Supreme Court of the United States

OCTOBER TERM, 1968

In the Matter of:

MARGARET E. SNYDER,

Petitioner

vs.

CHARLES HARRIS AND EARL W. KIRCHHOFF

Respondent.

Docket No. 109

Place Washington, D.C.

Date January 21, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

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MARGARET E. SNYDER,

Petitioner,

v. No. 109

CHARLES HARRIS and EARL W. KIRCHHOFF,

Respondents.

Washington, D. C.
Tuesday, January 21, 1969

The above-entitled matter came on for argument at 1:20 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

CHARLES ALAN SEIGEL, Esq.
1117 International Building
722 Chestnut Street
St. Louis, Missouri
Counsel for Petitioner

JAMES L. ZEMELMAN, Esq.
408 Olive Street
St. Louis, Missouri
Counsel for Respondents

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P R O C E E D I N G S

MR. JUSTICE DOUGLAS: No. 109, Snyder versus Harris. Mr. Seigel.

ORAL ARGUMENT OF CHARLES ALAN SEIGEL, ESQ.

ON BEHALF OF PETITIONER

MR. SEIGEL: Mr. Justice.

This was a case that was initially instituted in the eastern district of Missouri by the petitioner brought under the Federal Rule 23, the class action rules, seeking to recover for herself and for some 4,000 members of her class a judgment in the amount $1,200,000.

The petitioner is the owner of some 2,000 shares of stock of the Missouri Union Fidelity Insurance Company. In the petitioner's complaint it is alleged that the National Western Life Insurance Companies entered into agreement with the controlling members of the board of directors of the Missouri Fidelity Union Trust Insurance Company whereby, that the National Western agreed that they would buy some 300,000 shares of stock owned by the directors and members of the directors' families for the premium price of $1,200,000 over what the stock was selling for on the market, and the condition was that these directors resign and that is what happened.

The directors did resign and the shares were purchased and the nominees of National Western were then elected to control the board of directors and then were elected control

of the executive committee and the financial committee.

The relief sought in the complaint was that this $1,200,000 should be distributed to the shareholders of the Missouri Union Fidelity because that this was an illegal sale of the offices of the directors and it was a breach of trust owed by the directors to the stockholders.

The respondent filed a motion to dismiss taking the position in the motion to dismiss that the claim of each member of the class was a separate and distinct claim and that inasmuch as the claim, the respective amount of the petitioner's case was only $8,740 that the jurisdictional amount of $10,000 had not been met.

The District Judge, the District Court, sustained this motion. This was affirmed by the Court of Appeals and Certiorari was applied for and granted to the Court on this matter.

The sustaining of this motion to dismiss is what made up the issues in this case. The respondents claim that under the old rule, Federal Rule 23, and the cases decided before the Federal Rule 23, is that you could not aggregate separate and distinct claims.

It is the position of the petitioner that amended Rule, Federal Rule 23, does away completely with any designation of separate and distinction claims and the undercover rule 23 there is provided for one action and one judgment binding on

the whole class except those who want to be excluded. There is no such thing as separate and distinct claims, therefore, aggregation is permitted.

Now, going into a little history, the United States Constitution, Article 3, says that the judicial power should be in one supreme court and such inferior courts as the Congress should then designate.

The Section 2 of the Constitution provides that the judicial powers should extend to matters of citizens of different States. Now, in the Judicial Act of 1789, there was set forth by Congress the jurisdictional amount of $500 for jurisdiction in District Courts; this has now been extended presently to $10,000.

As might be expected, after it was set this jurisdictional amendment, there came the problem of what happens in joinder cases and what happens in class action cases. How do you compute the $10,000. The courts then looked; they cannot look at the statute. There was nothing in the statute that said how it should be determined. There is nothing in the Constitution, so they, then looked to their rules, the rules of common law and of equity practices as grew up as to joinder equity practice and also the interpretation of the old Federal Rule 23, which really was a codification of the old rules of common law joinder and of equity practices.

As we go back and look at the common law rules of

joinder, class actions and of equity practice, and as also is codified in Federal Rule 23, we find that there was such terms used as joint and common and separate and distinct.

The courts came down with this theory. They came down with this theory not at the statutes, not the Constitution, but at its own procedural rules, and they came with this conclusion, that if there was a joint action, and that would be an action, for example, when there was an interpretation of a trust that would be binding and all the parties plaintiff.

