In the

Supreme Court of the United States

H. KEITH ZAHN, et al.,
Petitioners,
v.
INTERNATIONAL PAPER COMPANY,
Respondents.

No. 72-888

Washington, D.C.
October 16, 1973

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v.	:	No. 72-888
INTERNATIONAL PAPER COMPANY Respondents	:	

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Tuesday, October 16, 1973

The above-entitled matter came on for argument at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PETER F. LANGROCK, ESQ., Drawer 351, Middlebury, Vermont
For the Petitioners

TAGGART WHIPPLE, ESQ., One Chase Manhattan Plaza, New York, New York For the Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 72-888, which is Zahn against the International Paper Company.

Mr. Langrock, you may proceed whenever you are ready.

ORAL ARGUMENT OF PETER F. LANGROCK, ESQ.,

ON BEHALF OF THE PETITIONER

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

This is an action that was initiated in the United States District Court, in the District of Vermont, on behalf of the Zahns and Leazers and other persons similarly situated.

It was brought against International Paper Company and the facts of the matter allege that certain problems with the pollution of Lake Champlain is affecting the plaintiffs and the class.

The particular mill involved in Ticonderoga is also the subject of another matter before this Court, which has also been referred to a master in chancery.

The district judge, on a motion to dismiss the class action aspects of the case, took the matter under advisement. We appeared before him and, after a period of time, he dismissed the class action aspects of the case with, and I quote from his opinion, "great reluctance."

The matter was then appealed to the second circuit of the Court of Appeals, interlocutory appeal permission being granted by the circuit as well as asked for by the district court. There, in a divided opinion, it was affirmed. The en banc proceeding was rather complicated with four of the active judges -- of seven voting, four en banc, but failing to be en bancked because of a failure to achieve the majority of five and certiorari was granted this Court.

The basic issue presented is rather a narrow one and that is, whether a United States District Court judge is prohibited from taking jurisdiction of a class action where one or more members of the class might not reach the jurisdictional amount.

In looking at the rule, this is a 23-B proceeding and the rule initially requires, before any court can take jurisdiction of the class, a finding that the class is superior to other available methods for the fair and efficient adjudication of the controversy.

The first proposition that I put to the Court is that one could really reduce this case to a mathematical formula that if we assume that a case on all the facts can be either -- is efficient in the courts or it isn't efficient, we then, if it is not efficient, the court is prohibited, the district court, from taking jurisdiction.

If it is efficient, then we have two choices.

Either the court may take jurisdiction of the class or it is prohibited. Under this ruling, it is prohibited from taking jurisdiction and so -- excuse me --

Q As I understand Judge Leddy's ruling, Mr. Langrock, he simply held that in his view of the law that each of the plaintiffs having to have $10,000 as a matter of in controversy, it was not efficient to maintain it as a class action. I didn't get the feeling from his ruling that he felt he was absolutely debarred, had he reached another result as to the practicality of the thing in view of his view of the law.

MR. LANGROCK: I'd have to disagree with you, sir. The opinion, I think, states quite clearly that it was dismissed solely on the prohibitation of Snyder versus Harris and that it was dismissed with great reluctance, and that is his words.

Q Yes, but he, interpreting Snyder against Harris as he did, he then went on to conclude that there would be such serious complications and delay in determining who was bound and who wasn't, that this was no maintainable as a class action.

MR. LANGROCK: Assuming that only members of a class who had reached the jurisdictional amount -- in other words, if you defined your class at $10,000, then he would say that would be impossible and therefore, he refused to

redefine the class, excluding members who would have less than the jurisdictional amount of the $10,000.

The question that -- the policy question here I think and so much that is before the Court in class actions is the question of judicial efficiency. I would promote that this type of class action --now, this is not a -- what I would consider an unmanageable class action, this is not a manufactured one. This is a real controversy involving approximately 240 owners of the lake, on the lakeshore. This is a case which is going forward in the Federal District Court, whether it is a class action or individually, on the merits.

The question of multiple litigation that may arise is the class action we are not allowed, may be very extensive. It may be done in several state courts, in other district courts. It may well be multiple litigation in the same district court.

We think that the judicial efficiency of this type of approach -- this is the proper place for the class action. Here is where there is real litigation, litigation which is already -- the facts of it have already been involved in a Supreme Court matter. This matter is not going to go away and we think a district court should be allowed to make a finding that this is the superior, most efficient way of handling it and if that is not the case, then he is

prohibited under Rule 23 of taking it in any case.

Q When you say, "Make a finding to that effect," you mean that he should be able to include in the class people who do not themselves have $10,000 in controversy.

MR. LANGROCK: That's right, sir.

Q Isn't the case of Clark versus Paul Gray that was cited in Snyder and was cited in the second circuit opinion,that 306 U.S. case, wouldn't we have to overrule that to go along with you?

MR. LANGROCK: I don't believe so, sir. That case goes back prior to the change of the rule. That was an action where some of the named plaintiffs did not meet the jurisdictional amount.

Q But one of them did.

