BYU Law Review

Volume 1996 | Issue 3 Article 8

9-1-1996

Class Actions and Supplemental Jurisdiction: Will Zahn v. International Paper Co. Remain Viable?

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Class Actions and Supplemental Jurisdiction: Will *Zahn v. International Paper Co.* Remain Viable?

I. INTRODUCTION

The United States Supreme Court held in *Zahn v. International Paper Co.*[1] that in a diversity class action brought under Federal Rule of Civil Procedure 23(b)(3),[2] each unnamed member of a class must independently meet the amount-in-controversy requirement of the diversity jurisdiction statute, 28 U.S.C. § 1332.[3] However, with the enactment of the supplemental jurisdiction statute, 28 U.S.C. § 1367, courts have questioned the continued viability of *Zahn*. Section 1367 authorizes a federal court to allow claims that do not meet original jurisdictional require-

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1. 414 U.S. 291 (1973).
2. Federal Rule of Civil Procedure 23 reads in 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.
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> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . . .
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> (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.

FED. R. CIV. P. 23(a)-(b).

3. The diversity jurisdiction statute, § 1332, reads in part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States;
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> (2) citizens of a State and citizens or subjects of a foreign state;
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> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
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> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a) (1994).

ments to be added to a federal action[4] so long as they have a sufficient factual relationship with claims already before the court. The federal district courts have split on the question of whether § 1367 overrules *Zahn*.

Recently, two federal circuits have attempted to clarify the relationship between § 1367 and the Court's decision in *Zahn*. The Fifth Circuit Court of Appeals, in *In re Abbott Laboratories*,[5] and the Seventh Circuit Court of Appeals, in *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*,[6] both held that § 1367 overrules *Zahn*. Both courts relied on a purely textualist reading of the statute, an approach which tries to distill the "ordinary" meaning of a statute.

However, the Fifth and Seventh Circuits' holdings are questionable. In reaching their decisions, both ignored significant legislative history which indicates that Congress did not intend § 1367 to affect the rules governing class actions. Furthermore, even if strict textualism is the proper method of interpreting this statute, the Fifth and Seventh Circuits' holdings are incorrect. Section 1367(a) gives broad authorization for the exercise of supplemental jurisdiction, subject only to a list of exceptions in § 1367(b). The Fifth and Seventh Circuits reasoned that since the exceptions do not include claims brought under Rule 23, the unnamed plaintiffs' claims in diversity class actions must be eligible for supplemental jurisdiction under the broad scope of § 1367(a).

However, the "ordinary" meaning of § 1367(a), based on the presence of the "same case or controversy" language in the statute, suggests that § 1367(a) simply codified the concepts of pendent and ancillary jurisdiction. Because Rule 23(b)(3) class actions have historically been ineligible for both pendent and ancillary jurisdiction, such class actions are likewise excluded from the scope of § 1367(a). Thus, this Comment argues that under either a textualist approach to statutory interpretation or under an approach which focuses on legislative history, *Zahn v. International Paper Co.* survives the enactment of § 1367.

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4. The primary statutes governing original federal jurisdiction are the diversity statute, § 1332, and the federal question statute, 28 U.S.C. § 1331 (1994).

5. 51 F.3d 524 (5th Cir. 1995) (Higginbotham, J.).

6. 77 F.3d 928 (7th Cir. 1996) (Easterbrook, J.).

Section II explains the background to the Fifth and Seventh Circuits' decisions. This background includes a brief outline of diversity jurisdiction, pendent and ancillary jurisdiction, and the rise of supplemental jurisdiction. Section III discusses the facts and reasoning of *Abbott Laboratories* and *Stromberg*. Section IV analyzes the Supreme Court's decisions addressing the use of pendent and ancillary jurisdiction in the class action context and the effect that changes in Federal Rule of Civil Procedure 23 have had on the Court's decisions. This Comment concludes that § 1367 was meant to codify the concepts of pendent and ancillary jurisdiction as they existed prior to 1989 and that class actions, when brought under Federal Rule of Civil Procedure 23(b)(3), do not qualify for pendent and ancillary jurisdiction. The legislative history confirms this point. Thus under either a textualist approach or an approach that examines legislative history, *Zahn* and its progeny are not overruled by § 1367.

II. BACKGROUND

A. Diversity Jurisdiction

Federal diversity jurisdiction, which is constitutionally authorized under Article III and congressionally authorized under 28 U.S.C. § 1332, gives federal courts power to hear actions based on state law, rather than federal law, when two conditions are met. First, § 1332 requires complete diversity of citizenship, which means that no plaintiff can be a citizen of the same state as any defendant.[7] Second, § 1332 requires that a certain amount of money be at stake in the action.[8]

Using diversity jurisdiction in class actions has presented difficult issues for federal courts. For example, the statute does not state whether all members of a class must meet the amount-

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7. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). While § 1332 requires complete diversity, the Court has held that as a matter of constitutional power, Article III of the Constitution only requires minimal diversity. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967) (holding in an interpleader action that the federal courts have jurisdiction if any two claimants are of diverse citizenship).

8. 28 U.S.C. § 1332(a) (requiring that "the matter in controversy exceed[] the sum or value of $50,000, exclusive of interest and costs"). The amount needed to meet the statute's requirement has changed over the years. At the time *Zahn* was decided, the amount was only $10,000. *See* Zahn v. International Paper Co., 414 U.S. 291, 292-94 & n.1 (1973).

in-controversy requirement or whether only the named plaintiff[9] must do so. The statute also does not state whether diversity of citizenship depends on the citizenship of all the members of a class or only the named plaintiff. In resolving these two issues, the Supreme Court has provided two seemingly divergent holdings. *Supreme Tribe of Ben-Hur v. Cauble*[10] addressed the "complete diversity" issue, and *Zahn*[11] addressed the "amount in controversy" issue.