This was a true class action and, therefore, aggregation should be permitted. If there were separate and distinct claims, such as the claims, we admit under the prior rule, would be this particular case, that these could not be aggregated because there could be separate judgments and in every respect under Federal Rule 23, the old Federal 23, and under the old equity and common law practice, even though there was a joinder or class action when they were separate and distinct claims, each claim maintained its own identity.

These joint and separate claims were called spurious claims and these claims the court would not allow aggregation, and again, under Federal Rule 23, the old Federal Rule 23, is that the only effect of a joinder in a class action where there were separate and distinct claims was that the person who had a separate and distinct claim could intervene in the action.

It was not binding on any other members of the class unless the class member actually intervened in the action. There could be separate and distinct judgments, there could be a judgment for plaintiff and there could be judgment against plaintiff.

In July of 1967 amended Rule 23 was passed and basically amended Rule 23 provides for is that when the class is so numerous that it would be impractical to join all the parties involved and there are common questions of law and fact common to the class and that their claims or defenses are common to the class and that the petitioner will fairly represent the class and that the questions of law and fact common to the members of the class prevail over any question affecting individual members then a class action may be maintained.

If a judgment is entered the rule specifically says: "The judgment", it does not say "the judgments", "the judgment in such an action", not "actions","shall describe the member of the class and shall be binding on all members of the class who do not notified by the court after being notified by the court that the action is pending that they want to be excluded."

So, as in this particular case, if the petitioner was prevailed there would be one judgment in the amount of $1,200,000 and which would be binding to all members of the class except those members who notified the court that they did not want to be included in the judgment.

Q What would they have left?

A Mr. Justice, there would be distributed to each member of the class his respective share.

Q How about the ones who notified that they didn't want to be part of the action? What would they have retained by that action?

A They would have retained the right to bring their own independent action, Mr. Justice.

They could bring an independent action, for example, if they so desire.

Q So there would be at least two actions, then, possibly?

A There could be. That is correct.

Q And if 100 shareholders each said, "I want to stay out", there would be all of those 100 bringing their own separate actions.

A That is correct.

Q And state their own cause of action.

A That is correct.

Q What if two of those 100 joined in one suit. Two parties of this class, two of the 100 who said,we don't want to be part of this case, then brought,in their own names, their own actions against the company, each for $5,000.

A They could maintain that action.

Q How could they do that?

A Well, if they do not have the $10,000 jurisdictional amount involved between them, then they would file the suit in the State Court ---

Q But, between them they do, but do you say that two stockholders may aggregate if they join in one action against the company?

A Under the class action rules, yes.

Q Well, this isn't a class action, they don't purport to be bringing a class action for anybody. They just say: "We are bringing our causes of action, the two of us, right here."

A Well, if their claims are in excess of the $10,000 they could bring it in a Federal Court. If they were not they would bring their claim to a State court.

Q I understand that. What makes you say that they could aggregate in that case?

A Well, in that case, Mr. Justice, that would be a simple case of joinder of two plaintiffs, and that would not fall under the class action rule and the old rules as far as joinder would apply.

Q Which means that they couldn't aggregate?

A That is correct.

Q So they couldn't bring their action into a Federal Court?

A Well, under the old rule if this was strictly

just a joinder case, Mr. Justice, that would be correct, because I want to make it clear that our position that the claim should be aggregated is really based solely ---

Q I understand that.

A Under the case that Mr. Justice has put forth is that would be simply a ---

Q Simple joinder case, no aggregation.

A I think that you would have to go to the old court decisions on that. There would not be aggregation because the sole basis of our claim for aggregation is Amended Rule 23 which now provides for one judgment binding on the whole class.

Q But in that case I gave to you, you said there would be no aggregation, but, nevertheless, both parties would be bound by the judgment.

A Mr. Justice, in the case that you mention, there would be, not one judgment, there would be two separate judgments in a strictly permissive joinder case there is not any provision for a single judgment, there would be a judgment for each plaintiff ---

Q But, nevertheless, when the lawsuit was over, both parties would be bound.

A That is correct.

Q And, furthermore, the issues of fact and law are identical.

A That is correct.