MR. LANGROCK: One of them did and he was allowed to proceed. There was in the face of the record certain aspects of the case which are not present in this case. In other words, there were people who did not meet the jurisdictional amount and the effect -- looking at the change of the rule, one of the problems and one of the reasons for the change of the rule is that it was an awkward situation. We are talking about spurious hyde right or whathaveyou and the rule simply states what tests should be, empirical tests to meet the class action, with a lot of safeguards and we don't think that the previous precedent of Clark versus Gray

calls for overruling.

Q But if you follow the reasoning of Snyder against Harris, the rules could be amended until one is blue in the face and you are still subject to the jurisdictional limitations of the statute and all the Court was interpreting in Clark versus Paul Gray was the statute. The fact that the class action rule may have been different then certainly doesn't affect their reasoning, as I read it.

MR. LANGROCK: Well, I, again, would beg to disagree. It seems to me that what we have in the statute is the diversity of jurisdiction, that diversity of citizenship plus the jurisdictional amount. There have been times in this court when matters not meeting the jurisdictional amount or matters not meeting the diversity requirement, have been allowed when attached to a case with this proper jurisdiction. The whole concept of ancillary, pendant jurisdiction. We have -- it seems to me that it is a clearly-set-forth doctrine that absolute diversity is not required when the main case has jurisdiction and, to me, it is not logical to say that one can proceed when you don't have complete diversity, which is one requirement of the statute, but you must meet the jurisdictional amount and this is even more so because the diversity requirement is really a Constitutional doctrine with the amount in controversy as a statutory one.

Q But, nonetheless, the Court, in Clark, did

say that and that was after the decision in Ben Hur, which was ruled the way you indicated on diversity.

MR. LANGROCK: The cases, without getting into a complete analysis of Clark, I think Clark misconstrued its previous precedent and it is really a dictum in Clark, the peculiar situation of the case. I don't think Clark needs to be overruled to reach our result. I think that it needs to be set forth in its proper context. What we have here is whether or not the jurisdiction is totally prohibited and I don't think that the concept of ancillary pendant jurisdiction is prohibited by Clark.

Q Excuse me, is this a diversity suit? Or not?

MR. LANGROCK: This is a diversity, based on diversity in the Mountain controversy.

Q And there is no basis here for saying that federal law governs this case, I take it?

MR. LANGROCK: There perhaps is, but there are several questions of state law that are involved and it was brought under the diversity statute.

Q Wouldn't you be on stronger ground, on firmer ground, in talking about pendant jurisdiction if you are starting off with a federal cause of action?

MR. LANGROCK: It certainly would be, on pendant, but I was referring to concept of pendant as being a form of --

Q Well, I meant ancillary, too.

MR. LANGROCK: Well, I don't think so. I think that at least the lower courts have brought ancillary jurisdiction over strictly state claims. The circuit court of appeals of the eighth circuit --

Q Well, I don't think there would be as much pressure in the cases or as much support in the cases for reaching out for other state causes of action to join with another state cause of action.

MR. LANGROCK: There is not as much case law as such on it, but there is, certainly cases which do --

Q Well, what about the governing law in this case?

MR. LANGROCK: We think that this is a case with first impression before this Court, that the Court has never ruled with regard to whether a court may take other controversies into its orbit when it is efficient in the interest of justice to do so, and when they --

Q But, on the merits, is this a state law? What governs it, the state or federal law?

MR. LANGROCK: The state law.

Q On the merits?

MR. LANGROCK: The state law, yes, sir.

Q On all these claims.

MR. LANGROCK: There is, in the pleadings, a mention of some federal claims. Basically, it is a state law,

your riparian rights -- nuisance --

Q Is this an interstate pollution sort of case?

MR. LANGROCK: The mill is on one side of the lake and the landowners are on the other side of the lake.

Q And is there a state line in between them?

MR. LANGROCK: There is a state line in between them.

There are various reasons in the law that we have made election to proceed on this. I think there is possibility for federal jurisdiction independent of that.

Q The plant is now not in operation. Is this correct?

MR. LANGROCK: Pardon?

Q The plant is not in operation any more. Is this correct?

MR. LANGROCK: The plant was closed several months after initiation of this lawsuit. The sludge bed, which is affecting the landowners, is still present and there is much litigation whether that should be removed or not removed or how to be disposed of. But the effects of the pollution are still very much in effect.

The -- one of the -- yes, excuse me.

Q Am I wrong in thinking that perhaps in one of our original actions in which we denied leave to file, was it Illinois against City of Milwaukee, we had something to say

about the governing law in interstate pollution cases?

MR. LANGROCK: It may be, sir. I am not familiar with that question.

Q Well, I would suppose it might make a lot of difference as to whether it is ancillary or not. If this is governing federal law, you might have a very different case.

MR. LANGROCK: The complaint that we have drawn in this case alleges three basic counts. It states the factual pattern. The class action of the case was dismissed at a very early stage. The law of the case has not yet been fully developed. There is an allegation of federal violation in the complaint but, basically, the counts sound in the common law of the State of Vermont rather than in any federal statutory law.

