Boston College Law Review

Volume 10
Issue 3 *A Symposium Federal Rule 23 - The Class Action*

Article 11

4-1-1969

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Recommended Citation
George A. Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C.L. Rev. 601 (1969),
http://lawdigitalcommons.bc.edu/bclr/vol10/iss3/11

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REVISED RULE 23: AGGREGATION OF CLAIMS FOR ACHIEVEMENT OF JURISDICTIONAL AMOUNT

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Historically, class actions were divided into three categories. In only one of these categories did the courts permit the claims of all the class members to be aggregated for satisfaction of the minimum jurisdictional dollar amount. The categories themselves proved to be unrealistic and productive of considerable confusion. Revised Rule 23 is intended to displace these obsolete classifications and to achieve a more practicable implementation of the class action concept. The author argues that aggregation is a logical concomitant of the intended operation of the revised Rule. Since the class action should now enable adjudication of the totality of the rights of all class members and since the totality of rights necessarily includes the totality of the claims, the aggregate of the total claim does lie in controversy within the meaning of the jurisdictional statutes.

I. BACKGROUND: AGGREGATION AND JURISDICTION

Congress has conferred original jurisdiction upon the United States District Courts of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, where the action arises under the Constitution, laws, or treaties of the United States.[1] Similarly, Congress has granted such jurisdiction in civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and diversity of citizenship exists.[2] The jurisdictional amount was originally established in 1789 at $500; it was increased in 1887 to $2,000, in 1911 to $3,000, and in 1958 to the present level of $10,000.[3] Obviously, the minimum jurisdictional amount was established to avoid congestion of the federal dockets by comparatively trivial controversies. This limitation and its relationship to and ramifications for the would-be class action suit are of the greatest importance to the potential reach of revised Rule 23 of the Federal Rules of Civil Procedure.

The class action was an invention of English equity jurisprudence designed to provide adjudication in cases where the interested parties

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1 28 U.S.C. § 1331 (1964).

2 28 U.S.C. § 1332 (1964).

3 See Alvarez v. Pan American Life Ins. Co., 375 F.2d 992, 995 (5th Cir. 1967).

were so numerous as to make their individual joinder impracticable.[4] Having been transplanted to and adopted in this country, the class action inevitably gave rise to the question of whether the "amount in controversy" for jurisdictional purposes should be measured by the claim of the representative plaintiff or plaintiffs, or whether it should be measured by the aggregate claims of all members of the class.

Original Rule 23 divided class actions into three separate categories which came to be known popularly as "true," "hybrid" and "spurious," respectively.[5] Aggregation was permitted in true class actions but was not permitted in hybrid or spurious class actions.[6] This effort to categorize class actions according to the nature of the right involved led to considerable confusion. In *Russell v. Stansell*,[7] three taxpayers of an assessment district, for themselves and all others similarly situated, sought injunction against collection of an assessment on all of the members of the district. The aggregate amount involved exceeded $70,000, but the amounts for which each individual plaintiff was liable was considerably less than the jurisdictional limit. The Supreme Court held that the interests of the plaintiffs were distinct and separate and could not be united for the purpose of making up the jurisdictional amount. Nine years later, in *Brown v. Trousdale*,[8] several hundred taxpayers of a Kentucky county, for themselves and all other taxpayers, alleged the invalidity of a bond issue and sought an injunction to restrain its collection. The Court, through Chief Justice Fuller, held that the relief sought could not cause injury to any of the taxpayers of the county and that the interests of those who did not join in or authorize the suit were identical with the interests of the plaintiffs. Accordingly, the rule applied in *Russell*, where the plaintiffs were each claiming under a separate and distinct right in respect to a separate and distinct liability, was held to be inapposite. The opinion goes on to state: "The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."[9] Nowhere in the opinion is the *Russell* case even mentioned. Moreover, the quoted language of Mr. Chief Justice Fuller sets forth the wiser rule; and it will subsequently be argued that this view merits full adoption and compliance.

To set forth and analyze the many cases illustrating the hazards

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[4] See Hansberry v. Lee, 311 U.S. 32, 41 (1940).

[5] "[T]he so-called 'true' category was defined as involving 'joint, common, or secondary rights'; the 'hybrid' category, as involving 'several' rights related to 'specific property'; the 'spurious' category, as involving 'several' rights affected by a common question and related to common relief." Advisory Committee's Note to Rule 23, 39 F.R.D. 98 (1966) [hereinafter cited as Advisory Note].