In *Ben-Hur*, the Supreme Court considered whether § 1332 requires all plaintiffs and defendants in a class action, including unnamed class members, to be completely diverse. The Court held that only the named plaintiffs must be of diverse citizenship from the defendants for federal diversity jurisdiction to exist.[12] While the facts of *Ben-Hur* suggest that the holding was limited to cases where all class members have a joint interest in the property at issue,[13] federal courts have interpreted *Ben-Hur* to apply to any type of class action.[14]

At first glance, *Ben-Hur*'s lenient "complete diversity" rule stands in stark contrast to the holding in *Zahn*. In *Zahn*, the Supreme Court held that even if the named plaintiffs in a Rule 23(b)(3) diversity class action satisfy the requirements of § 1332, the unnamed class members must still independently meet the amount-in-controversy requirement.[15] The rules arising out of both *Zahn* and *Ben-Hur* were well established when Congress enacted § 1367 in 1990.

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9. This Comment will use "named plaintiff" to refer to the named class representative who files and litigates a suit on behalf of the rest of n class.

10. 255 U.S. 356 (1921).

11. 414 U.S. 291 (1973). For a review of the cases leading up to the *Zahn* decision, see 2 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 6.11, at 6-34 to 6-37 (3d ed. 1992).

12. *Ben-Hur*, 255 U.S. at 364-67.

13. *See infra* notes 116-119 and accompanying text.

14. *See* 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1755, at 61 & n.6 (2d ed. 1986) ("Prior to the 1966 amendment of Rule 23, the general rule was that only the citizenship of the named representatives would be taken into account in determining if complete diversity existed . . . .").

15. *Zahn*, 414 U.S. at 301.

B. Supplemental Jurisdiction

Supplemental jurisdiction, currently embodied in 28 U.S.C. § 1367,[16] developed from the concepts of pendent and ancillary jurisdiction. Pendent jurisdiction had two prongs: pendent claim jurisdiction and pendent party jurisdiction. Pendent claim jurisdiction allowed a court to hear "nonfederal claims between parties litigating other matters properly before [a federal] court."[17] For example, a plaintiff bringing a federal question claim[18] against a defendant might have used pendent claim jurisdiction to bring a state claim against the same defendant in the same federal action.[19] For pendent claim jurisdiction to be proper, *United Mine Workers v. Gibbs*[20] required that the federal and state claims arise from a "common nucleus of operative fact."[21]

Pendent party jurisdiction differed from pendent claim jurisdiction in that it involved jurisdictionally insufficient claims by or against parties who were not named in the original action.[22] For example, a plaintiff bringing a federal question claim against one defendant might have used pendent party jurisdiction to bring a state law claim against a second defendant. For most courts, the "common nucleus of operative fact" test was also the standard for pendent party jurisdiction.[23]

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16. Much has been written about supplemental, ancillary, pendent claim, and pendent party jurisdiction. *See, e.g.*, David P. Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753 (1978); C. Douglas Floyd, *The ALI, Supplemental Jurisdiction, and the Federal Constitutional Case*, 1995 B.Y.U. L. REV. 819; William H. Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 33 U. PITT. L. REV. 1 (1972); Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399 (1983); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849 (1992).

17. Finley v. United States, 490 U.S. 545, 548 (1989).

18. *See* 28 U.S.C. § 1331 (authorizing federal actions "arising under the Constitution, laws, or treaties of the United States").

19. *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 721-29 (1966).

20. *Id.*

21. *Id.* at 725.

22. Finley v. United States, 490 U.S. 545, 549 (1989) (defining pendent party jurisdiction as "jurisdiction over parties not named in any claim that is independently cognizable by the federal court"); 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567.2, at 151 (2d ed. 1984) (stating that pendent party jurisdiction is proper if "there is federal question jurisdiction—or admiralty jurisdiction or jurisdiction because the United States is a party—of a claim against one party, that carries with it pendent jurisdiction of a closely related state claim against another party").

23. *See, e.g.*, *Finley*, 490 U.S. at 549 ("We may assume, without deciding, that the

Ancillary jurisdiction[24] differed from pendent jurisdiction in that it "typically involve[d] claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."[25] Under ancillary jurisdiction, the relationship of the claims was "not mere factual similarity but logical dependence,"[26] meaning that the resolution of the ancillary claim was entirely dependent on the resolution of the original claim. When this logical dependence existed, courts did not require the ancillary claim to meet either federal question or diversity jurisdiction requirements. Ancillary jurisdiction was held to be proper in impleader, cross claim, and counterclaim contexts.[27]

The common thread among the two types of pendent jurisdiction and ancillary jurisdiction was that they allowed federal courts to hear claims that, by themselves, did not meet either federal question or diversity jurisdiction requirements. While slight differences appear in the definition of each concept, the Supreme Court has noted that pendent and ancillary jurisdiction were "two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?"[28] Indeed,

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constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction . . . ."); Rodriguez v. Pacificare of Texas, Inc., 980 F.2d 1014, 1018 (5th Cir.), *cert. denied*, 113 S. Ct. 2456 (1993); Nolan v. Boeing Co., 919 F.2d 1058, 1062-63 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991); Rodriguez v. Comas, 888 F.2d 899, 903 (1st Cir. 1989); Giardiello v. Balboa Ins. Co., 837 F.2d 1566, 1570-71 (11th Cir. 1988); Feigler v. Tidex, Inc., 826 F.2d 1435, 1437-38 (5th Cir. 1987); Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511, 518-19 (7th Cir. 1985); Transok Pipeline Co. v. Darks, 565 F.2d 1150, 1154-55 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); Curtis v. Everette, 489 F.2d 516, 519-20 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974). As discussed below, the Supreme Court ruled in *Finley* that in the absence of congressional authorization federal courts may not use pendent party jurisdiction.

24. *See generally* 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523 (2d ed. 1984) (giving a general outline of ancillary jurisdiction).

25. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978).

26. *Id.*; *see also* 13 WRIGHT ET AL., *supra* note 24, § 3523, at 85 ("Ancillary jurisdiction exists because without it the federal court neither could dispose of the principal case effectively nor do complete justice in the dispute that is before the tribunal."); *id.* § 3523, at 87-89 (explaining instances where "ancillary jurisdiction is virtually a matter of necessity").