Q You talk as though there might be a choice on it.

MR. LANGROCK: Well, I think --

Q Well, there might be. There might not be, too.

MR. LANGROCK: This is correct. We have stated, under the civil rules, a complaint stating a factual basis which we believe calls for relief. We believe we are entitled to relief under the diversity and state argument. We also believe there may well develop a federal concept out of that but, to be quite candid, we have not developed that question because of the jurisdictional point as yet and we certainly

believe it is with the Court.

Q In other words, you invoke federal jurisdiction exclusively upon the basis upon the diversity relationship?

MR. LANGROCK: That is right, our complaint alleges diversity, is based upon the diversity sections.

Q Right.

MR. LANGROCK: I think I, in response to Justice REhnquist's question, responded to the Ben Hur situation. We think that is still the good law, that it is not necessary to have complete diversity. Where the case is in controversy, the case is before the court, there is full diversity and ancillary, pendant matter can come before the court.

We fail to see how the diversity requirement should be differently treated than the amount in controversy. The effect of this case, if it is not -- I should point our one more thing, too. That is, there is a great body of case law which, in the question of intervention as a matter of right under 24(a)2 indicates that there is not a need for independent jurisdictional mount where the first case has.

And I would suggest that this Court, the problems that would come about if this Court does not recognize that where, in the efficient cause of the administration of justice you have got to have this finding first, that a court is prohibited from taking jurisdiction over a class, not only does it destroy the class action concept wherever there is a

federal question requiring an amount in controversy or a diversity question involving the amount in controversy, but it has effects on the question of the development of the concept of pendant or ancillary jurisdiction. It has the effect on the law involving intervention of right and I don't see how, logically, one can say that the Court can take jurisdiction on cases which don't meet the jurisdictional requirements ancillary in certain cases and not in others.

What I am arguing here for is not an expansion of any law as I see it, but merely an application of law to those cases where we can efficiently put this into the hands of the district judge. Let the man who is on the spot make the decision. Let us not tie his hands. Let's not force this into several pieces of litigation. Let's not force this on the state courts, three pieces. What if we have six cases in the Vermont District Court that have adjoined the problem? It is just as difficult to try.

The class action case can, for instance, on the damages question, use a master. It can do things. It can deal with what is really a major problem, a serious pollution situation in the most efficient, intelligent manner before it and we would hate to see the Court prohibit it from doing so and this is what this amounts to. We would suggest that the arguments of the Defendant in this matter are really that they don't want class action because it causes problems for them,

not because of the jurisdiction of this Court at the time this was initiated.

Q Would it not be just as much of a problem for the Defendant in a state court as here?

MR. LANGROCK: Well, I that if it were filed in the state court, we might have a removal petition and we'd be faced with the same jurisdictional question. I've seen another case very recently of that type of situation.

Q Well, isn't that for their choice?

MR. LANGROCK: At that point, it would be.

Q Why aren't you in the state court, really?

MR. LANGROCK: At the time this case was initiated, there was no state class action proceeding. There was a proceeding that was -- the rules of civil procedure were amended subsequently to allow it but in any case, whether or not, the Congress has given a choice under diversity both to the plaintiff and to the defendant. The question is not whether or not we have the diversity, but it is how to make efficient use and to prevent any more litigation than is necessary, given the diversity situation that we have in Congress.

It seems to me that, in conclusion, that the Court is faced with two choices here, a most restrictive ruling which prohibits the district judge from what I -- I think in the mathematical sense, prohibits him from using

this when it is a good tool. And there is nothing here. This is not a case of six million or publication. This is a piece of real litigation before the courts and if the district judge, and we are asking this to be remanded, not for necessarily a class action, for the determination that if the Court feels that it is the proper tool, that it can do so and it is not prohibited by the fact that one or more persons in the class may not have the $10,000 jurisdictional amount.

The alternative would be to tie the hands of the district court and, in doing so, bring up the various problems I mentioned.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Whipple.

ORAL ARGUMENT OF TAGGART WHIPPLE, ESQ.

ON BEHALF OF THE RESPONDENT

MR. WHIPPLE: Mr. Chief Justice and may it please the Court:

I'd like to divide my argument as follows: I'd like to make a few comments about Mr. Langdock's statements and some of the questions that were asked and then I want to address myself to the principal question which, it seems to me, Plaintiff's counsel argument did not address itself to directly, and that is this:

Althought the Plaintiff stressed the environmental

aspects of this case, the legal question presented by this case concerns the jurisdiction of the Federal District Court which had been limited since the beginning of this country in their jurisdiction, was so designed by Congress and had been so construed and limited by the Constitution and Congress in 1789, indeed, the first Bill introduced in the Senate of this country ended up as the Judiciary Act of 1789, with a jurisdiction limit of $500.

And I submit we must never forget, in this case or elsewhere, that the federal court system is a system for a limited purpose and every demand like this made on the federal courts has to be carefully examined by lawyers, by the courts, by Congress and the public, to see whether it is consistent with the ever-mounting federal case load which engulfs the federal courts.