I might point this out that, theoretically, in a permissive joinder case, there could be different judgments, whereas, in a class action under amended Rule 23, there cannot be different judgments.

There is one judgment that is binding on the whole class, and there is only one consistent judgment. There cannot be separate judgments.for one member of the class and against the other, because the rule says that if the claims or defenses are not common, then there should not be a class action rule.

So there is no possibility of an inconsistent judgment under amended Rule 23.

Q Your position really means that the jurisdictional amount would not be consequential for purposes of determining Federal jurisdiction and diversity case. That is the practical effect of it. Of course, in theory you could have,as my Brother White's question indicated, you could have enough stockholders saying, we don't want to be included, so that the remaining group would not have the $10,000 jurisdictional amount.

Actually, the position that you take construing the rule wouldn't mean that any party could start a stockholders derivative action, as a practical matter, and would not be troubled by the jurisdictional requirement of the jurisdictional amendment.

A Mr. Justice, that would be so as long as the

aggregate amount of ---

Q It is hardly worth bringing to suit.

A That is correct. The respondents have contended that we must look to the old rules as to aggregation, the old rules as to what the courts -- the decisions of the courts held that there could not be aggregation if there were separate and distinct claims.

We must look to the old Federal rule, which had this breakdown and used these terms, the carry-over from the old common law and class actions of joint, common and several, and that, as I indicated, if it was a joing claim, there could be adjudication but if it was several there,could not be.

Now, that is what respondents look to in support of their position. But, now when the petitioner wants to look at amended Rule 23 to find out there can be aggregation,the respondents now claim that this is inviolation of Rule 82 of the Federal Rules of Civil Procedure, which says that the Federal Rules cannot expand Federal jurisdiction.

I submit that if the petitioner, in seeking to justify aggregation under the amended Rule 23, is in violation of expanding jurisdiction, then the respondents in looking at the Court's interpretation of its own rules, its own common law rules, equity rules, and old rule Federal 23 is also in violation of the restrictions of the Rule 82 which says that

not only must you not extend jurisdiction, you must not limit jurisdiction.

Otherwise, if we are expanding jurisdiction by looking at amended rule 83, they are limiting jurisdiction by looking at the old Federal Rule 23, and looking at the Court's decisions which were handed down before the old Rule 23.

Obviously, a Court cannot limit its own jurisdiction. Actually, we are not really talking about jurisdiction. We are talking about procedure. The amended Rule 23 in no way seeks to increase or decrease the amount of the $10,000 jurisdictional amount. It simply provides a procedure that wherein a class action brought under amended Rule 23, there is one binding judgment and this judgment is binding on the whole class.

We might say that it is possible, in a case such as this, when there is one binding judgment on the whole class which could be in the amount of $1,200,000, that there is not in controversy the sum of $10,000.

Yet, I want to emphasize that we are talking about one judgment, the rule speaks about one judgment and one action. I have been talking about theory and there is a practical sensibility to the amended Rule 23.

A class action really was thought of and enacted and devised to provide a forum to get rid of a multitude of cases, to cite them all in one case. Also, it was devised to give the small litigant a chance to litigate his claim.

The makers of the rule recognized this when they -- in their statements -- that they were doing away completely with these terms, joint, common, several, true, spurious and hybrid actions. These would be done away and new amended Rule 23 would provide for only one action. These terms were going to be no longer looked to.

I submit that if we take the interpretation, as urged by the respondents in this case, that there would very seldom be brought an action under the amended class action rule. That is for this reason: The first requirement of amended Rule 23 is that the class be so numerous that it would be impractical to bring them all before the Court.

I cannot think of any case that I have read or heard about in which there was so many people that suffered any dependent damages of $10,000 that they could not be brought before the Court, and in most of the cases, such as the case we are talking about, you find persons who have sustained damages of $500, of $1,000, in our case, $8,740, but in very few cases will you find so many people that it would be impractical to bring to Court each one of them who has sustained a $10,000 damage.

Therefore, the position urged by the respondents really completely makes Rule 23, amended Rule 23, annulled. It will never be used, and I suggest and urge this Court that the interpretation urged by the petitioner be adopted.