27. *Owen*, 437 U.S. at 375; *see also* 13 WRIGHT ET AL., *supra* note 24, § 3523, at 82-85.

28. *Owen*, 437 U.S. at 370.

some courts, including the Seventh Circuit in *Stromberg*, have used the terms "pendent party jurisdiction" and "ancillary jurisdiction" interchangeably.[29]

In 1989, the landscape of pendent party jurisdiction changed when the Supreme Court decided *Finley v. United States*.[30] In that case, the Court held that pendent party jurisdiction could not be exercised by federal courts unless Congress had given express statutory authorization for doing so.[31] In 1990, Congress responded to this call by enacting 28 U.S.C. § 1367.[32] Section 1367(a) allows a federal court to exercise "supplemental jurisdiction over all . . . claims," whether ancillary, pendent claim, or pendent party, "so related to claims in the action within . . . original [federal] jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."[33]

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29. For example, *Finley v. United States* referred to *Owen Equipment & Erection Co. v. Kroger* as a "pendent-party jurisdiction" case, 490 U.S. at 550, but *Owen* specifically addressed itself to "ancillary jurisdiction," 437 U.S. at 370. In *Stromberg*, the Seventh Circuit referred to *Zahn* as a case concerning "pendent parties." 77 F.3d at 930-32. The majority in *Zahn* explicitly addressed neither pendent nor ancillary jurisdiction, although the dissent argued against the majority's holding on the basis of "ancillary jurisdiction." 414 U.S. at 308-09 (Brennan, J., dissenting).

30. 490 U.S. 545 (1989).

31. *Id.* at 549-50.

32. Section 1367 reads in 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.
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> (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.

28 U.S.C. § 1367 (1994).

33. *Id.* § 1367(a). The Supreme Court had held in *Gibbs* that the standard for measuring whether claims form part of the "same case or controversy" under Article III is whether they arise out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Most courts now hold this standard is

While allowing for the exercise of supplemental jurisdiction over a broad range of related claims, § 1367 also embodies the Supreme Court's decision in *Owen Equipment & Erection Co. v. Kroger*,[34] which limited the exercise of ancillary jurisdiction in some circumstances. In *Owen*, the plaintiff brought a claim against the defendant based on diversity jurisdiction. The defendant subsequently filed a third-party complaint against a third-party defendant whose state citizenship was the same as the plaintiff's. Despite the lack of diversity, the plaintiff then filed a state law claim directly against the third-party defendant. The Court ruled that when a plaintiff's original claim is based on diversity jurisdiction, the plaintiff cannot use ancillary jurisdiction to assert a state law claim against a nondiverse defendant.[35] To allow such a claim would, according to the Court, circumvent § 1332.[36]

Section 1367(b) incorporates *Owen*[37] by listing several types of joinder which do not qualify for supplemental jurisdiction in diversity cases. However, § 1367(b)'s list of exclusions does not include Federal Rule of Civil Procedure 23 (class actions) as a type of joinder that is prohibited in diversity cases. This omission raises questions about the interpretation of the statute in class action contexts. Some argue the omission allows supplemental jurisdiction to be exercised over unnamed class members who do not meet the amount-in-controversy requirement, overruling *Zahn*. Others point to the legislative history of § 1367 to argue that Congress did not intend to diminish *Zahn*.

C. Split Among the Federal Districts

The district courts are split on the question of whether the omission of Rule 23 from § 1367(b)'s list of exceptions means that § 1367(a) overrules *Zahn*. The argument advanced by some fed-

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satisfied when claims arise out of the "same transaction or occurrence." *See, e.g.*, Ambromovage v. United Mine Workers, 726 F.2d 972, 990 (3d Cir. 1984); Revere Copper & Brass Inc. v. Aetna Casualty & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970).

34. 437 U.S. 365 (1978).

35. *Id.* at 376-77.

36. *Id.*

37. *See* Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 948-49 (1991) ("[T]he [Federal Courts Study Committee] had no intention of tinkering with the complete diversity requirement or disturbing the [*Owen*] result . . . .").

eral districts is that the broad language of § 1367(a), which applies supplemental jurisdiction to "all" civil actions, encompasses class actions. They argue that because class actions are covered under § 1367(a) and are not excluded in § 1367(h), Congress intended to overrule *Zahn*.[38]

However, the weight of authority among the federal districts holds that *Zahn* survives § 1367. While the districts have differed in their reasoning, most have relied on the statute's legislative history.[39] The House Committee report specifically states that the Supreme Court cases governing jurisdiction in class actions—*Zahn* and *Ben-Hur*—were not meant to be overturned.[40] To avoid contravening legislative intent, the district courts have held that *Zahn* is still viable.[41] In this context, the Fifth Circuit decided *Abbott Laboratories*[42] and the Seventh Circuit decided *Stromberg*.[43]

III. FIFTH AND SEVENTH CIRCUIT CASES

A. In re Abbott Laboratories

A brief description of *Abbott Laboratories* and *Stromberg* will provide a context in which to analyze *Zahn*'s viability. On October 14, 1993, Robin and Renee Free filed a class action suit in Louisiana state court against Abbott Laboratories, Bristol-Meyers Squibb, and Mead Johnson, alleging violations of Louisiana's antitrust laws. The complaint charged the companies with conspiring to fix the prices of infant formula. Before the class was certified, the defendants removed the action to federal district court on diversity grounds. The district court found that the named plaintiffs satisfied the diversity jurisdiction require-

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38. *See, e.g.*, Patterson Enter. v. Bridgestone/Firestone, Inc., 812 F. Supp. 1152, 1154-55 (D. Kan. 1993); Garza v. National Am. Ins. Co., 807 F. Supp. 1256, 1258 (M.D. La. 1992) (dealing with Rule 20 rather than Rule 23).