I would like to address myself first to the reasons why the Court of Appeals is correct in holding that the district court did not have jurisdiction over the class action. I think Mr. Justice Rehnquist put his finger on one of the cardinal points, sir, when you said that in order to overrule the opinion of the Court of Appeals below and the opinion of Judge Leddy, this Court must confront Clark against Gray and overrule it. I think that is clear and I think that is particularly so because of the interpretation put upon Clark against Gray, admittedly

decided, as Plaintiff's counsel said, before the federal rule 23 was amended in 1966, but the interpretation put upon Clark against Gray and Snyder against Harris was there after rule 23 was amended.

I'd also like to talk about ancillary jurisdiction and the reasons why ancillary or pendant jurisdiction is superficially an appealing idea here and, in my judgment, badly misinterpreted by the dissenting judge below. The reasons why ancillary or pendant jurisdiction, if applied to a spurious class action, where the separate and distinct claims, not a unitary Constitutional case of controversy, separate claims of the people will fall short of the jurisdictional requirement would contravene Constitutional statutory decisional and policy considerations.

Now, a couple of comments about statements by plaintiff counsel: He said, as I understood him, that the so-called "sludge bed" still shows that the effects of pollution are still very much in effect. This is wrong. In the case brought by the State of Vermont against New York and my plant, which is now on trial before special master, we have finished 70 trial days. We have a record of 14,000 pages. We have hundreds of exhibits, thousands of pages and in that case I have cross-examined witnesses who have said -- one of them has spent his life on the river and sails over the waters of the sludge bed. I asked him "What's the water like?" and

he said, "beautiful."

Q Does that have anything to do with our --

MR. WHIPPLE: No, sir, but I don't want to stand here and permit this statement to go unchallenged.

Q Well, we don't need to get into the merits now on either side.

MR. WHIPPLE: Well, I simply didn't want that to go by, Mr. Chief Justice.

Now, let us look at the basis for the federal diversity jurisdiction. I think it is clearly defined that from the beginning of time, Congress has had the task of prescribing limitations on this diversity jurisdiction. Congress has repeatedly reenacted the phrase, "matter in dispute," originally in 1789 or "matter in controversy" as it is now.

The courts have held that this phrase must be strictly construed. The policy of the statute calls for its strict construction. We say that holds good now just the way it has held good from the beginning of time here and the cases with smaller amounts are for the state courts.

Indeed, the diversity statute, 1332(a) constitutes, as the Court said in Healy, and represents a demonstration of the delicate balance between federal and state powers. The Federal Court should not be looked upon as a reservoir for all litigation, but, rather, in diversity cases, only those

cases which meet the jurisdictional amount and the jurisdictional amount which this Court knows applies in cases arising under the laws, the treaties and the Constitution of the United States is Section 1331(a).

Snyder, in 1969, a recent case, applied this principle. It rejected aggregation, despite the claims of the plaintiffs and the dissenters in that case that this rejection of aggregation would"undercut and undermine." Those words are used in the majority of the dissenting opinion. "Undercut and undermine the amendments to rule 23." The Court pointed out that a spurious class action is a kind of permissive joinder device of separate and distinct claims and in that situation, each plaintiff who has a separate and distinct claim must meet the jurisdictional amounts. They pointed out that the nonaggregation doctrine was not based on old rule 23 or on any rule of procedure. Rather, it is based under Court's consistent interpretation of the phrase "matter in controversy" which predates even the federal rules of procedure amendments in 1938 that the Court has held a consistent interpretation for years and that Congress, in four times raising the jurisdictional amount, starting in 1789, has reenacted the word, "matter in --" the phrase, "matter in controversy" for years and years in the light of these interpretations.

Q Well, this litigation will go on as respects

the four, each of whom has the appropriate jurisdictional amount?

MR. WHIPPLE: I assume it will, in the federal courts, your Honor.

Q Yes.

MR. WHIPPLE: Yes.

Q So it is not quite in the same posture as that, and, of course, I did not agree with Snyder, and that's --

MR. WHIPPLE: I recognize, your Honor, you did not, and I read your dissent carefully. At the same time, I have noted, with all respect, that in your dissent, you and Mr. Justice Fortis pointed out that the majority rule would apply to a case just like this where one or more plaintiffs did meet the jurisdictional amount and the others did not.

Q Well, that may just reflect the fault of dissenters who usually sound an alarm bigger than is warranted.

MR. WHIPPLE: Well, whatever the reason, your Honor, I have noted that and I have noted that in two cases cited, the majority opinion, in Snyder and Clark against Gray and a Court of Appeals decision, Alvarez, in each of those cases, one plaintiff satisfied the jurisdictional amount and I can't see, really, logically, any difference at all. I think it is true, as the Court of Appeals said, that they saw

"persuasive internal evidence" from the Snyder opinion that the rule there admittedly, in Snyder, there was no plaintiff with the requisite jurisdictional amount but the Court of Appeals felt that, read carefully, the majority opinion in Snyder covered the situation before your Honors now and that is where we have four named plaintiffs which seek the requisite jurisdictional amount and none, according to the complaint, none of the unnamed plaintiffs meet that amount.

