "class action in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief." *Id.*

189. *Id.*

Court's holding in *Snyder v. Harris*.[190] It could also potentially make the Supreme Court's holding in *Zahn* useless.[191]

As previously mentioned, the district court cannot exercise jurisdiction over a "limited scope case."[192] This term is defined as "a class action in which the record indicates that all matters in controversy asserted by all members of all proposed plaintiff classes do not in the *aggregate* exceed the sum or value of $1,000,000, exclusive of interest and cost . . . ."[193] In light of this definition, it would appear the district court can aggregate the claims of the plaintiffs to determine whether the action surpasses the $1,000,000 jurisdictional bar. The district court cannot only aggregate the claims of the plaintiffs but can also aggregate the number of plaintiffs in an effort to determine whether jurisdiction attaches.[194] Both of these provisions appear to be efforts of the sponsors to ensure that class actions involving a limited number of plaintiffs and minor class damages remain in state courts. This interpretation would be consistent with Representative Goodlatte's explanation that the bill merely allows "federal courts to hear big lawsuits involving truly interstate issues, while ensuring that purely local controversies remain in state courts."[195]

The final alteration that greatly expands federal diversity jurisdiction requirements for class actions is the liberal removal provision. Section 4 of the Act establishes who can remove a class action and when it can be removed.[196] The class action can be removed "(1) by any defendant without the consent of all defendants; or (2) by any plaintiff class member who is not a named or representative class member of the action for which removal is sought, without the consent of all members of such class."[197] The class action could be removed from state court before or after any order certifying a class, with the minor exception that unnamed plaintiffs cannot seek removal before the class has been certified.[198]

The Interstate Class Action Jurisdiction Act of 1999 passed the House on September 23, 1999, by a margin of 227-207.[199] The bill was

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190. As previously mentioned in Part II, the Supreme Court's longstanding rule announced in *Snyder v. Harris*, 394 U.S. 332, 338 (1969), states that separate and distinct claims by class plaintiffs can not be aggregated to provide the necessary jurisdictional amount.

191. No longer would every plaintiff in the class be required to meet the $75,000 jurisdictional amount. The district court will simply have to determine whether the aggregate claims of the class exceed $1,000,000. H.R. 1875, § 3.

192. *Id.*

193. *Id.* (emphasis added).

194. The definition of a "limited scope case" also provides that a district court cannot exercise jurisdiction over "a class action in which the number of all proposed plaintiff classes in the aggregate is less than 100." *Id.*

195. 145 CONG. REC. E1026-01 (daily ed. May 19, 1999) (statement of Rep. Goodlatte).

196. H.R. 1875, 106th Cong. § 4 (1999).

197. *Id.*

198. *Id.*

199. Berkman, *supra* note 185, at A5.

received in the Senate on September 24, 1999, and referred to the Senate Judiciary Committee on November 19, 1999.[200]

B. The Class Action Fairness Act of 1999

Members of the Senate have also introduced a bill in the 106th Congress that, if enacted, would alter the traditional jurisdictional requirements for diversity-based class actions. Senator Charles Grassley (R.-Iowa) introduced the Class Action Fairness Act of 1999 on February 3, 1999.[201] The bill was referred to the Senate Committee on the Judiciary[202] and had hearings before the Senate Subcommittee on Administrative Oversight and the Courts on May 4, 1999.[203] Like the Interstate Class Action Jurisdiction Act of 1999, it removes the complete diversity requirement, permits aggregation of claims, and provides a liberal removal provision for class actions.[204]

The bill removes the traditional complete diversity requirement for diversity-based actions brought under 28 U.S.C. § 1332. Section 3 of the bill provides that the district court will have original jurisdiction over any civil action in which the amount in controversy exceeds $75,000, exclusive of interest and costs, and is a class action falling within one of three categories.[205] The first category provides jurisdiction if "any member of a class of plaintiffs is a citizen of a State different from any defendant."[206] The second category provides jurisdiction if "any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State."[207] The final category provides jurisdiction if "any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state."[208] Although the district court can exercise jurisdiction if there is minimal diversity,[209] the bill carves out three exceptions when the district court shall abstain from exercising jurisdiction.[210]