[6] 3A J. Moore, Federal Practice ¶ 23.13, at 3478 (1968).

[7] 105 U.S. 303 (1881).

[8] 138 U.S. 389 (1891).

[9] Id. at 394.

and difficulties of the effort to "pigeonhole" class actions into the three historical categories would extend this article beyond reasonable length and would serve little useful purpose. Suffice it to say, in the words of the Advisory Committee, that "[i]n practice, the terms 'joint,' 'common,' etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain."[10]

In *Alvarez v. Pan American Life Ins. Co.*,[11] the first aggregation case to reach a court of appeals under revised Rule 23, the Fifth Circuit denied aggregation. In this case, the plaintiff, a Cuban national, held a life insurance contract with the defendant. The Castro government expropriated certain assets of the defendant in Cuba and, for this reason, defendant repudiated its contract obligations with respect to Alvarez and all other Cuban nationals. Plaintiff apparently sought a declaratory reinstatement of such contract rights on behalf of himself and all others similarly situated. His particular stake in the litigation did not amount to the jurisdictional minimum but the aggregate claims of all similarly situated would have met this dollar requirement. The court adhered to the historical rule that separate and distinct demands of two or more plaintiffs cannot be aggregated to make up the jurisdictional amount. Otherwise, reasoned the court, there would be an infraction of the limitation expressed in Rule 82 of the Federal Rules of Civil Procedure, which provides in part: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ."[12]

The next case to reach the appellate level on this question found the Tenth Circuit in disagreement with the *Alvarez* decision. In *Gas Serv. Co. v. Coburn*,[13] a class action was brought by a single customer of the gas company, having a claim of $7.81, for himself and 18,000 other customers similarly situated whose claims, of course, aggregated to more than $10,000. The court recognized that the claims were not joint or common but were several in nature and that aggregation would not have been permitted prior to the revision of Rule 23. Nevertheless, aggregation was permitted. The opinion lays great emphasis upon the view that the amended Rule is intended to eradicate the historical classification of class actions, and to approach the entire class action concept on a pragmatic and realistic basis. By this reasoning, the court reaches the conclusion that the amount in controversy is to be measured by the aggregate of all claims which are to be considered and adjudicated in the litigation.

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10 Advisory Note, 39 F.R.D. at 98.

11 375 F.2d 992 (5th Cir. 1967).

12 Fed. R. Civ. P. 82.

13 389 F.2d 831 (10th Cir.), cert. granted, 89 S. Ct. 232 (1968), rev'd, 89 S. Ct. 1053 (1969) (see note 17 infra).

Almost simultaneously the Eighth Circuit had occasion to pass upon the question in *Snyder v. Harris*.[14] In a brief per curiam opinion,[15] the court followed the *Alvarez* case and denied aggregation. Plaintiff in the *Snyder* case was the owner of 2,000 shares of stock in a small life insurance company having a market price of $2.63 per share. Certain major, but not majority, shareholders who controlled the board of directors sold their stock to another life insurance company at $7.00 per share and arranged, through serial resignations, that the nominees of the purchaser obtain immediate control of the board of directors and its vital committees. Plaintiff sought an accounting of the premium realized by such selling shareholders. The trial court viewed the claims of the non-selling shareholders as "separate and distinct demands" and denied aggregation for jurisdictional purposes upon the principal authority of *Pinel v. Pinel*.[16] This was a joinder action in which the court enunciated the doctrine that multiple parties could not aggregate their claims to satisfy the jurisdictional amount if their interests, however similar in fact, were in legal theory "several." As stated, the trial court's ruling in *Snyder* was affirmed by the Eighth Circuit on the basis of the *Alvarez* decision. Certiorari was granted by the Supreme Court in October, 1968, and oral argument scheduled for January, 1969.[17]

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[14] 390 F.2d 204 (8th Cir. 1968).

[15] The court stated that the appellant offered little supporting authority aside from the suggestion of Professor Wright that aggregation should be permitted in all cases on the ground that the judgment under the new Rule will be binding on all class members and therefore that the claims for or against the entire class are in controversy within the meaning of the jurisdictional statute. 2 W. Baron & A. Holtzoff, Federal Practice & Procedure § 569, at 115 (Wright Supp. 1968).