Q Have you considered our decision in Illinois and the City of Milwaukee?

MR. WHIPPLE: I have indeed, your Honor. I'd be glad to answer questions about it.

Q Well, do you think that has any bearing on what law governs the merits of this litigation?

MR. WHIPPLE: I start with the proposition, your Honor and answer your question that the complaint itself rests solely and entirely on 1352(a), which is diversity. I listened to Mr. Langrock carefully and I heard him say that there is sitting the complaint state law claims. Now, I think that is evident. This is not a case arising under 1331(a), as you know.

Q Well, I was just wondering, though, after Illinois and Milwaukee, we said federal law governs, federal common law. It had still to be developed. Would the district court be free to apply state law? I understand that what is

involved here is alleged pollution from the New York side by your client that caused damage to the plaintiffs here on the Vermont side.

MR. WHIPPLE: Your Honor, I see the differences between Illinois against Milwaukee on the one hand and this case on the other. Illinois - Milwaukee was an action to abate a public nuisance of large measure. This is an action for money damages. Each and every one of the four plaintiffs and each and every one of the 200 unnamed, it was the money of the class, were suing for money damages. They are not trying to abate. If they wanted to abate, they have other remedies. Indeed, under the Federal Water Pollution Control Act of 1972, citizen suits of large measure --

Q What about liability, though, Mr. Whipple? What about the initial question of liability? Are you going to have one set of laws -- one law govern the original action you are litigating and another law governing this suit here with respect to the very same pollution?

MR. WHIPPLE: I don't think so, your Honor. In the original suit, the fundamental prayer is removal of the sludge bed.

Q Well, that is going to be a federal common law, isn't it?

MR. WHIPPLE: By your ruling, I gather it is, in Illinois against Milwaukee.

Q But in the question of whether there is an obligation to remove or whether there has been a violation of somebody's rights in the first place, it is going to be a question of federal law, isn't it?

MR. WHIPPLE: Well, I don't think it necessarily applies to us.

Q In the original action.

MR. WHIPPLE: Well, in the original action, the question as to whether the bed ought to be removed is now before the Court and it seems to me the thrust of your ruling in Illinois against Milwaukee is to visit the remarks you made on actions brought by estate. It says nothing about actions brought by private people, actions brought by estate to abate.

Q Certainly, if you take a case like Georgia against Tennessee Copper, where the Court intimated that there would be a kind of federal common law rule, there is no intimation there that the same rule would govern action between private parties, is there?

MR. WHIPPLE: None whatever, your Honor and, indeed, at one point, in either Milwaukee or one of the other cases, the Court indicates that you would be slow to apply this doctrine to private claims. Illinois against Milwaukee also adopted the language of Texas against Panke, where the judge there spoke of the state's right, a quasi-soverign right in ecological purity. That is not this case. This is a strict,

common law, border play case for money damages based on --

Q Would it make any difference in your case?

MR. WHIPPLE: No, I don't think it would.

Q Well --

MR. WHIPPLE: In either case it is based on federal common law. Then you are in 1331(a) and you have got the $10,000.

Q So then you don't think it makes any difference with respect to the argument about ancillary or pendant jurisdiction?

MR. WHIPPLE: Well, I don't think it makes any difference there and I'll be glad to talk about that argument right now.

As far as ancillary jurisdiction goes, my first point is that when Snyder was decided, and all the chain of cases that Snyder adopted, the ancillary jurisdiction goes back -- and our brief points out -- it goes back to at least 1824 and so I would submit that this Court, over the years, in applying the thinking that led to Snyder implicitly rejected the doctrine of ancillary jurisdiction. But I don't have to rely on implicit projection. I rely upon --

Q Of course, one can rely on the single claim in Snyder that gave the court this jurisdiction.

MR. WHIPPLE: That is correct. That is correct and I can't find that the matter of ancillary jurisdiction was

ever presented in Snyder. I want to be frank about that. But in the cases where it has been presented, I think that the way the law has developed, it is perfectly clear that the courts have explicitly refused to exercise ancillary jurisdiction or the permissive joinder of separate and distinct claims and in Snyder, the Court pointed out that a class action is a kind of permissive joinder device, where the particular scope is not directed at a reis or a corpus and this isn't just having to do with disputed title in real property or conflicting claims to some kind of a fund or assets in the hands of the court.

My analysis of the ancillary jurisdiction cases suggest -- and I think the law will support me on this -- that this is a permissable procedure only where there is a unitary constitutional case or a controversy and that is not this case. This is a bundle of more than 200 separate and distinct claims and we point out in our brief at the end on page 45 or so, a half a dozen or more of the issues that are going to be raised by each and every one of these 200 people when they come to trial.

Ancillary jurisdiction, in order to be applicable, it seems to me, from the cases, must have a direct relation to property or assets in the court's possession or control and that is not the case here.