200. H.R. 1875.
201. 145 CONG. REC. S1144 (daily ed. Feb. 3, 1999) (statement of Sen. Grassley).
202. *Id.*
203. 145 CONG. REC. D478 (daily ed. May 4, 1999).
204. *See supra* Part III.A.
205. S. 353, 106th Cong. § 3 (1999).
206. *Id.*
207. *Id.*
208. *Id.*
209. The district court can exercise jurisdiction when the amount in controversy requirement has been met and "any member of a class of plaintiffs is a citizen of a State different from any defendant." *Id.*
210. The Act provides an abstention provision that states the following:

> (3) The district court shall abstain from hearing a civil action described under paragraph (2) if -
> (A)(i) the substantial majority of the members of the proposed plaintiff class are citizens of a single State of which the primary defendants are also citizens; and
> (ii) the claims asserted will be governed primarily by the laws of that State; or

The bill also permits the district court to aggregate the claims of the plaintiffs in order to meet the jurisdictional requirement. It retains the current jurisdictional amount in controversy requirement for diversity actions under 28 U.S.C. § 1332 by requiring that "the matter in controversy exceed[] the sum or value of $75,000, exclusive of interest and costs."[211] It also explicitly permits the district court to aggregate the claims of each plaintiff: "In any class action, the claims of the individual members of any class shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and cost."[212] This proposed provision will essentially invalidate the Supreme Court's holdings in *Snyder*[213] and *Zahn*.[214] The drafters of the bill did not raise the matter in controversy amount like the modest effort found in The Interstate Class Action Jurisdiction Act of 1999.[215] The bill also does not allow the district court to aggregate the number of plaintiffs in the class in an effort to confer jurisdiction, unlike its House counterpart.[216]

The bill also provides for a virtually identical removal provision contained in The Interstate Class Action Jurisdiction Act of 1999.[217] The bill permits a class action to be removed to a district court "(1) by any defendant without the consent of all defendants" or "(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class."[218] The class action can be removed by these individuals before or after the class has been certified by the state court.[219]

IV. "FEDERALIZING" CLASS ACTIONS

The Supreme Court's holding in *Abbott Laboratories* and the current bills before Congress threaten to redefine the diversity jurisdiction re-

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(B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

S. 353, § 3.

211. *Id.*

212. *Id.* (emphasis added).

213. The *Snyder* Court established that class plaintiffs would not be able to aggregate their separate and distinct claims to satisfy the jurisdictional amount in controversy requirement. Snyder v. Harris, 394 U.S. 332, 338 (1969).

214. The *Zahn* Court established that any class plaintiff that did not satisfy the jurisdictional amount in controversy must be dismissed from the action, even if one or more members of the class satisfied the jurisdictional requirement. Zahn v. International Paper Co., 414 U.S. 291 301 (1973).

215. This Act requires that the aggregate claims of the class exceed $1,000,000 before jurisdiction is conferred. H.R. 1875, 106th Cong. § 3 (1999).

216. The district court can exercise jurisdiction over claims with 100 or more plaintiffs in a class. *Id.*

217. *See supra* Part II.C.

218. S. 353, 106th Cong. § 4 (1999).

219. *Id.*

quirements for class actions. These judicial and legislative movements have the potential to "federalize" class actions by removing the jurisdictional bars currently preventing some diversity-based class actions from being filed in federal court.

A. *The Potential Effects of* Abbott Laboratories

Abbott Laboratories presented the Court with the opportunity to overrule *Zahn* and hold the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts to exercise supplemental jurisdiction over the claims of unnamed class members not meeting the jurisdiction amount whenever it has original jurisdiction over the claims of at least one named plaintiff.[220] The Supreme Court did not seize the opportunity to settle the split among the circuits. Its opinion affirming *Abbott Laboratories* by an equally divided court provides lower federal courts the freedom to determine whether section 1367 abrogates *Zahn*.[221]

Allowing supplemental jurisdiction over the jurisdictionally insufficient claims could potentially "federalize" diversity-based class actions. It would give more classes the option of filing their action originally in federal court because the class would only need one member to satisfy the jurisdictional amount in controversy requirement. Furthermore, it would allow more defendants in class actions the opportunity to remove the litigation to federal court because the district court would have original jurisdiction in more instances.[222] Overruling *Zahn* would not only have the potential effect of increasing the number of class actions filed in federal court, it also would create a "sensible symmetry" between the two requirements of the diversity jurisdiction statute, aid judicial economy, and prevent the distasteful options currently facing potential class members not meeting the amount in controversy requirement.