[16] 240 U.S. 594 (1915).

[17] Snyder v. Harris, 390 F.2d 205 (8th Cir.), cert. granted, 89 S. Ct. 232 (1968). This case was consolidated with Gas Serv. Co. v. Coburn, and oral argument was heard on January 22, 1969. The United States Supreme Court handed down its decision on March 25, 1969. 89 S. Ct. 1053. HELD: Separate and distinct claims presented by and for various claimants in a class action pursuant to amended Rule 23 may not be aggregated to satisfy the requirement of $10,000 jurisdictional amount in controversy in diversity suits.

The opinion of the Court, delivered by Mr. Justice Black, gives unyielding emphasis to "traditional judicial interpretation," congressional silence and legislative purpose. The traditional judicial interpretation of "amount in controversy" declares that separate and distinct claims may not, under any circumstances, be aggregated to satisfy the jurisdictional amount requirement. This judge-made doctrine is perpetuated by the *Snyder* Court on the ground that Congress by reenactment and attendant silence has frozen the judicial interpretation of this statutory language. The majority cites the legislative purpose of restricting the jurisdiction of the federal courts in diversity matters in support of this rationale of congressional adoption by congressional silence.

The Court adheres to the "consistent judicial interpretation" of the statutory phrase, "matter in controversy," and fits it inflexibly upon new Rule 23 procedure. The judicially developed notion of "matter in controversy" arose and matured in the context of the three-category view of class actions. Indeed, the majority concedes that "[t]he 1966 amendment to Rule 23 replaced the old categories with a *functional approach* to class actions." 89 S. Ct. at 1056 (emphasis added). Consequently, the Court's resuscitation of the

As against the thesis of the *Alvarez* decision, however, it should be observed that an extension of federal jurisdiction more far reaching

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traditional interpretation of the phrase, "matter in controversy," undermines the purpose of amended Rule 23.

Two considerations in particular militate against the *Snyder* rationale. First, the decision equates "class actions formerly classified as spurious" with permissive joinder under Rule 20. In the latter type of action the claims of plaintiffs cannot be aggregated even though they too will be bound by the final judgment. This easy analogy overlooks the significant operative differences between the two Rules. Rule 20 is permissive; it allows parties to join on a voluntary basis. The claims are combined pursuant to the desire and initiation of the individuals. Thus, parties would frustrate the purpose of the jurisdictional amount by expedient consolidation of individual claims to gain access to the federal forum.

This is not the case under new Rule 23. As the dissent by Mr. Justice Fortas points out, the amended Rule 23 has, within its sphere of operation, the force of a statute. 28 U.S.C. § 2072 (1964). Thus, by operation of law, the interests of class members are, from the very outset, viewed as a single entity from which interests may be subtracted at a later time and not as separate items which may be united at a later time if the parties are so inclined. The stated effect of judgments in class actions evidences this unity by binding all the members of the class—even the absent ones (by far, the majority of the class members in most cases). The class members are treated as a unit and fragmentation occurs only on the motion of the members. This arrangement is very different from that under Rule 20, where the bound parties have voluntarily intervened and actively participate in the action.

Second, tenacious adherence to the traditional judicial interpretation of "matter in controversy" forecloses the necessary, ongoing evaluation of the jurisdictional statute and the Rule. The dissent by Mr. Justice Fortas recognizes the groundlessness of this position. "[T]here is certainly no reason the specific application of this body of federal decisional law to class actions should be immune from re-evaluation after a fundamental change in the structure of federal class actions has made its continuing application wholly anomalous." 89 S. Ct. at 1063.

The Court, then, lets pass the opportunity for re-examination of the prior judicial aggregation doctrines applied originally in the context of a classification of interests as "joint" or "several," on the ground that Congress has consistently re-enacted the jurisdictional amount statutes without comment on the traditional judicial interpretation. The *Snyder* majority suggests that the upshot is congressional adoption by way of congressional silence—that by its muteness Congress has glaciated the judicial exposition of the statute. However, the decision itself acknowledges the "hazards and pitfalls" of an unbending application of such a yardstick as simultaneous congressional silence and re-enactment. Mr. Justice Fortas warns against the deceptive ease of this technique of statutory construction:

> "It would require *very persuasive circumstances* enveloping Congressional silence to debar this Court from reexamining its own doctrines. It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." [Quoting from Girouard v. United States, 328 U.S. 61, 69-70 (1946).]