It also has been expanded, getting away from Hurn against Oursler, to include compulsory counterclaims or

claims of a nature that would be precluded if not raised in the principal action and this is not that case. These 200 unnamed plaintiffs case claims are not going to be precluded by any judgment with respect to the two couples who brought this suit, the Zahns and the Leazers.

I dont find any decision cited by the plaintiffs or any decision cited in the dissent which is precedent for the use of ancillary jurisdiction in a spurious class action.

The cases are limited, as I said before, to unitary Constitutional cases or controversy and to expand that limited doctrine, and it is a doctrine of limitation, to sweep in 200 separate and distinct claims with 200 separate and distinct trials and 200 separate and distinct juries, that is what it is going to be, or you are going to have a mass trial with 200-odd people before the court and one jury is going to be asked to segregate out each of the considerations involving each of the plaintiffs.

I submit, to sweep in these 200 claims under the loose application of the doctrine of ancillary jurisdiction, which the dissentable law would do, flies right in the face of the settled principles about the jurisdiction of federal courts that I talked about a moment ago.

Pendent jurisdiction also is involved here. Although the term, perhaps, was used rather loosely and intermixed with ancillary by the judge below, pendent -- and

the Court had occasion to look at this very recently in the Moore against County of Alameda case, not cited in my brief because it came out so recently, pendent jurisdiction is a specialized form of ancillary jurisdiction and it really involves, as the Court knows, the exercise of federal jurisdiction over a state law claim, which is pendent to a federal claim, where --

Q And I take it, even if federal law governed here, so that this were not a diversity state law case, then there is no problem of pendent jurisdiction?

MR. WHIPPLE: No, there wouldn't be. On your --

Q All 200 of these -- yes?

MR. WHIPPLE: On your assumption there would be no state claim to scotch-tape on to the federal claim. But I also point out in pendent jurisdiction, if we are correct in saying state law applies, that the cases have involved federal and state claims by the same party, which is not the case here, at all.

Q Well, why isn't it, if one accepts the hypothesis advanced by Justice White and Justice Brennan that each individual might have a claim under state law and also under federal law?

MR. WHIPPLE: Well, the complaint doesn't say that, your Honor, but if you -- taking your assumption -- let's take that for the moment, let's say this is the 1331 case as well

as the 1332 case and each of these 200-odd plaintiffs has a state law claim and a federal law claim. Then the argument --

Q May I just --

MR. WHIPPLE: Sir?

Q My premise was that there would be no state law claim at all.

MR. WHIPPLE: I thought it was.

Q If this is the kind of pollution case which, under Milwaukee, is governed by federal law, then there is no problem as to any of these 200 claims. On the state law claim, it is entirely, all 200 of them are federal law claims.

MR. WHIPPLE: I appreciate that, your Honor, but, because the complaint does couch the claim --

Q State law.

MR. WHIPPLE: -- under state law, which is the necessary result of using 1332(a) as a diversity suit, I felt I had to address myself to that.

Q Well, Mr. Whipple, take three different hypotheses, if you will, which may represent the views of varying members of the Court that in a situation like this, it is governed by straight state law that the rule governing an action where a state is involved, where you have federal common law doesn't apply to the action between private parties. That is the first hypothesis.

The second is that you would have two sets of laws available to private parties, both that which would govern where a state is a party and also the Vermont law.

And the third being that you would have only federal laws, as Justice Brennan suggests.

In the second of those hypotheses, at any rate, you would have a case for pendent jurisdiction, wouldn't you?

MR. WHIPPLE: No, sir, if I may say so. And the reason you wouldn't is there isn't a unitary case of controversy. There are more than 200 separate and distinct claims. Now, the cases, as I read them, in pendent jurisdiction, I am referring to United Mine Workers against Gibbs and the recent opinion of this Court last spring in Moore against County of Alameda makes this very plain, there has to be -- as Gibbs said, a common nucleus of operative fact. There isn't a common nucleus of operative fact here. Each and every one of these plaintiffs is going to have to vest his claim on separate considerations.

Looking at the record itself, the Zahns own more than half a mile of shorefront. The record doesn't show it, but they are four miles away from this plant. The Leazers -- and they run an orchard. The Leazers own 1,800 feet of shorefront. They are a mile from the plant. They run a marina. If you look at the spectrum of these people up and down the 20 miles of the Vermont shorefront, they are all in different

situations.

Q The Zahns themselves might have pendent jurisdiction, under my second hypothesis.

MR. WHIPPLE: Oh, yes, sir.

Q But they couldn't bring someone else in who had less than the $10,000.

MR. WHIPPLE: I think the Zahns might. I think the Zahns might, your Honor, but the thrust of the dissent, as you know, under plaintiff's argument here, is that pendous jurisdiction is enough to sweep in the 200 other people to make their claim with the Zahns or the Leazers.

Have I answered your question?

Q Yes.