39. *See, e.g.*, Clement v. Occidental Chem. Corp., 1994 WL 479155, *4-*5 (E.D. La. Aug. 30, 1995); *In re* Potash Litigation, 866 F. Supp. 406, 413-14 (D. Minn. 1994); North Am. Mechanical Serv. Corp. v. Hubert, 859 F. Supp. 1186, 1188-89 (C.D. Ill. 1994); Riverside Transp., Inc. v. Bellsouth Telecoms., Inc., 847 F. Supp. 453, 455-56 (M.D. La. 1994); Fink v. Heath, 1991 WL 127664, *3 & n.4 (N.D. Ill. July 8, 1991).

40. H.R. REP. NO. 734, 101st Cong., 2d Sess. 29 & n.17 (1990).

41. *See* cases cited *supra* note 39.

42. *In re* Abbott Lab., 51 F.3d 524 (5th Cir. 1995).

43. Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996).

ments,[44] but that the unnamed class members did not meet the amount in controversy requirement because each alleged only $20,000 in damages. Despite the insufficient amounts in controversy, the district court held that § 1367 validly conferred supplemental jurisdiction over the unnamed class members' claims.[45] However, the district court dismissed the named plaintiffs' claims on abstention grounds[46] and relied on the discretion given to the court in § 1367(c)[47] by refusing to exercise supplemental jurisdiction over the unnamed class members' claims.

On appeal, the Fifth Circuit held that § 1367 granted supplemental jurisdiction over the unnamed class members' claims.[48] In examining § 1367(a) and (b), the court rejected the statute's legislative history and relied solely on its text. The court stated: "We cannot search legislative history for congressional intent unless we find the statute unclear or ambiguous. Here, it is neither."[49] Citing *West Virginia University Hospitals, Inc. v. Casey*[50] and *United States v. X-Citement Video, Inc.*,[51] the court asserted that when a statute is clear and unambiguous and an absurd result will not flow from application of its language, congressional intent can only be gleaned from the language of the statute itself.[52] Here, no ambiguity or absurdity existed. The court rea-

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44. Although the named plaintiffs only alleged $20,000 in damages, Louisiana law attributes the recovery of the class's attorney fees to the named plaintiffs. *Abbott Lab.*, 51 F.3d at 526. This pushed their claims over the $50,000 mark. *Id.*

45. *Id.* at 525, 529.

46. *Id.* at 525 (citing Colorado River Water Conservation Dist. v. United Stotes, 424 U.S. 800 (1976) and Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983), which direct a federal court to refrain from exercising jurisdiction when doing so would promote comity between the federal government and the Statos).

47. Section 1367(c) reads:

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

28 U.S.C. § 1367(c) (1994).

48. *Abbott Lab.*, 51 F.3d at 529.

49. *Id.* at 528.

50. 499 U.S. 83 (1991).

51. 115 S. Ct. 464 (1994).

52. *Abbott Lab.*, 51 F.3d at 529.

soned that § 1367(a) therefore encompasses class actions, subject only to § 1367(b)'s list of exclusions. Since Rule 23 is not mentioned in § 1367(b), supplemental jurisdiction can be used to support jurisdictionally insufficient claims of unnamed class members, contrary to *Zahn*. The court found that such a result was not absurd because both commentators and jurists have criticized *Zahn*.[53]

B. Stromberg Metal Works, Inc. v. Press Mechanical, Inc.

Unlike *Abbott Laboratories*, *Stromberg* did not involve a class action. Press Mechanical, which was hired to install heating, ventilation, and cooling services at a nuclear power plant in Maryland, hired two subcontractors, Stromberg Metal Works and Comfort Control. Money paid to Press Mechanical by the general contractor was not passed on to Press Mechanical's subcontractors. The subcontractors, which were Maryland corporations, sued Press Mechanical, an Illinois corporation, in federal court alleging a misappropriation of the funds under Maryland law. Press Mechanical challenged the asserted diversity jurisdiction on the grounds that Comfort Control's claim did not exceed $50,000, although Stromberg's claim did.[54] Stromberg and Comfort Control, however, argued that supplemental jurisdiction allowed them to pursue their claims in federal court.

On appeal, the Seventh Circuit acknowledged that in *Clark v. Paul Gray, Inc.*[55] the Supreme Court had prohibited plaintiffs from aggregating their amounts in controversy unless they had a joint or common interest in the property at issue in the suit.[56] Citing *Abbott Laboratories*, the Seventh Circuit asserted that if § 1367 has overruled *Zahn* by allowing unnamed class members to fall under supplemental jurisdiction, then the rule in *Clark* must also yield to § 1367.[57] The court reasoned that since both *Stromberg* and *Clark* involved adding only a few claimants to a federal action, overruling *Clark* would be axiomatic after extend-

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53. *Id.*

54. Stromberg Metal Works, Inc. v. Press Mechanical, Inc, 77 F.3d 928, 930 (7th Cir. 1996).

55. 306 U.S. 583 (1939).

56. *Stromberg*, 77 F.3d at 931; *see also Clark*, 306 U.S. at 588.

57. *Stromberg*, 77 F.3d at 930-31.

ing supplemental jurisdiction to class actions in *Abbott Laboratories*, which had granted federal jurisdiction to many claimants.[58]

In examining § 1367's effect on *Zahn*, the Seventh Circuit, like the Fifth Circuit, rejected the use of legislative history. Judge Easterbrook, writing for the majority, stated that while "some legislative history suggests that the responsible committees did not expect § 1367 to upset *Zahn*, the text is not limited in this way. When text and legislative history disagree, the text controls."[59] Relying on § 1367(a)'s text, the court reasoned that the statute authorizes federal courts to exercise pendent party jurisdiction in all situations, including class actions.[60] The court asserted that in *Zahn*, the only impediment to exercising pendent party jurisdiction was that Congress had not altered the traditional rules prohibiting aggregation of amounts in controversy.[61] Since Congress had altered the jurisdictional rules, by authorizing pendent party jurisdiction under § 1367, *Zahn* had been overruled.