89 S. Ct. at 1063 (emphasis added).

Congress has simply re-enacted a general statute, and it is mere speculation to assert that Congress thereby manifested an intent to adopt and perpetuate an existing technical judicial doctrine. As predicated by the dissent, it is "far more reasonable to assume that Congress was aware that the courts had been developing the interpretation of the jurisdictional amount requirement in class actions and would continue to do so after the . . . amendments." Id. at 1064.

Finally, the majority seizes upon the provisions of Rule 82 prohibiting the courts from expanding by rule their own jurisdiction. The Court posits that "[a]ny change in the Rules that did purport to effect a change in the definition of 'matter in controversy' would clearly conflict with the command of Rule 82 . . . ." Id. at 1057. This reasoning should be suspect. The gravamen of a violation of Rule 82 is the expansion of jurisdiction beyond limits set by statute. Rule 82 does not preclude judicial reshaping of

than the one here advocated was countenanced by the unanimous opinion of the Supreme Court in *United Mine Workers v. Gibbs*.[18] In the *Gibbs* case, the plaintiff asserted a claim under the Labor-Management Relations Act and an additional claim arising from the same basic facts under state law. Through Mr. Justice Brennan, the High Court determined that, having assumed jurisdiction under a federal claim, the trial court had power to adjudicate the related state claim under the doctrine of pendent jurisdiction and could retain that power to adjudicate the state claim even though the federal claim might fail upon trial. The opinion states:

> This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *," U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of

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a judicially developed rule (here the boundaries of "matter in controversy") in comportment with evolving needs. Pursuant to statutory authorization, Rule 23 was amended, and as amended has the effect of statute. The law has created a new type of class action and thereby altered the procedural context in which subject matter jurisdiction statutes are to be applied. Mr. Justice Fortas observes,

> [m]aking judicial rules for calculating jurisdictional amount responsive to the new structure of class actions is not an extension of the jurisdiction of the federal courts, but a recognition that the procedural framework in which the courts operate has been changed by a provision having the effect of law.

Id. at 1067.

In fact, the tack taken by the Court is ironical insofar as it purports to follow congressional command but actually tampers with legislative mandate. Rule 23, by operation of law, authorizes a single suit in the federal courts. In theory and in practice, the "matter in controversy" is the total claim of the whole class. Therefore, courts may be contravening the jurisdictional statutes by imposition of anachronistic judicial doctrines fragmenting properly integral claims.

Revised Rule 23 provides a new procedure for the assertion and resolution of multiple interests in a single action. The *Snyder* Court itself concedes the "functional" purpose behind the Rule. Practicability was to receive emphasis, and the uncertainty generated by the tenuous distinctions among "joint," "common" and "several" claims, and among "true," "hybrid" and "spurious" class actions was to be removed. In *Snyder* the Court reaches a most unfortunate result, unraveling the threads of the new Rule and returning it to the hopeless entanglement of the old.

[18] 383 U.S. 715 (1966).

> the federal issues, there is *power* in federal courts to hear the whole.[19]

This extension of federal jurisdiction is more far reaching than that effected by aggregation because it involves questions of constitutional rather than statutory limitations. The Constitution defines the judicial power as extending to all cases arising under the Constitution, the laws and treaties of the United States.[20] The Court has thus determined that a constitutional "case" can by judicial interpretation be construed to embrace a non-federal cause of action which arises out of the same nucleus of operative fact as does a federal cause of action. It should impose, therefore, no greater strain upon constitutional limitations to determine that the amount in controversy in a class action embraces all claims which are to be judicially determined in the case.

One of the leading cases on the subject of federal jurisdiction over class actions appears to be *Supreme Tribe of Ben-Hur v. Cauble.*[21] Certain non-resident members of a fraternal benefit association domiciled in Indiana brought a class action against the society in which the latter prevailed. Thereafter, citizens of Indiana sued the same society in the state courts seeking to litigate the same issues; the prior federal judgment was pleaded in bar of the action. The Supreme Court held that the class action in the federal court was binding and conclusive upon all members of the class including the Indiana residents. Equity Rule 38 was then in force: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."[22] The rule had formerly contained the following concluding sentence: "But in such cases the decree shall be without prejudice to the rights and claims of the absent parties."[23]

The contention was there raised that the change in Rule 38 could not properly affect the jurisdictional authority of the court, but the Supreme Court overruled that contention:

> The change in Rule 38 by the omission of the qualifying clause is significant. It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known

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[19] Id. at 725 (footnotes omitted).