MR. WHIPPLE: I want to make it plain that I am not trying to restrict Gibbs or Moore because I think that in addition to the holding there, that there has to be unitary case of controversy. Gibbs also, it seems to me, extends pendent jurisdiction, and Moore does, too, to situation where the litigation of the principal claim might well have a preclusive effect on the dependent claim, but then, again, that isn't this case here because the litigation of the Zahn and Leazer's claim isn't going to preclude these 200 other people from trying their cases wherever they may try them.

Now, the plaintiffs have a block of cases in their

brief which they claim slide away from the principles of Gibbs and Moore as I interpret them. We said in our brief that substantially all those cases involved the unitary case of controversy.

Since our brief was written, I have read the Court's opinion in Moore and at footnote 29, 411 US at page 713, substantially all of the cases relied on by the plaintiff in this respect were categorized by this Court as involving unitary case of controversy, just what we said in our brief. I think that distinguishes those cases from our situation.

Now, even if the power to hear exists here with respect to pendent jurisdiction, still, the Court pointed out in Moore that that doctrine of pendent jurisdiction involves consideration of judicial economy and convenience and fairness and I submit to you that sweeping in these 200 people, with 200 separate and distinct claims, runs 180 degrees away from consideration of judicial economy and fairness or convenience.

These cases which are sought to be swept in here in the class action belong in the state courts. There is, as plaintiff counsel pointed out, a Vermont class action statute. It's a Chinese copy of federal rule 23. It was passed in July, '71, a couple of months, a few months after this complaint was brought.

My client is sueable in the state courts of Vermont. There is no jurisdictional bar with respect to the

Vermont class action statute because, according to my reading of Vermont law, the county courts have jurisdiction of cases involving $200 there. So this isn't a case where the unnamed plaintiffs are going to be debarred from suing in an appropriate forum. They have their forum. It is available. We can be sued there.

One final observation, basically, as plaintiff's counsel said, this case involves claims of niusance and trespass, whether under the federal or the state rubric and because that is so, we really have a situation which is a mass tort and I remind this court that the notes to the advisory committee with respect to the change in Rule 23 said that ordinarily class action treatment would not be appropriate in mass tort situations and even if the text writers who were in favor of class actions have come down in that for the same reason, and the reasons are just those that I mentioned, that each and every one of these plaintiffs is going to have to present a set of different facts to the court and this certainly would not satisfy the requirement of rule 23 that common --

Q Are you suggesting that we might get a different answer here if they just had a separate injunction?

MR. WHIPPLE: As far as federal law goes?

Q Well, as far as the permissibility of class action.

MR. WHIPPLE: Well, in either event, your HOnor, it seems to me that the plaintiffs would be met by the $10,000 jurisdictional amount and I don't think that you'd get a different rule with a different result for that reason.

Q Of course, the argument you just made, Mr. Whipple, that this kind of mass tort thing is not amenable to class action, I take it all Petitioner is asking us to do is to say that the $10,000 jurisdictional amount doesn't apply to each and every claimant and he is perfectly willing to have the district court consider anew whether this would be manageable as a class action if he was wrong on the law.

MR. WHIPPLE: I agree, your HOnor. I agree, your Honor, The fundamental case, the threshold hurdle is whether the limited jurisdiction that is always a part of the federal district court as here is going to be disregarded when we sweep in these 200 class people, none of whom, according to complaint, have a jurisdiction claim over $10,000.

Q And I gather you think, Mr. Whipple, that Clark is an obstacle to the Petitioner's case, whether or not state or federal law --

MR. WHIPPLE: I do, because if it is federal law, then 1331(a) governs, which speaks of cases arising under the Constitution, the laws and the treaties of the United States and that has a $10,000 jurisdiction limit in it and the

reason for the $10,000 limit there is just same as it is in the 1332(a), namely, to try to stave off and to prevent the ever-mounting caseload.

Q So that those with less than $10,000 claims would have to go to state courts and the state courts, then, if federal law governs, have to apply common law.

MR. WHIPPLE: On your assumption that the federal common law would govern, then I think the state courts would apply federal common law and I argued this before your Honor in the original case where you directed us to argue federal common or estate common law and it seems to me there'd be no difficulty there because, as I understand it, in trying to evolve a federal common law, the courts look to a variety of sources including relevant state law.

Q Well, actually, I think we said in Milwaukee, did we not, that we might, in fashioning federal rules, consult state standards?

MR. WHIPPLE: I think so. I think that is the clear teaching of Milwaukee and other cases, but I don't want you to believe that I am conceding that federal common law governs here. I am not.

Q I don't.

MR. WHIPPLE: In summary, from the standpoint of discretion or power -- this is my closing summary, your Honor -- ancillary or pendous jurisdiction is improper here

because it would impermissibly expand, contrary to Rule 82, the limited jurisdiction of the district courts. It would multiply, I think in geometric proportions, the rising caseload of the federal courts.

It would, finally, contrary to the principles enunciated in Gibbs and Moore and the principles spelled out in Snyder, and it would be contrary to the Congressional purpose underlying the $10,000 limitation.

I may save some time, if necessary, to comment on Mr. Langrock's rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Langrock.