That was the intention of the framers of the rule, that small litigants have a form to litigate their claims and that under the Federal amended Rule 23 that there would be one action, one judgment, binding on all the members of the class who have not chosen to be excluded, and, certainly, in this case, that amount would be far in excess of the $10,000 jurisdictional amount.

Q But it isn't quite that, is it, it is a question of whether you have to litigate in the State or a Federal Court.

A Well, the ---

Q You have a forum.

A That is true. There could be a forum, but I think that the litigants are entitled to an impartial forum as provided for by the diversity of the citizenship provisions of the Constitution and the mere fact that there might be a forum in the State Court does not mean that there cannot also be a forum in the Federal Court.

I think it was the intention of the framers to have a rule -- the State courts, none that I know of have this particular rule. I think it was the intention of the framers of amended Rule 23 to provide such a forum because it was seen that under the old rule is that no class actions were being brought.

The only thing that was happening was is that when

there were separate and distinct claims that one or two persons would intervene in the case. It was really a method of permissive joinder. That is all the old class action rule was. It was not a class action in the true sense.

It was not designed to do away and to decide a multitude of claims. It was not designed, as a class action should be, to give the small litigant the chance to litigate his claim. I think that was the intention of the framers. I think it was clearly expressed, as I indicated before, they state that the class must be so numerous.

Well, obviously, we know that from our practical viewing with life that there would not be so many people -- very seldom would there be so many people that would lose $10,000 in a transaction that would be impractical to bring them into court.

So the framers were thinking of the small litigant.

Q That was in the old rule, wasn't it?

A Yes, sir.

Q There is nothing new about that provision, is there?

A That is correct. It was in the old rule ---

Q The member didn't change that.

A That is correct. But the old rule could not work because each person under the old rule, there being separate

and distinct claims had to have suffered a $10,000 jurisdictional amount loss.

So the purpose of a class action rule of doing away with a multitude of litigation would not have been carried forth.

Thank you very much.

MR. CHIEF JUSTICE WARREN: Mr. Zemelman.

ORAL ARGUMENT OF JAMES L. ZEMELMAN, ESQ.

ON BEHALF OF RESPONDENTS

MR. ZEMELMAN: Mr. Chief Justice, may it please the Court:

I would like to first direct the Court's attention to one particular position in our prosecution of this matter. That is, and I will start out with the history of the aggregation doctrine, leads us, as the respondents, to the inescapable conclusion that the doctrine, that is the aggregation doctrine is not tied to the Federal rules of Federal Rules of Civil Procedure.

The aggregation doctrine began approximately 100 year prior to the time that our Federal rules were enacted. The jurisdiction of our lower courts was established by the legislature and from time to time modified and amended until such time as it reached the $10,000 limitation that it presently has.

Admittedly, when the Federal Rules of Civil Procedure

were amended, there was an effort on the part of the advisory committee to give, it seems to me, the Federal District Courts, wider discretion as to the type, the latitude,that they could choose in applying any sort of joinder application.

Nevertheless, it is our contention, and it has been our contention from the beginning, that this amendment to Rule 23, although it does away with the designations we call hybrids, spurious and true and those, I remind this Court, were creations, I think, of the writers rather than of the courts, nevertheless, they have to be used today as some form of a guideline.

Mr. Justice White asked my opponent as to what procedure might be evolved in the event various of the parties within a class should seek to remove themselves from that class, and clearly, as we have pointed out in our brief, the possibility is that the final remaining or remaining parties would not have the jurisdictional limit.

I think that the intention of the Federal rules was not to determine whether or not the party litigant could get into Court, but, rather, what procedure might be used to simplify the approach that the Court to take to the handling of the various litigation before it.

The jurisdictional limits that are imposed upon the Courts must be viewed first, and, in this instance, it is a $10,000 limitation. The plaintiff in this case, by the

admission of counsel, has only approximately an $8,000 claim and that only by aggregation could she have, as a forum, the Federal Court.

She is not without a forum. The Missouri Rules of Civil Procedure, as set out in our brief, provide the same or comparable provision as did Rule 23 prior to its amendment.

It would be my understanding that the simple result of the amendment to the rule was to promulgate a more practical working of the class procedure.

It enabled the Court to determine whether or not a matter fell within a class action procedures and would be appropriate to that court. But prior to making that determination, it seems to me, that this Court, or any court, has to determine whether or not the jurisdictional requirements are met.