IV. ANALYSIS

In deciding *Zahn*'s continued viability under § 1367, both the Fifth and Seventh Circuit relied on a textualist method of statutory interpretation and explicitly rejected the use of legislative history. The relevance of which method of statutory interpretation a court chooses is illustrated by the district court decisions on this issue. The outcomes of the district court cases have largely turned on the chosen method of statutory interpretation.[62]

Nevertheless, it can be argued that under either a textualist or a legislative history approach, *Zahn* should survive § 1367. As will be shown, the Fifth and Seventh Circuits erred by assuming too quickly that § 1367(a), irrespective of § 1367(b), applies to class actions, especially those brought under Federal Rule of

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58. *Id.*

59. *Id.* (citation omitted).

60. *Id.*

61. *See id.* (stating that *Zahn's* reluctance to exercise pendent party jurisdiction was not altered by the new Federal Rule of Civil Procedure 23 because alterations in the federal rules did not change traditional jurisdictional rules).

62. Those district courts which have used a textualist approach have held that § 1367 overrules *Zahn*. Those relying on § 1367's legislative history have upheld *Zahn*. *See supra* notes 38-39 and accompanying text.

Civil Procedure 23(b)(3). This Comment shows that on a closer inspection the text of § 1367(a) simply codifies pendent and ancillary jurisdiction as those doctrines were understood prior to *Finley v. United States*.[63] Legislative history also indicates that § 1367 was meant to codify pendent and ancillary jurisdiction. Once it is established that § 1367's scope is the same as that of pendent and ancillary jurisdiction, the question that should be asked is whether the claims of unnamed class members in a Rule 23(b)(3) diversity class action qualify for pendent or ancillary jurisdiction. The answer to that question must be no. The Supreme Court has held that claims in such class actions do not come within the scope of ancillary or pendent jurisdiction. Thus, *Zahn* must remain viable after § 1367 because the very holding of *Zahn* was that pendent and ancillary jurisdiction were inapplicable to Rule 23(b)(3) class actions.

A. The Textual Meaning of § 1367(a)

The pertinent language in § 1367(a) states that supplemental jurisdiction will extend to "all . . . claims that are so related to claims in the action within [the district court's] original jurisdiction that *they form part of the same case or controversy under Article III of the United States Constitution.*"[64] The statute's language referring to claims forming part of the "same case or controversy" is not self-defining. Indeed, the Supreme Court was unclear about what this language meant until 1966,[65] when the Court, in *United Mine Workers v. Gibbs*,[66] decided the boundaries of "case or controversy." In *Gibbs*, the Court was asked to determine if a plaintiff bringing a federal question claim in federal court could also bring a pendent state law claim within the same action. The Court stated:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ," and the relationship between that claim and the state claim permits the conclusion

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63. 490 U.S. 545 (1989).

64. 28 U.S.C. § 1367(a) (emphasis added).

65. *See generally* Floyd, *supra* note 16, at 827-35 (tracing the development of pendent jurisdiction).

66. 383 U.S. 715 (1966).

> that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact.[67]

Gibbs stands for two propositions. First, the limits of a case or controversy under Article III are determined by the "common nucleus of operative fact" test. Second, the "common nucleus of operative fact" test is synonymous with the boundaries of pendent jurisdiction.

Ancillary jurisdiction first developed along a line different from pendent jurisdiction.[68] However, starting with the Supreme Court's decision in *Moore v. New York Cotton Exchange*,[69] the limits of ancillary jurisdiction became increasingly dependent on factual relatedness, just as with pendent jurisdiction. In *Moore*, a defendant filed a counterclaim after being haled into federal court. When the plaintiff's claim was dismissed, the Court retained Article III jurisdiction over the counterclaim because it was factually related to the plaintiff's claim.[70]

"After Moore, the evolution of ancillary jurisdiction became intertwined with . . . pendent jurisdiction,"[71] and the scope of both pendent and ancillary jurisdiction became a function of *Gibbs*' "common nucleus of operative fact" test.[72] The Supreme Court solidly unified these two jurisdictional doctrines into a single constitutional test in *Owen Equipment & Erection Co. v. Kroger*.[73] In *Owen*, the Court specifically acknowledged that the limits of ancillary jurisdiction were defined by the factual relatedness test of *Gibbs*.[74]

In *Owen*, as noted earlier, a plaintiff tried to assert a state law claim against a nondiverse third-party defendant. While it

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67. *Id.* at 725 (citations and footnotes omitted) (alteration in original).

68. *See generally* Floyd, *supra* note 16, at 835-44 (tracing the development of ancillary jurisdiction).

69. 270 U.S. 593 (1926).

70. *Id.* at 607-09.

71. 13 WRIGHT ET AL., *supra* note 24, § 3523, at 96.

72. *See id.* § 3523, at 100.

73. 437 U.S. 365 (1978); *see* 13 WRIGHT ET AL., *supra* note 24, § 3523, at 96 ("These two doctrines, originally spawned from two distinct chains of cases, have moved toward each other and finally were brought together by the Supreme Court in Aldinger v. Howard and Owen Equipment & Erection Company v. Kroger." (footnotes omitted)).

74. *Owen*, 437 U.S. at 370-73.

did not allow the exercise of ancillary jurisdiction in this case, the Court stated that "*Gibbs* and this case are two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?"[75] The Court went on to say that "[i]t is apparent that *Gibbs* delineated the constitutional limits of federal judicial power."[76] The Court rejected the use of ancillary jurisdiction in this situation because § 1332 was a congressional limitation,[77] but the Court implied that absent such a statutory limitation, the boundary of ancillary jurisdiction would be measured by the *Gibbs* test.[78] After *Owen* it was clear that pendent and ancillary jurisdiction were both to be measured by the *Gibbs* factual relatedness test, and that the *Gibbs* test was the constitutional standard for whether two claims form part of the "same case or controversy under Article III"—the language later used in § 1367(a).

The *Gibbs* test was formally adopted as the constitutional test for pendent party jurisdiction in the 1989 case of *Finley v. United States*.[79] *Finley*, like *Owen*, rejected the use of pendent party jurisdiction in the absence of congressional authorization.[80] However, the Court noted that "[w]e may assume, without deciding, that the constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction."[81] This pronouncement made final the unification of pendent claim, pendent party, and ancillary jurisdiction under one constitutional test.