[20] U.S. Const. art. III, § 2.

[21] 255 U.S. 356 (1921).

[22] The Federal Equity Rules were the prototypes of the present Federal Rules of Civil Procedure. Equity Rule 38 was promulgated by the Supreme Court in 1912. It read: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Equity R. 38, 226 U.S. 659 (1912).

[23] 255 U.S. at 364.

> before the adoption of our judicial system, and were in use in English chancery.
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> The District Courts of the United States are courts of equity jurisdiction, with equity powers as broad as those of state courts.[24]

Thus the Court seems committed to the proposition that rules of court may properly have an effect upon the jurisdiction of the federal trial courts without infringing upon the congressional prerogative of prescribing such jurisdiction.

In the light of this reasoning, it becomes apparent that the revision of Rule 23 has made a significant change in the scope of the class action by making its outcome binding upon all members of the class who have not by affirmative act excluded themselves from the class. The constitutional due process hazards pointed out in *Hansberry v. Lee*[25] have been avoided by provision for notice under court supervision to all members of the class and by imposition upon the trial judge of the obligation of determining that the named parties afford adequate representation to the absentees. Since the judgment in the class action will bind all members and since due process requirements will be respected, the "amount in controversy" in any class action brought under revised Rule 23 should be measured by the size of the judgment which the court could enter upon finding the factual issues in favor of the plaintiff.

II. The Argument for Aggregation

The entire argument against aggregation is that, historically, rights of a several rather than a common nature upon which separate suits might have been brought cannot be joined together for the purpose of fulfilling the jurisdictional dollar minimum.[26] This conclusion seems unsupported by either logic or policy in the light of the changes sought to be achieved by the revision of Rule 23. In the words of the Advisory Committee,

> The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.[27]

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[24] Id. at 366 (citations omitted).

[25] 311 U.S. 32 (1940).

[26] See Alvarez v. Pan American Life Ins. Co., 375 F.2d 992, 994 (5th Cir. 1967)

[27] Advisory Note, 39 F.R.D. at 99.

The obvious purpose of the Rule as amended is to eradicate the traditional and unsatisfactory categories of "true," "hybrid" and "spurious" actions and to make the class action binding upon all members of the class. If this purpose of the Rule is to be achieved, it must necessarily follow that the amount in controversy in a class action be measured by the totality of the claims involved.

The celebrated case of *Perlman v. Feldmann*[28] serves as a useful vehicle to illustrate the practicality and logic of this approach. Newport Steel Corporation was a comparatively small concern engaged in the manufacture of steel which was sold to the manufacturers of finished steel products. During the Korean crisis, such steel was in exceedingly short supply and the price was regulated, not by governmental edict but by an understanding among the producers who agreed, for patriotic reasons, not to increase the price. This situation made Newport very attractive to users of its products. As a consequence, Mr. Feldmann, the controlling stockholder, was able to sell his stock to a syndicate formed by ten customers of the corporation at a price of $20.00 per share—double the current market value of the stock. Perlman, a minority shareholder, brought a class action, denominated a derivative action, claiming that Feldmann had thereby sold a corporate asset: the right to control the sale of the corporate product. The trial court found no cause of action and dismissed the complaint.[29] The Second Circuit reversed and apparently transformed the derivative suit into a non-derivative class action in the following terms:

> Hence to the extent that the price received by Feldmann and his codefendants included such a bonus, he is accountable to the minority stockholders who sue here. Restatement, Restitution §§ 190, 197 (1937); Seagrave Corp. v. Mount, supra, 6 Cir., 212 F.2d 389. And plaintiffs, as they contend, are entitled to a recovery in their own right, instead of in right of the corporation (as in the usual derivative actions), since neither Wilport nor their successors in interest should share in any judgment which may be rendered. See Southern Pacific Co. v. Bogert, 250 U.S. 483, 39 S. Ct. 533, 63 L. Ed. 1099. Defendants cannot well object to this form of recovery, since the only alternative, recovery for the corporation as a whole, would subject them to a greater total liability.[30]