Counsel has suggested that we might be talking about a limiting factor by invoking Rule 82. Federal Rule 82 says, and I quote in part, that: "The jurisdiction shall not be extended or limited.

I am not suggesting to this Court that we are talking about any limitation. The limitation is in existence by the present statutory enactment being the $10,000 limitation. We are suggesting that the Court is not changing that. We are merely suggesting that if petitioners' application were applied here, that any number of people with separate and

distinct claims with common matters of law, in fact, could join in and bring a cause before the Court.

In the Federal District Court in making its decision in this matter, it referred to the Pinel case and we, subsequently, called the Court's attention to Troy Bank of Troy, Indiana versus G. A. Whitehead.

In that case, probably, the aggregation doctrine is more clearly defined than in any I have read. It points out that when two or more plaintiffs having separate and distinct demand unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount.

Clearly, in this case, this plaintiff, bringing of this lawsuit, on her own, seeking the $8,000 based upon her 2,000 shares does not have a forum in the Federal Court. She is not limited from a day in court, but she is limited, in our understanding, of the forum of this Court, or of the Federal Courts.

Q Is the claim in the present case, peculiarly, a derivative claim, that is to say, a claim of the corporation against some of its officers and directors?

A Mr. Justice, it is not. This is a class action claim that has been brought, not under the derivative proceedings of the Federal Court. There is a derivative suit that has been filed, and I would point that out to this Court, by a

shareholder in the State courts of Missouri.

In addition, this particular petitioner has filed cases in the District Court in the State of California and in the District Court in the State of Wisconsin, one of which was dismissed, the California case; the Wisconsin case following the holding of the 10th Circuit in the Gas Service Case, and accepting that proposition determined that the action was properly brought, and overruling, so to speak, the decision of the 8th Circuit Court in our case and in the 5th Circuit Court in the case of Alvarez versus Pan American Life Insurance Company.

Q I am not sure I understand you. Isn't the claim here mismanagement or use of inside -- the claim here, let's see here, as I recall it, the claim is that the insiders sold their stock at a specially high price, to a company which sought to acquire control of your client; is that right?

A The allegation, Mr. Justice, is that certain company directors, who controlled a large block of their stock sold their stock to other persons.

Q At a premium price.

A At a premium price ---

Q The resulting cause of action is,conventionally speaking, a corporate cause of action; is it not?

A It may be. In this instance ---

Q And this would be typically a derivative

stockholders action?

A The one petitioner, the petitioner in our State Courts in Missouri, has chosen that route, the derivative route.

In this instance, what the petitioner has chosen to do is to recover, not for the corporation, but for the stockholders themselves, this fund that they have determined by multiplication to be approximately $1,200,000.

They are not seeking this money for the corporation, which is the derivative action. My corporation has been damaged, I,as shareholder, seek to recover when you directors will not take such action.

Q Now, let us suppose that the stockholder here had brought us a derivative action. That is to say, asserted the cause of action on behalf of the corporation.

Would you still challenge the jurisdictional amount?

A This would take some thought. But it would appear that if it was the corporation that were seeking the fund -- if the fund was to be sought for the corporation and no singular stockholder, and I think this is an important element, and no singular stockholder was to realize other than the enrichment of the corporation.

Q Well, that is a derivative stockholders action.

A That is right. In that situation, it would

be conceivable that if the amount that had been taken away from the corporation were $1,200,000, they would reach the jurisdictional limit, but that is not the case.

Q Well, when you say it would be conceivable. I go with you, I can conceive of a lot of things. But do you think that is a correct interpretation of the law.

In other words, I believe that the question is quite relevant to your case, if I may say so, because the question that we have to consider is whether the rule that we would lay down in this case would also apply to a derivative stockholder's action, or whether the two are distinguishable. That is really what I am asking you.

A Well, I am not certain that I agree with you, Mr. Justice, that the same procedure would be followed in a derivative action.

Q I am asking you whether the rule with respect to computing jurisdictional amount in the case before us now would necessarily apply had the stockholder here brought a derivative stockholder's action, whether you say that the rule is the same or if it is different and if you think that it would be different what would be the rule in a derivative action?

A I think that it would have to be different. I think the derivative -- it is not my understanding that Rule 23-B, that the procedure is on B-3, that we are proceeding

under here is the derivative action. It is a form of class action.