After *Gibbs*, *Owen*, and *Finley*, the judiciary understood the meaning of "case or controversy under Article III" as a reference to the "common nucleus of operative fact" test of *Gibbs*. Furthermore, reference to the *Gibbs* test was synonymous with the constitutional scope of pendent claim, pendent party, and ancillary jurisdiction. Thus, when Congress enacted § 1367(a), authorizing supplemental jurisdiction over claims forming part of the "same

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75. *Id.* at 370.
76. *Id.* at 371.
77. *Id.* at 372-73.
78. *See id.* (explaining that even though there is constitutional power under *Gibbs* to exercise ancillary jurisdiction, statutory limitations must also be examined).
79. 490 U.S. 545 (1989).
80. *See supra* text accompanying notes 30-33.
81. *Finley*, 490 U.S. at 549.

case or controversy under Article III," they were simply granting statutory authorization to the *Gibbs* test. Therefore, the "ordinary meaning" of § 1367(a) must be that the statute is simply a codification of the concepts of pendent and ancillary jurisdiction.

The legislative history confirms that Congress intended "subsection (a) [to] codif[y] the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*,"[82] and to bring together the "doctrines of pendent and ancillary jurisdiction" under the label "supplemental jurisdiction."[83] Commentators have also agreed that § 1367(a) simply codifies *Gibbs* and the concepts of pendent and ancillary jurisdiction as they were understood prior to *Finley*.[84]

B. Class Actions and the Scope of § 1367(a)

Both the textual meaning and the legislative history indicate that the scope of § 1367(a) is synonymous with pendent and ancillary jurisdiction. Nevertheless, the question remains whether Rule 23(b)(3) class actions have traditionally qualified for pendent or ancillary jurisdiction and should consequently qualify for supplemental jurisdiction under § 1367(a).[85] The Fifth Circuit assumed without discussion that Rule 23(b)(3) class actions fall within § 1367(a).[86] The Seventh Circuit's discussion was more thorough. The court argued that the *Zahn* Court had not extended pendent party jurisdiction—"ancillary jurisdiction," as it was called by the dissent in *Zahn*—only because Supreme Court precedent prohibited it from doing so.[87] However, § 1367(a) overruled precedent and authorized the use of pendent party jurisdiction.[88] According to the Seventh Circuit, the fact that *Zahn*

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82. H.R. REP. NO. 734, *supra* note 40, at 29 n.15.

83. *Id.* at 27.

84. *E.g.*, 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523, at 48 (2d ed. Supp. 1996) ("Congress responded [to *Finley*] with Section 1367, which . . . codifies the doctrines of ancillary and pendent jurisdiction as they existed prior to Finley, and gives them the collective name of 'supplemental jurisdiction.'").

85. The inquiry should be limited to Rule 23(b)(3) because *Zahn*'s holding was limited, by its facts, to this type of class action. *See* Zahn v. International Paper Co., 414 U.S. 291, 301 (1973).

86. *See In re* Abbott Lab., 51 F.3d 524, 527 (5th Cir. 1995).

87. *See* Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 931 (7th Cir. 1996).

88. *Id.*

involved a class action was irrelevant.[89] The inference is that if pendent party jurisdiction had been available to the federal courts at the time *Zahn* was decided, the Supreme Court would have invoked it.

On closer examination, however, the Seventh Circuit's reading of *Zahn* is incorrect. Supreme Court precedent did not prohibit the use of pendent party jurisdiction. The holding of *Zahn* was that despite the availability of pendent and ancillary jurisdiction, the traditional rules governing ancillary jurisdiction in a Rule 23(b)(3) diversity class action should not be changed.

In *Zahn*, a paper-making plant allegedly dumped its pulp into a stream that ran into Lake Champlain. Owners of lakefront property, claiming the pulp in the lake damaged their property and limited its usefulness, filed a Rule 23(b)(3) diversity class action against the paper plant. The Supreme Court acknowledged that all of the named plaintiffs in the case satisfied the amount-in-controversy requirement, but noted that many of the unnamed class members did not. The Court refused to expand diversity jurisdiction 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."[90]

This result was the same as in *Snyder v. Harris*,[91] a case decided only four years earlier, which had held that in Rule 23(b)(3) diversity class actions, amounts in controversy could not be aggregated. However, *Zahn* was not simply a rehash of *Snyder*.

To understand the distinction between *Snyder* and *Zahn*, a brief description of the historical rules for bringing a class action is needed. Class actions[92] were categorized as "true," "hybrid," or

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89. *Id.*

90. Zahn v. International Paper Co., 414 U.S. 291, 301 (1973).

91. 394 U.S. 332 (1969).

92. "Class action," in the true sense of the term, describes an action where the judgment rendered for or against the named party is made binding on the unnamed members of the class. *See* FED. R. CIV. P. 23 advisory committee's note—1966 amendments, at 263-64 (stating that the categories of class suits determined the "proper extent of the judgment in each category, which would in turn help to determine the *res judicata* effect of the judgment" and that the "spurious" class action, although termed a "class action," was an anomaly because it did not "adjudicate the rights or liabilities of any person not a party").

"spurious."[93] True class actions involved "joint, common, or secondary rights"[94]—today the vernacular is a "common or undivided interest." A hybrid class action involved "'several' rights related to 'specific property.'"[95] Judgments rendered in either of these two types of class actions were considered binding on the unnamed class members.[96] The third type, spurious, encompassed actions "involving 'several' rights affected by a common question and related to common relief."[97] However, spurious class actions were an "anomaly" because they were "supposed not to adjudicate the rights or liabilities of any person not a party."[98] Spurious class actions were useful only to invite class members to "intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction."[99] Thus, the first principal distinction between true/hybrid and spurious class actions was that the first two required the class to have some common interest in the subject of the suit, whereas spurious actions only required common "questions." Second, in true/hybrid actions, judgments were binding on the unnamed members of the class without any further independent basis for federal jurisdiction, whereas unnamed members of a spurious class action who wished the judgment to be binding were required to intervene, thereby invoking the court's ancillary jurisdiction. Absent intervention, no jurisdiction over the unnamed class members existed in a spurious class action. Therefore, ancillary jurisdiction over unnamed class members turned on the type of class action involved, which in turn depended on the existence of a common interest in the relief sought by the class.