REBUTTAL OF PETER F. LANGROCK, ESQ.,

FOR THE PETITIONER

MR. LANGROCK: I just want to make a couple of comments with regard to Mr. Whipple's argument. He talks about causing a rise in the federal caseload. If I read the mandate of 23(b)3 right, the only time that this could be done is when it is efficient and the only time when a court could do so is when it is going to save judicial time, a cross-state aspect and this parade of horrors which were suggested by Mr. Whipple, I think, are untrue.

Let us go back to the district court. I don't want to argue here whether we are going to have a mass trial of 240 people or the merits if the issue. But I say, let the

district court judge look at this thing. Let him sit on the issue and make a decision, how am I going to handle this problem involving a serious number of people who are affected in a peculiar way by acts.

Q Hasn't he already had something to say about the manageability factor?

MR. LANGROCK: I don't think so, your Honor. He indicated that it could not be managed if he had to separate out those who had $10,000 and those that didn't because you'd have to try the damages before you could get to/the define class, but his opinion said, "with great reluctance" he dismissed the suit because of the holding in Snyder versus Harris and so I think we should really leave that decision in the hands of the judge who is going to have to make that decision on the trial and have to live with it one way or another and if we lose there, I think that takes care of the issue.

I appologize to the Court before because I did not recognize the name of Illinois versus Milwaukee. That case was decided after we brought this and I am familiar with the case but I am not quite sure, as Mr. Whipple knows, exactly what the effect of the common law, of the federal common law on environmental matters and waterways, how this would affect it.

In any case, I think we still would be involved in the $10,000 jurisdictional amount.

Q You don't think it would help you any, then, if this were governed by federal law?

MR. LANGROCK: It would make the pendent concept -- bring us into pendent situation.

Q There wouldn't be any state claim to be pendent.

MR. LANGROCK: No, there would be -- right, there would be straight ancillary where right now we'd have to go into the pendent in part if there is a federal claim in the both situation.

I also would like -- this is not --

Q Well, I take it from your remark just then that the characterization of the question as an issue of federal law, you concede, does not assist you much.

MR. LANGROCK: Not very much. I think we still have to hit the $10,000. The question is still there. There are other efficiencies which tie into this type of thing, the efficiencies of expert time, the efficiencies all the way along the lines in the whole environmental field, but I don't think we want to get into that. But the statement that this sounds in nuisance and trespass are only two of the three areas which it sounds. It also sounds on the property rights, riparian rights of adjoining owners on a lake or not at this rate adjoining, but owners on the same body of water and we think that if ever there was a common nucleus of fact,

this is it.

The International Paper Company, we allege, has done one thing and it has continuously done this thing and this affects a large number. The only difference here would be the question of damages and that can be handled, we suggest, in a multitude of ways including the possibility of a master sorting them out and we don't see the horrors of the mass trial.

I can say on the other side that to have 240 trials on the issue of the merits frightens me a great deal more than to have some procedure in dealing with damages on a common set of facts.

The comment was made that Snyder has nothing for -- that Snyder -- that ancillary jurisdiction did not come in Snyder. I would suggest to the Court that Snyder -- there was no jurisdiction to the Court to begin with. That was not a case that was going forward and there was nothing more ancillary to hang its hat onto or to tie into and I would not have been going forward in the courts because of the fact that there was not independent jurisdiction, as there is in this case.

I might suggest to the Court that we may very well have a class here or there may be other classes where we have 50 or 200 or 250 or only one or two claims and to prohibit the district judge, as a jurisdictional matter, from going

forward, is not promoting efficiency, as suggested by my opponent, but is tying the court's hands for using it in the proper case.

I am not suggesting for a moment that this matter should be handled as a class action unless it meets the test and that test is that it is superior to other matters, other ways of handling this as an efficient way in the controversy.

The very rule of 23(b)3 itself, if it doesn't meet that, we are out and if we do meet that, I would hate to see the district court judge forced, as a jurisdictional question, to make it a less efficient approach.

Q Mr. Langrock?

MR. LANGROCK: Yes?

Q In the Appendix, where your complaint is reprinted at pages six and seven. I notice in count one you say that "the matter in controversy exclusive enters and causes to each of the named plaintiffs exceeds the sum of $10,000. Jurisdiction is founded on 28USC section 1332(a)."

Now, do you contend that at this stage of the case you have a right to rely on some other jurisdictional basis rather than what you name in your complaint?

MR. LANGROCK: No, I don't , your Honor. I think if we went back we'd be subject to the amendment rules, which might be appropriate but here the question of jurisdiction has arisen on this one and I think this is where we are here.

I think I'd have to stand on our position.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

Q One moment. I have a question. It is of no significance and I should know the answer but I do not. What is the comparative state of the calendars of the federal courts and the state courts in the State of Vermont?

MR. LANGROCK: The federal calendar is more current in most parts.

Q Are the state calendars greatly uncurrent?

MR. LANGROCK: Depending on the counties, but for the most part, the federal courts -- the federal court is as current as any state court calendar and there are some state court calendars which are substantially behind the federal court calendar.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 10:54 o'clock a.m., the case was submitted.]