That under a derivative action the amount in controversy would be determined by what the corporation would be entitled to rather than by aggregating the claims of the various stockholders.

Q You mean a stockholder owning one share of stock worth $1 would satisfy the requirements of jurisdictional amount provided that he brought a derivative stockholder's action.

A A shareholder with one share of stock worth $1, in bringing a shareholder's derivative action, I care not what the value of the shareholder's stock is, it is what the amount of the claim that the shareholder is asserting on behalf of that corporation.

In this instance we are led down the path of a single shareholder seeking a single recovery for herself and by ---

Q No, she is not. She has brought class action.

A That is what she is doing -- well, she is doing this under the class action procedure. She is saying to the Federal Court that I may aggregate my $8,000 claim with your $4,000 claim and your $11,000 claim.

Q Suppose nobody comes in and enjoins here.

A Well, ---

Q And let's the plaintiff wins; now, would the judgment rendered by the Court be related solely to this one stockholder's holdings or would it be a judgment on behalf of the entire class.

A It is my position that in this case, in this litigation, assuming that it follows the merits of the cause, that the Federal District Court in Missouri would give this lady an award of, and I will refer to my -- some $8,000.

Q Well, then you are back to the point of saying that this is not a proper class action under the rule as amended, aren't you?

A Under Rule 23-B I am saying that she has not the jurisdictional requisite to come within the class action.

Q You understand my quarrel, because I am saying that if you say that this is a proper class action under Rule 23 as amended, then I believe you have the greatest difficulty in sustaining your position that the recovery would be limited to the damages incurred to this single stockholder ---

A This is a separate and distin ct claim brought by this petitioner enacting Rule 23-B as they interpret it to be which entitles them to, because of the cumbersome condition of the class, to represent the class.

Q Suppose the petitioner had $10,000.01.

A I am sorry.

Q Suppose the petitioner was claiming for herself

$10,000.01. Then she can file a class action.

A She may if she has $10,000 herself, as I understand you ---

Q She would have to have $10,000.01. It has to be over $10,000.

A $10,000.01, yes.

Q Then she could file a class action.

A Then she could bring this action, absolutely.

Q And everything would attach to her.

A It would attach in the way that counsel wishes it to attach, that a judgment would be rendered which would bind the class excepting for those members of the class that chose to get out of it.

Q Some could refuse to take the money.

A They could asked to be excused ---

Q Yes, refuse to take the money.

A Well, they could be asked to be excused from the action and bring their own private action.

I don't think this will happen. The practicalities dictate otherwise. I would like to speak to one additional point. That is this: That oneof the matters that has been belabored here is this feeling sorry for the people who do not have the jurisdictional requirement to get in this Court. Notwithstanding that, we have, every day, in the courts of this land cases where plaintiffs and petitioners have $9,999

and they are unable to avail themselves of this forum.

If this is the excuse that is going to be used to allow them to arrive within the forum of the Federal Court, then, of course, new learning is going to have to be established here and it is our position and our argument that the entire aggregation doctrine which has been derived, and from the many cases that have come before this and the other Federal Courts, will have to be waived away and I don't believe that, ipso facto, we are going to take a wand and erase all of these procedures.

Again, I go back to my initial claim which is this: That it is our contention that the jurisdictional requirements have to be met and then we look to the Federal Rules of Civil procedure to determine what manner of action may be brought here and if a class action properly lies because I have the $10,000.01, so be it. I am in this Court.

Otherwise, I am limited to a perfectly adequate forum which provides the same sort of determination as the Federal Court.

I am not led to believe that the State courts of Missouri are going to be arbitrary in reaching a decision here any more than I would believe that the Federal Courts, and I feel that an adequate result, if the law so supports it, can be achieved by the petitioner in the State courts.

Again, I allude to the fact that, based upon my

interpretation, the interpretation of Judge Harper in our District Court, and a reading of the advisory committee indicates that this is a procedural working and that under the doctrine established in the Pinel case, under the do ctrine established in the Troy Bank versus Whitehead case, and under all of the cases that we have cited in our brief, that the aggregation doctrine is not to be wiped it away.

It is a doctrine that is determinative of the jurisdictional requisites needed to get into this Court.