In 1966, the Advisory Committee sought to clarify the use of class actions under the Federal Rules of Civil Procedure, eliminating the sometimes "obscure and uncertain" traditional categories[100] to allow unnamed class members in a "spurious" class action to be bound by a court's judgment without having to intervene as a party.[101] Under the 1966 revision, the threshold re-

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *See id.*

quirements for bringing a class action were that the class had to be too numerous to maintain separate actions, the class's claims had to present common questions of law and fact, the class representative's claims had to be typical of the class as a whole, and the class representative had to be able to adequately represent the entire class.[102] In addition, the 1966 revision required the class to fall under one of three categories spelled out in subsection (b) of the rule. The three categories under subsection (b) roughly correspond to the three traditional categories of class actions, with (b)(3) corresponding to the "spurious" class action.[103]

In *Snyder v. Harris*,[104] the Court was asked to decide whether the 1966 changes to Rule 23 changed the rules governing the amount in controversy in diversity class actions. The case involved two different class actions where none of the class members alone satisfied the amount-in-controversy requirement, but where, if the claims were aggregated, the amount would have been met. The class members argued that the jurisdictional rules prohibiting aggregation of the amount in controversy were changed when Rule 23 was revised.[105] They argued that the rules allowing aggregation in a "true" class action, but prohibiting it in a "spurious" class action, were changed when those categories were abolished.[106] The Court, however, rejected these arguments, stating that the rules governing the amount in controversy in class actions did not hinge on procedural rules, but rather on the Court's interpretation of § 1332:

> The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase "matter in controversy." The interpretation of this phrase as precluding aggregation substantially predates the 1938 Federal Rules of Civil Procedure.[107]

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102. FED. R. CIV. P. 23(a).
103. 7A WRIGHT ET AL., *supra* note 14, § 1752, at 18-19.
104. 394 U.S. 332 (1969).
105. *See id.* at 335.
106. *Id.* at 334-36.
107. *Id.* at 336.

In *Zahn*, the Supreme Court relied on this reasoning from *Snyder* to conclude that the traditional rule against aggregating amounts in controversy in a spurious class action continued to apply in a Rule 23(b)(3) context.[108] However, the key aspect of *Zahn*, as it relates to the Fifth and Seventh Circuits' decisions, was the Court's rejection of a different argument.

The plaintiffs in *Zahn* acknowledged the rule prohibiting aggregation of amounts in controversy unless there is a joint interest at stake. However, "[t]heir contention [was] rather that a second theory, ancillary jurisdiction, support[ed] a determination that [their] claims may be entertained."[109] The plaintiffs claimed that ancillary jurisdiction had been used in other contexts to overcome the diversity statute's requirements,[110] and that "the Court has . . . sustained ancillary jurisdiction over the nonappearing members in a class action who do not meet the requirements of [the] traditional rule of complete diversity laid down in *Strawbridge v. Curtiss*."[111] The plaintiffs were referring to *Supreme Tribe of Ben-Hur v. Cauble*,[112] in which the Court had held that unnamed class members do not have to be of diverse citizenship because their claims were ancillary to the named plaintiff's claim.[113] The *Zahn* dissent agreed, arguing that meeting the amount-in-controversy requirement was unnecessary because the unnamed class members' claims were ancillary to those that did meet the requirement.[114] The *Zahn* majority did not explicitly address either the plaintiffs' or the dissent's arguments for ancillary jurisdiction, but implicitly rejected them in reaching a contrary result.

The Seventh Circuit implied in *Stromberg* that the reason the *Zahn* majority did not assert pendent party (ancillary) jurisdiction was that it was not available to the Court.[115] However, the concepts of pendent and ancillary jurisdiction had been spe-

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108. Zahn v. International Paper Co., 414 U.S. 291, 300-02 (1973).
109. *Id.* at 305 (Brennan, J., dissenting).
110. *Id.*
111. *Id.* at 308-09 (Brennan, J., dissenting).
112. 255 U.S. 356 (1921).
113. *Id.* at 366.
114. *See Zahn*, 414 U.S. at 309-10 (Brennan, J., dissenting).
115. The Seventh Circuit stated that since § 1367(a) now gives congressional authorization for pendent party jurisdiction, *Zahn* would be decided differently today. Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 931-32 (7th Cir. 1996).

cifically acknowledged by the Supreme Court at the time it decided *Zahn* in 1973. *Gibbs*, the seminal case for pendent jurisdiction, had been decided in 1966. More to the point, *Ben-Hur* had specifically authorized the use of ancillary jurisdiction in non-spurious (non-Rule 23(b)(3)) class actions in 1921.[116]

The Supreme Tribe of Ben-Hur was a fraternal benefits association organized under Indiana law. The members of the association were citizens of several states. When the legislative body of the association decided to reorganize the benefits scheme into "Class A" and "Class B" memberships, the members filed a federal class action to enjoin the reorganization. The suit was filed under diversity jurisdiction, with non-Indiana citizens as the named plaintiffs. However, the class also encompassed some members who were Indiana citizens. The federal court found jurisdiction proper, but upheld the reorganization. When the Indiana citizens filed a second suit in state court, seeking to relitigate the validity of the reorganization, the association filed a bill in federal court to enjoin relitigation in state court. The association claimed that the federal action upholding the reorganization precluded any member of the class from bringing a state action. The federal district court dismissed the association's bill, holding that the original federal suit lacked diversity jurisdiction because both the association and some of the unnamed class members were Indiana citizens.