Overruling *Zahn* will create a "sensible symmetry" between the two requirements for diversity jurisdiction.[223] In *Supreme Tribe of Ben Hur v. Cauble*,[224] the Supreme Court established the "requirement of complete diversity of citizenship in class actions is assessed solely by reference to the citizenship of the named plaintiffs, not the absent class members."[225] However in *Zahn*, the Supreme Court refused to examine

220. Brief for Respondent at *i, Free v. Abbott Lab., Inc., 2000 WL 177169 (No. 99-391).

221. *See supra* Part II.D.

222. This is precisely what happened in *Abbott Laboratories*. The defendants successfully removed the class action from state court because the named plaintiffs satisfied the jurisdictional amount in controversy requirement. 51 F.3d 524, 529 (5th Cir. 1995).

223. Brief for Respondent at *21, *Abbott Lab.* (No. 99-391). The two requirements for diversity jurisdiction to attach are that the matter in controversy exceed $75,000, exclusive of interest and costs, and there be complete diversity between the parties. *See* 28 U.S.C. § 1332 (1994).

224. 255 U.S. 356 (1921).

225. *Cauble*, 255 U.S. at 366.

only the qualifications of the named plaintiffs in determining whether the jurisdictional amount in controversy requirement had been met.[226] The Court instead decided to examine whether every plaintiff in the proposed class satisfied the statutory matter in controversy requirement.[227] Overruling *Zahn* will provide symmetry because the district court will only be required to examine whether any of the named plaintiffs have claims that satisfy the jurisdictional amount in controversy requirement. If any plaintiff satisfies this requirement, and there is complete diversity between the named plaintiffs and defendants, the district court can exercise original jurisdiction over those claims. Consequently, the district court can exercise supplemental jurisdiction over the rest of the claims of the other class members. Not only would this create symmetry between the two diversity jurisdiction requirements, it would also aid in judicial economy.

Overruling *Zahn* will preserve judicial resources. The fundamental purpose of supplemental jurisdiction is to "avoid[] the necessity of litigating the same factual issues twice."[228] *Zahn*'s holding has burdened judicial economy by creating concurrent actions in state and federal courts.[229] Under *Zahn*'s rule, the named plaintiffs having jurisdictionally sufficient claims may proceed in federal court while the plaintiffs with insufficient claims are forced to seek redress elsewhere.[230] This creates a scenario in which judicial resources are wasted by the filing of concurrent actions in federal and state courts. This problem can be compounded if the plaintiffs remaining in federal courts are not allowed to proceed as a class. Each plaintiff may then be required to file a separate action in federal court. Instead of presiding over one class action, the same court adjudicates the same issues in several separate actions.[231] This not only increases the litigation in federal courts but has a similar effect on state court case levels.[232]

Not only will overruling *Zahn* aid judicial economy, it will also alleviate some of the "unsavory options" facing unnamed class action plaintiffs with jurisdictionally insufficient claims.[233] *Zahn*'s holding has had harsh effects on the litigation options of unnamed plaintiffs dismissed from the federal action because of their jurisdictionally insufficient claims. These individuals appear to only have three future courses

226. *Zahn*, 414 U.S. at 308-09 (Brennan, J., dissenting).
227. *Id.* at 301.
228. Tasca, *supra* note 104, at 442.
229. Afshin Ashourzadeh, *Supplemental Jurisdiction in Class Action Lawsuits: Recovering Supplemental Jurisdiction From the Jaws of Aggregation*, 26 SW. U. L. REV. 89, 130-31 (1996).
230. *Zahn*, 414 U.S. at 301.
231. Ashourzadeh, *supra* note 229, at 130-31.
232. Crawley, *supra* note 97, at 1055.
233. *Id.*

of action.[234] These plaintiffs may be forced to file an individual action in state court.[235] In reality this is not a viable option. The meager amount of their claim, when weighed against their potential legal bills, will give most potential litigants pause for concern.[236] The dismissed plaintiffs may also attempt to refile the class action in state court.[237] There are several substantial barriers to this option. For example, some states require that class action plaintiffs must have minimum contacts with the states.[238] Also, a significant barrier to maintaining multi-state class actions in state court arises "where the injury suffered by the plaintiffs occurs in multiple states."[239] The final option facing these dismissed class members is to forego litigation altogether.[240] This is an undesirable result because it allows corporations to succeed at "mass 'nickle-and-dime' theft."[241] When thousands of individuals suffer minor losses they have little financial incentive to hold unscrupulous businesses accountable. By following the Fifth Circuit's decision that section 1367 abrogates *Zahn* and permits supplemental jurisdiction in diversity-based class actions, lower federal courts would provide the public with a powerful tool to curb these abuses in federal court.