I would call Mr. Chief Justice Warren's attention to a paragraph that we refer to in our brief, which points out, among other things that the increase in 1958 of the jurisdictional amount to $10,000, seemingly has only had a slight effect on the workload of the judiciary.

If this effort on the part of petitioner to invoke Federal Rule 23-B is allowed to be utilized under the situation that they claim, then I can see that this Court will be flooded with just extensive litigation, because all of those claimants who have one cent that want to get $10,000.01 together under a separate and distinct claim procedure will have the forum of this Court available to them.

This petitioner recognized the separate and distinct nature of its claim throughout and we merely urge upon this Court that the decisions of the 5th Circuit which applied for Certiorari to this Court and which was subsequently

denied, the decision of the 8th and of, by the way, some of the Federal Districts of Illinois, are very well reasoned and have arrived at a proper result.

I would call the Court's attention to one other case. There are two cases in Illinois which go in opposite routes. It would be our position that the Booth versus General Dynamics case which seems to permit an aggregation, actually, was viewed in Lesch case, also cited in our brief, and recognized by the Lesch case as reaching an improper result.

I would also like to call this Court's attention to the Gas Service Company case. The 10th Circuit, in reaching its result, at least in our determination, in relying on the Gibbs versus Buck case, has misconstrued the decision of that case, but that, in fact, in that case, an examination shows that all of the parties that were petitioners to that case had the requisite jurisdictional amount, so that there was no question here as to whether aggregation was required.

It seems to me that the Buck case, Gibbs versus Buck case, reiterates and reaffirms the earlier and later decisions of this Court that the aggregation doctrine is a well-thought of and a well-situated doctrine that should not be wiped away, and I would suggest to this Court that if the Court feels that amended Rule 23-B permits this, then what the Court is doing is in one swoop is wiping out the aggregation doctrine which seems to us to be a very realistic

doctrine that has been established for over 100 years in this Court.

Thank you very much.

MR. CHIEF JUSTICE WARREN: Mr. Seigel.

REBUTTAL ARGUMENT OF CHARLES ALAN SEIGEL, ESQ.

ON BEHALF OF PETITIONER

MR. SEIGEL: I just have two short statements.

MR. CHIEF JUSTICE WARREN: Very well.

MR. SEIGEL: Mr. Justice, members of the Court: I think that the question that really brings this whole thing to point is the question, what happens if there is $10,001? Does that make it a class action?

Well, under the theory of the respondents, although respondents said, yes, it does, but under the theory here it would not because stil each -- under their theory, for each member of the class you would have to have $10,000.

As I stated before, where are we ever going to find a class action,as we think of a class action, where there has been so many people that have sustained $10,000 loss. The amended rule would be a complete fatality.

Q Did Mr. Zemelman argue that each one of them had to have $10,000 interest or that one had to have $10,000 and then he could aggregate?

A Mr. Justice, on being questioned here by Mr. Justice Marshall his answer was that if the petitioner had

$10,001 that would permit a class action.

However, throughout their brief they take the position that they are separate and distinct claims and that $10,000 for each claim.

Q Where do you find that in this brief?

A Bear with me just one second.

They cite, Mr. Justice, Mr. Zemelman, on behalf of respondents, cited the case United States Supreme Court case of Troy ---

Q Where is this?

A On Page 13.

Q Thirteen?

A Of the respondents' brief.

I think this sets forth their position that -- and this was under the old rule and under the old court procedure of joinder, when two mor more plaintiffs having separate and distinct demands unite for convenience and economy in a single suit, it is essential that the demand of be the requisite jurisdictional amount and, so ---

Q That is joinder. That is not a class action. That appears, from the language, at least, to be simple joinder.

A That is correct, Mr. Justice, but it is the position of the respondents in this case that the rules for aggregation for joinder apply for class action.

Under the old Rule 23 it was really no more than a

joinder action. So, in interpreting -- the amended Rule 23 is really the first class action, as we think of it, that the Federal Court has ever had.

The old Rule 23 was no more than a permissive joinder, because when there was separate distinct claims of common questions of law, all it does was to give a person having a separate and distinct claim, the right to come into the Court and join, and any judgment -- there would be separate judgments and it would not bind any of the members of the class. It was not a class action ---

Q But isn't it also true that the old rule required that the named plaintiff, for example, a spurious class suit, the named plaintiff must have all, all, emphasize, underscore, jurisdictional qualifications to maintain the action as an individual; isn't that the old rule?