The Supreme Court reversed the dismissal, holding that diversity jurisdiction existed over the Indiana members in the original class action because of ancillary jurisdiction. Since jurisdiction was proper between the named plaintiffs and the association, the Court reasoned that the claims of the unnamed class members were "'ancillary to the jurisdiction acquired between the original parties.'"[117] The Court asserted that this decision about ancillary jurisdiction—a type of jurisdiction "not warranted by the Constitution and laws of the United States,"[118]—did not stem from any court-made rule, but was jus-

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116. 255 U.S. 356 (1921). Not until *Finley v. United States* was decided in 1989, holding that congressional authorization was required to exercise pendent party jurisdiction, was it clear that such jurisdiction was unavailable. *See supra* text accompanying notes 22-23, 30-33.

117. *Ben-Hur*, 255 U.S. at 365 (quoting Stewart v. Dunham, 115 U.S. 61, 64 (1885)).

118. *Id.* at 366.

tified by the fact that "class suits were known before the adoption of our judicial system, and were in use in English chancery."[119] Thus, ancillary jurisdiction was available to allow claims of unnamed class members who did not meet diversity jurisdiction requirements.

However, ancillary jurisdiction was authorized in *Ben-Hur* only because of the nature of the class action brought. The *Ben-Hur* plaintiffs in the original suit had common rights related to the specific property at issue—the benefits fund. The *Ben-Hur* Court adopted the statement of the case as delivered by the district court judge, who stated that the members of the "Supreme Tribe of Ben-Hur had a common but indivisible interest" in the benefits plan.[120] Because the plaintiffs filed a "true" class action, ancillary jurisdiction was proper.

Taken together, *Ben-Hur* and *Zahn* outline the Supreme Court's view on ancillary jurisdiction in diversity class actions. Ancillary jurisdiction was available to add class action claimants that did not meet the requirements of § 1332.[121] However, the use of ancillary jurisdiction to do so was dependent on which traditional category of class action was involved—true, hybrid, or spurious. Thus, in *Ben-Hur*, a "true" class action, ancillary jurisdiction was available. In *Zahn*, a Rule 23(b)(3) ("spurious") class action, it was not. The *Zahn* Court rejected the exercise of ancillary jurisdiction, not because there was no congressional authorization for it, but because, historically, ancillary jurisdiction had not been proper when there was no common right or interest in the outcome of the case.

After examining the Supreme Court's holdings in the area of class actions, the Seventh Circuit's decision must be called into question. The Court in *Zahn* did not hold that pendent party jurisdiction was generally unavailable, but implicitly held that pendent and ancillary jurisdiction were inapplicable to diversity class actions brought under Rule 23(b)(3). Because pendent party jurisdiction was generally available to the *Zahn* Court, the fact that Congress authorized pendent party jurisdiction in § 1367 cannot affect *Zahn*'s holding. Moreover, as evidenced by the stat-

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119. *Id.* (citation omitted).

120. *Id.* at 361; *see also* Floyd, *supra* note 16, at 851 ("*Ben Hur* involved a 'true' class action which sought to enjoin a disposition of the funds of the association in which all members of Class A were alleged to have a joint interest." (footnote omitted)).

121. *See Ben-Hur*, 255 U.S. at 366.

ute's "same case or controversy" language, Congress not only authorized pendent party jurisdiction, but also textually tied its exercise to limits recognized in previous cases such as *Zahn*. Thus, a textualist reading of § 1367 demands a result contrary to *Abbott Laboratories* and *Stromberg*.

C. *Legislative History of § 1367*

A look at the legislative history confirms that § 1367 should not affect the holdings of *Ben-Hur* and *Zahn*. The House Committee report states that the statute was meant to "essentially restore the pre-*Finley* understandings of the authorizations for and *limits* on other forms of supplemental jurisdiction."[122] By "supplemental jurisdiction," Congress meant the doctrines of pendent and ancillary jurisdiction, as understood by the federal courts prior to the Supreme Court's decision in *Finley v. United States*.[123] Importantly, the report continues: "The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to Finley."[124] As a footnote to this statement, the report cites *Ben-Hur* and *Zahn*.[125] The Committee's specific reference to *Ben-Hur* and *Zahn* as cases that should not be affected by § 1367 evidences Congress's intention that the statute not affect the traditional jurisdiction rules governing diversity class actions.

V. CONCLUSION

The Fifth Circuit's decision in *Abbott Laboratories* and the Seventh Circuit's decision in *Stromberg* attempted to resolve a split among the districts concerning the continued viability of *Zahn v. International Paper Co.* Such a resolution was needed to settle disagreements among both courts and commentators about the application of § 1367 to diversity class actions. However, the Fifth and Seventh Circuits' answers are unsatisfactory.

Both courts relied on a textualist approach to interpreting § 1367, reasoning that the "ordinary" meaning of § 1367 overrules *Zahn*. In using a textualist approach, both courts rejected

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122. H.R. REP. NO. 734, *supra* note 40, at 28 (emphasis added).
123. 490 U.S. 545 (1989).
124. H.R. REP. NO. 734, *supra* note 40, at 29.
125. *Id.* at 29 n.17.

significant legislative history which states that Congress meant for *Zahn* to survive. However, even using a textualist approach, § 1367 requires a different result than that reached by the Fifth and Seventh Circuits. The best reading of § 1367 in the Rule 23(b)(3) diversity class action context is that *Zahn* survives. The text of the statute uses language that has been understood as a reference to the traditional concepts of pendent claim, pendent party, and ancillary jurisdiction. Thus the scope of § 1367 is synonymous with the limits of pendent and ancillary jurisdiction. The legislative history confirms this point. Traditional concepts of pendent and ancillary jurisdiction, however, do not apply to diversity class actions brought under Rule 23(b)(3)—the descendant of "spurious" class actions. *Ben-Hur* and *Zahn* together demonstrate that ancillary jurisdiction was only proper in the diversity class action context when the class had a common right or interest in the subject of the litigation—a "true" or "hybrid" class action. In *Zahn*, the Supreme Court implicitly held that Rule 23(b)(3) class actions cannot be subject to ancillary or pendent jurisdiction. Since the scope of § 1367 is no broader than pendent or ancillary jurisdiction, Rule 23(b)(3) class actions can no more be subject to supplemental jurisdiction under § 1367 today than they were subject to ancillary or pendent jurisdiction after *Zahn*.

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