Pursuant to remand, the trial court entered a single judgment for a lump sum, allowed counsel fees and expenses, and directed distribution of the balance to the nonparticipating shareholders in accordance with

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[28] 219 F.2d 173 (2d Cir. 1955).
[29] Perlman v. Feldmann, 129 F. Supp. 162 (D. Conn. 1952).
[30] 219 F.2d at 178.

their respective stockholdings.[31] This judgment can hardly be deemed typical of a derivative suit since the recovery was awarded, not to the corporation, but to the individual stockholders who did not participate in the wrongdoing. Under the old three-category system, this would presumably be denoted a spurious class action. Thus, it seems fair to argue that the Second Circuit anticipated the realism and spirit of revised Rule 23 and disregarded the supposedly well established principle that each plaintiff in a spurious class action must have at stake the minimum jurisdictional amount. Although the exact facts and figures are not available, it is inconceivable that every minority stockholder in the corporation had sufficient stock to entitle him to a recovery equivalent to the jurisdictional amount.

Even if the result be justified on the ground that it was a hybrid class action in that the action was aimed at a specific fund consisting of the premium for control-of-product sales received by the selling shareholder Feldmann, then the ambit of hybrid class actions is considerably broader than either the courts or the commentators have conceived it to be.

Rather, *Perlman v. Feldmann* appears to be a classic example of the impracticability and the inequity of the attempt to divide class actions into the three historical categories. So viewed, that decision supports the disposal of the old classifications and vindicates the reasoning for the Advisory Committee's revision of Rule 23 on the ground that the historical categories were confusing, inaccurate and unrealistic.

In fact, reality is the lodestar even when the aggregation principle is examined within the technical confines of the statute. Section 1332 commands that the amount in controversy shall not be less than $10,000, excluding interest and costs. As noted previously, the original purpose of a jurisdictional amount was to avoid clogging of the federal courts with minor litigation. If a court, as in *Feldmann*, is empowered in a given case to enter a judgment in one single lump sum in excess of $10,000, allow payment of litigation costs and attorney fees from the unit recovery, and direct the distribution of the remainder to a specified class of persons in a determinable ratio, then the case does involve more than the jurisdictional amount and the federal court should have jurisdiction if the representative plaintiff's citizenship is diverse from that of all the defendants.

Further proof of the unreality of the non-aggregation doctrine is available from the current controversy involving the well known Playboy Clubs. After selling lifetime memberships at a specified fee, Playboy Clubs imposed a five dollar annual maintenance charge as a condition to credit privileges. A class action in a United States district

[31] Perlman v. Feldmann, 154 F. Supp. 436 (D. Conn. 1957).

court based on diversity jurisdiction was dismissed for lack of jurisdictional amount in denial of the aggregation principle.[32] The state class action is being settled under court supervision by use of the mechanics required under revised Rule 23, although counsel for plaintiff advises that such procedure, involving mailing of detailed notices of proposed settlement to all class members, is not prescribed by California rule or statute. The settlement involves distribution of scrip redeemable in highly liquid assets at any Playboy Club, to the amount of $3,700,000. This was a case which a federal court dismissed because "the matter in controversy" did not exceed $10,000.

The Second Circuit has emphatically proclaimed that one of the primary functions of the class suit is to provide a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group.[33] Therefore, under revised Rule 23, which has overcome the constitutional obstacles mentioned in *Hansberry v. Lee*,[34] the doors of the federal courts should not be closed against cases which involve very substantial amounts of money simply because the individual claimants may have less than the jurisdictional amount at stake. Such a holding would do no violence whatsoever to the anti-congestion purpose of the jurisdictional amount. It should also be borne in mind that many of the states do not have the counterpart of revised Rule 23. Consequently, a denial of federal diversity jurisdiction might well mean that a gross wrong involving many thousands of dollars would go unredressed because no individual plaintiff would have a sufficient financial stake to justify the payment of a filing fee, let alone the employment of counsel. In *Eisen v. Carlisle & Jacquelin*,[35] the Second Circuit states with reference to the new Rule:

> Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. Nevertheless, Rule 23 of the Federal Rules of Civil Procedure, as it was originally enacted, did not effectively achieve either of the above two objectives.
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> We are not persuaded that it is essential that any other members of the class seek to intervene. Absent class members

[32] McCann v. Playboy Clubs Int'l, Civil No. 46250 (N.D. Cal., filed Dec. 30, 1966).
[33] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968).
[34] 311 U.S. 32 (1940).
[35] 391 F.2d 555 (2d Cir. 1968).