B. *The Potential Effects of the Passage of the Interstate Class Action Jurisdiction Act of 1999 or the Class Action Fairness Act of 1999*

The two bills currently being considered by Congress, if enacted,[242] would essentially rewrite the federal diversity jurisdiction requirements for class actions.[243] Both bills are bold attempts to "federalize" class actions by removing the current diversity jurisdictional bars. They would essentially abrogate the Supreme Court's decisions in *Cauble*, *Snyder* and *Zahn*. As previously discussed in Part III, these bills would greatly increase the number of class actions eligible to be filed in federal courts by requiring only minimal diversity, allowing aggregation of

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234. *Id.*

235. *Id.*

236. *Id.*

237. Crawley, *supra* note 97, at 1055.

238. Patricia M. Noonan, Note, *State Personal Jurisdictional Requirements and the Non-Aggregation Rule in Class Action*, 1987 U. ILL. L. REV. 445, 454.

239. Crawley, *supra* note 97, at 1055.

240. *Id.*

241. *Id.* One commentator succinctly described this phenomenon in this fashion:

> Thus, unnamed class members may face the real possibility of being left without a forum if the named plaintiffs choose to stay in federal court rather than refile in state court. Such a scenario is fertile breeding ground for wide-scale penny-ante theft. Theft on a grand scale can be achieved by stealing nickels and dimes from a large number of people who would have little incentive to sue because of the high costs of litigation.

Ashourzadeh, *supra* note 229, at 128-29.

242. The analysis that follows assumes that either bill is enacted by Congress.

243. *See supra* Part III.B-C.

claims, and by providing a liberal removal provision.[244]

Although there is uncertainty surrounding whether either of these bills will be enacted, one thing is quite clear: the decision to broaden the scope of diversity jurisdiction in class actions is not a constitutional one but a political one.[245] Congress' only limitation is Article III's requirement that the controversy be "between Citizens of different States."[246] As Professor E. Donald Elliott explains: "The Supreme Court has regularly recognized that the decision to require complete diversity, and the decision to set a minimum amount in controversy, are political decisions not mandated by the Constitution."[247] Accordingly, it is within Congress' discretion to increase the scope of diversity jurisdiction as long as there are at least two diverse parties to the lawsuit.

The passage of either bill would have the positive effect of abrogating the restrictions of *Cauble*, *Snyder*, and *Zahn* regarding diversity jurisdiction for class actions. Allowing the aggregation of claims in class actions would produce two beneficial effects. First, it would protect the original intention of the Founders when they created diversity jurisdiction. Second, it would place class actions in a judicial forum that has the appropriate resources and procedural devices to handle this complex litigation.

By allowing the district court to aggregate the claims of plaintiffs in an effort to satisfy the jurisdictional bar, these bills protect the original intent of the Founders by providing a neutral forum to litigate interstate disputes. Although there is some debate concerning why diversity jurisdiction was created,[248] the "traditional theory is that diversity jurisdiction was intended to protect out-of-state residents from the bias that they might experience, or at least fear that they might face, in state courts."[249] The Founders were concerned with stimulating interstate commerce and protecting businesses[250] from the actual or perceived biases of state

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244. *Id.*

245. *Summary of Key Points Testimony of Prof. E. Donald Elliot Before the Subcomm. on Admin. Oversight and the Courts of the Senate Committee on the Judiciary Concerning S. 353, The Class Action Fairness Act of 1999*, Federal Document Clearing House, May 4, 1999, *available in* 1999 WL 273299, U.S. Testimony Database, at Part II.A.

246. U.S. CONST. art. III, § 2, cl. 1.

247. *The Class Action Fairness Act of 1999: Hearings on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. 99 (1999) (statement by Professor E. Donald Elliott). *See also* Newman-Green, Inc. v. Alfonzo-Larrian, 490 U.S. 826, 829 n.1 (1989) (explaining that the complete diversity requirement is based on the diversity statute, not Article III of the Constitution).

248. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3.2, at 286 (1982) *and* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS, ch. 4, § 23 (4th ed. 1983).