A Mr. Justice, the rule does not so state. That was the interpretation that was given by the courts, not by looking at the rule, or not looking at any statute, by looking at the old principles of what was a joint claim and what was a common claim. There is nothing in the rule ---

Q But the spurious class action required that. That,first, plaintiff had to be diversity, $10,000 plus, $3,000 it was then, plus, of age and everything, and then the class was a mass outside someplace.

A Well, Mr. Justice ---

Q If you follow that, the only changes that you could argue for would be that the one person would have to set it and then anybody could come in.

I don't see how you can argue that they are asking that everybody has to show $10,000. I don't understand the argument to mean that, at all.

A Well, it is just that that has been their position throughout the whole proceedings and I might say this, is that, Mr. Justice, there is nothing in the old Rule 23, that in any way indicates or states that the person bringing a separate and distinct claim must have separate and independent Federal jurisdiction.

Q It is because the rules cannot touch jurisdiction. You get jurisdiction out of the code.

A Well, Mr. Justice, it is our position in this case, that when we talk about jurisdiction, we are talking about the $10,000 limitation that was established, originally was $500 by the Federal Judiciary, this was established by Congress.

We are not talking about jurisdiction because there is no statute at all that tells how you should compute that $10,000 amount. We are talking about a method of procedure ---

Q Have you looked at the decisions of this Court?

A Pardon me. I didn't hear you.

Q Have you looked at the decisions of this Court?

A I think that we have ---

Q That is what the respondent is doing.

A That is correct. Now the respondents are looking to the decisions of this Court. Now, a court cannot limit jurisdiction, or cannot expand jurisdiction.

A rule cannot limit or expand jurisdiction. So, we must be talking about procedure, because a court cannot touch jurisdiction; that is set by statute.

Q Well, except that Congress, I suppose, could be presumed to have known the case law at the time it enacted these various jurisdictional amounts; isn't that fair to say?

A Well, I assume that Congress did know the case law, but, of course, there was no mention as to how computations should be made, but still the Court had to look to its procedural rules to find out how the jurisdictional amount should be computed. And that is what we are urging here.

Q And this $10,000 jurisdictional amoung of diversity jurisdiction, I suppose, reflects some sort of policy on the part of Congress to limit diversity jurisdiction to that extent.

In so limiting it, I suppose, the Congress, as I said earlier, we have to assume that Congress knew about the cases that had construed the requirements with respect to class actions.

A At the time when the Congress initially passed

the jurisdictional amounts, there really wasn't any -- there really wasn't any law as far as joinder and class actions.

Q But then, the amount was $500.

A That is correct.

But, the point is, and I know I have emphasized this, and that is that you are only talking about jurisdiction when you talk about raising or lowering the $10,000 amount.

We are not talking about that. We say that amended Rule 23 has provided for a procedure whereby there is a binding one single judgment in a class action binding on each and every member of the class that does not choose to withdraw from the class, that, in this case, that one single action, one single judgment would be $1,200,000 ---

Q Your adversary says that that is not the way you framed your complaint. If you framed your complaint that way that may very well be argued but that is a way of determining the amount in controversy and if the amount in controversy, namely, the judgment to be entered, if you win exceeds $10,000 and your argument has point.

Your adversary seems to contest that that is the way you drafted your complaint. He says you have got a complaint in a State court, as I remember, drafted on that theory but that this is not such an action. I take it you dispute that.

A Mr. Justice, I might say that there isn't an

action in the State court, a corporate, a traditional corporate derivative action, which we do not participate in and our position is this: Our action is brought on behalf of the stockholders, not on behalf of the corporation, for the reason that if this $1,200,000 is recovered and was repaid back into the corporation, that it would be the wrong-doers who now control who would be getting the benefit of this premium that was paid to them.

There are cases to substantiate our position. Therefore, our complaint specifically states that we are asking judgment for $1,200,000 for the members of the class. That is the judgment prayed for.

Q In other words, you agree that this is not a derivative?

A This is not a derivative action.

Thank you.

(Whereupon, at 2:15 p.m. the argument in the above-entitled matter was concluded.)