> will be able to share in the recovery resulting in the event of a favorable judgment, and, if they wish to avoid the binding effect of an adverse judgment they may in various ways and at various times that we need not now attempt to particularize, attack the adequacy of representation in the initial action or disassociate themselves from the case. Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940); see Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 436 (1960). If we have to rely on one litigant to assert the rights of a large class then rely we must. The dismissal of the suit out of hand for lack of proper representation in a case such as this is too summary a procedure and cannot be reconciled with the letter and spirit of the new rule.[36]

This same concern for the vindication of the rights of persons whose damages are small individually but large in the aggregate has led Professor Loss to observe: "The ultimate effectiveness of the federal remedies, when the defendants are not prone to settle, may depend in large measure on the applicability of the class action device."[37]

III. Conclusion

It would be inappropriate to conclude any discussion of the far reaching effects of revised Rule 23 without reference to the well considered observations of Judge Frankel of the Southern District of New York.[38] Judge Frankel suggests that a class suit by a single stockholder to compel payment of a dividend affects the whole class of stockholders and that, therefore, the amount in controversy is to be judged by the total sum due to all members of the class.[39] However, he continues in the next breath to endorse the decision of the Fifth Circuit in the *Alvarez* case[40] where that court respected the historical rule that separate and distinct claims (the former "spurious" category) of two or more plaintiffs cannot be aggregated to satisfy the jurisdictional amount.

If Alvarez is assumed to be legally entitled to a reinstatement of his policy, which was repudiated by the defendant, along with the policy obligations of all other Cuban nationals, then in a class action under the revised Rule, the total amount in controversy should be measured by the claims of all policyholders similarly situated. Judge

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[36] Id. at 560, 563.

[37] 3 L. Loss, Securities Regulation 1819 (2d ed. 1961).

[38] Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39 (1968).

[39] Id. at 49.

[40] Id. at 50.

Frankel himself recognizes the force of this argument.[41] His suggestion that cases cognizable under subdivisions (b)(1) and (b)(2) of the revised Rule should be eligible for aggregation, but that cases cognizable under subdivision (b)(3) should be denied aggregation, has the appeal of permitting a "pigeonhole" treatment similar to the historical treatment of class actions under the three-category system. As argued above, such treatment is antithetical to the purpose and thrust of the revised Rule.

A reading of the revised Rule in its entirety, in the context of the notes of the Advisory Committee, compels the conclusion that the ultimate purpose is to make the judgment in any class action binding upon all members of the class. The spurious class action, which was merely a device for voluntary intervention, is extinct. Members of a purported class may exempt themselves from the binding effect of the judgment by "opting out" pursuant to notice under subdivision (b)(3) and thereby protect their right to prosecute their individual remedies as they may see fit. There is to be no concern whether the right asserted on behalf of the class is a right which is held jointly, severally or in common. To those who protest that this is judicial invention independent of legislative enactment, it can only be replied that the class action itself was, in its origin, a judicial invention elicited by necessity. To produce a broader, more comprehensive and more binding form of class action does not require legislative initiative but merely a longer period of judicial gestation.

The judiciary invented the class action device in order to deal with controversies in which the number of parties involved was so great as to render it impractical to bring them all before the court. Traditionally the judgment in such a class action has been deemed to be binding upon all members of the class only in those cases where the right sought to be vindicated or enforced was a right held in common, rather than severally. It is now recognized by the framers of revised Rule 23 that the complexity of contemporary legal relationships requires that the judgment in a class action be binding upon all members of the class even though their rights be held severally rather than in common. Appropriate means have been devised to inform the members of the class of the pendency of the action and of their right to adequate representation. Means have been devised also to enable the owner of a clearly separate and severable right to withdraw from the class action and proceed in accordance with his own desires and with his own counsel.

Viewed in this light, each action is designed to adjudicate the totality of the rights of the members of the class. Consequently, the

[41] Id. at 51-52.

amount in controversy should and must be determined by the totality of the claims to be adjudicated. The word "aggregation" is thus probably a misnomer. The "amount in controversy" in any action sought to be introduced in the federal court system should be determined in a manner that defers to reality—by the total amount of the rights which will be adjudicated in the case.