249. CHEMERINSKY, *supra* note 248, § 5.3.2.

250. According to Professor Elliott, the use of state judicial processes to discriminate against out-of-state businesses was regarded as a "great threat to the growth and economic health of the nation." *Hearings on S. 353*, *supra* note 247, at 100.

courts.[251] Expanding diversity jurisdiction for class actions would support these goals because "in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises."[252] These two bills will eliminate the diversity jurisdiction requirements established in *Cauble*, *Snyder*, and *Zahn* and will provide an opportunity for more class action to be litigated in a neutral federal forum.

These bills will not only support the original intent of the Founders concerning diversity jurisdiction, but will also place class actions in a judicial forum having the appropriate resources and procedural devices to handle this complex litigation. The federal courts have more resources to adjudicate class actions than do state courts.[253] Federal judges generally have access to two or more law clerks on their staffs while state court judges typically have none.[254] These judges are also usually able to delegate some aspect of their class action cases to magistrate judges or special masters while state court judges typically do not have these resources available.[255] The federal courts also have appropriate procedural mechanisms for managing diversity-based class actions that are filed in various districts.[256] Federal courts are authorized "to consolidate before a single judge any similar class actions that are filed around the country."[257] The state courts do not have this procedural device to coordinate similar class actions filed in several states.[258] Consequently,

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251. Chief Justice Marshall explained this rationale for diversity jurisdiction:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

252. *Interstate Class Action Jurisdiction Act of 1999: Hearings on H.R. 1875 Before the House Comm. on the Judiciary*, 106th Cong. 50 (1999) (statement of the Honorable Griffin B. Bell).

253. *Cf. The Class Action Fairness Act of 1999: Hearings on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, Federal Document Clearing House, May 4, 1999, *available in* 1999 WL 273272, U.S. Testimony Database, at Part II (statement of Stephen G. Morrison). The Department of Justice does not support this assertion. According to Assistant Attorney General Eleanor D. Acheson, the Department is "concerned about the potential impact of this legislation on the Federal judiciary at a time when the Chief Justice of the United States has expressed serious concern about the marked expansion of caseloads of Federal courts." *Class Action Fairness Act of 1999: Hearings on S. 353 Before Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, Federal Document Clearing House, May 4, 1999, *available in* 1999 WL 273276, U.S. Testimony Database, at Parts III & IV. (statement of Eleanor D. Acheson, Assistant Attorney General, Dep't of Justice).

254. *Hearings on S. 353* (statement of Morrison), supra note 253, at Part II.

255. *Id.*

256. 28 U.S.C. § 1407 (1994) provides in relevant part: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."

257. *Interstate Class Action Jurisdiction Act of 1999: Hearings on H.R. 1875 Before the House Comm. on the Judiciary*, 106th Cong. 51 (1999) (statement of the Honorable Griffin B. Bell).

258. *Id.*

defendants are forced to expend extra financial resources by defending in multiple forums against "these duplicative lawsuits."[259] Therefore, allowing diversity-based class actions to proceed in federal court aids judicial economy by placing litigants before a tribunal having the necessary resources and procedural devices to adjudicate their claims.

V. CONCLUSION

The Supreme Court's decision in *Abbott Laboratories* and Congress' current consideration of interstate class action legislation leave the future of the traditional diversity jurisdiction requirements for class actions in a sea of uncertainty. The Supreme Court had the opportunity to affirmatively open the federal jurisdictional gate to more class actions by utilizing *Abbott Laboratories* to overturn its opinion in *Zahn*. This course of action would allow district courts to exercise supplemental jurisdiction over the jurisdictionally insufficient claims of class members when the court has at least one named representative satisfying the jurisdictional requirements. The Supreme Court refused to take this broad step. By affirming the Fifth Circuit's opinion in *Abbott Laboratories*, the Supreme Court has left this issue open for future debate.[260]

The Supreme Court's decision in *Abbott Laboratories* possibly opens the federal jurisdictional gate a crack. The district court must still find a named representative satisfying the jurisdictional requirements before it can exercise jurisdiction. However, the two class action jurisdiction bills before Congress have the potential to take this gate off its hinges. The bills will have the effect of "federalizing" essentially every diversity-based class action by requiring only minimal diversity between the parties, allowing the district court to aggregate the plaintiffs' claims, and by providing a liberal removal provision.

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259. *The Class Action Fairness Act of 1999: Hearings on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. 113 (1999) (statement of Stephen G. Morrison).

260. *See* Free v. Abbott Lab., Inc., 529 U.S. 333 (2000).