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IS ZAHN GONE? THE EFFECT OF 28 U.S.C. § 1367 ON THE “NO AGGREGATION DOCTRINE”

*Joseph J. Shannon*¹

I. INTRODUCTION

There are two jurisdictional requirements that need to be established to bring a diversity-based class action law suit. The first requirement is that the class action representative(s) must be completely diverse from all defendants.² The Supreme Court has relaxed the diversity requirement in class action suits by requiring only the class representative(s) to be completely diverse from the other defendant(s), not every member of the class.³ The second requirement is that the class representative, as well as the other members of the class, must satisfy the jurisdictional amount in controversy.⁴ In *Zahn v. International Paper Co.*,⁵ the Supreme Court held that in diversity-based class action litigation multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount in controversy requirement.⁶ The Court concluded that “any plaintiff [or absent class members] without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.”⁷ This rule has been referred to by courts as the “separate and distinct

¹ J.D. Candidate Touro Law Center 2003; *Touro Law Review*, Senior Associate Editor 2002-2003.

² Complete diversity means that all plaintiffs and all defendants are from different states. However, in class actions, there needs to be complete diversity between the class representative(s) and all defendant(s), not complete diversity between every member of the class and all defendant(s). It is also important to note that a single plaintiff can sue a class of defendants, but this is very unlikely.

³ See *Supreme Tribe of Ben-Hur v. Cluble*, 255 U.S. 356 (1921); *Snyder v. Harris*, 394 U.S. 332 (1969) (reasoning that complete diversity must be satisfied between the class representative(s) and all defendants).

⁴ See also 28 U.S.C. § 1332. Today, the jurisdictional amount must exceed \$75,000.00 exclusive of interest and costs. *Id.*

⁵ 414 U.S. 291 (1973).

⁶ *Id.* at 300-01.

⁷ *Id.* at 300.

doctrine" in class actions.⁸ This paper refers to the separate and distinct doctrine as the "no aggregation doctrine."⁹ The overall purpose of this doctrine is to prohibit separate plaintiffs from aggregating their claims for purposes of satisfying the jurisdictional requirement. The "no aggregation doctrine" went unchallenged until 1990, when Congress enacted the supplemental jurisdiction statute, 28 U.S.C. § 1367.¹⁰

However, what Congress did not envision was the host of problems that an otherwise carefully drafted Section 1367 statute could have avoided.¹¹ Yet, after a careful analysis, it seems that

⁸ *Id.* The "no aggregation doctrine" was established in *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39 (1911). However, the Court in *Zahn* based its decision on long standing judicial precedents such as *Troy Bank*. *Id.* at 300-01.

⁹ Also note for the purpose of this paper *Zahn* and its predecessors refers to the "no aggregation doctrine."

¹⁰ 28 U. S. C. § 1367 (2001) Supplemental Jurisdiction reads in pertinent part:

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

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

¹¹ See, e.g., Thomas C. Arthur & Richard D. Freer, Essay, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L. REV. 1007, 1007 (1991) (stating that "section 1367 is a nightmare

the problem is not so much with Congress but with the circuit courts' faulty analysis of the statute. In fact, some circuit courts have held that Section 1367 has overruled *Zahn* and its predecessors.¹² On the other hand, other circuit courts have held that the reasoning of *Zahn* has not been affected.¹³ According to some commentators, Congress' intention in enacting Section 1367 was unclear with respect to the holding of *Zahn*.¹⁴ Yet other commentators claim that "*Zahn* is still good decisional law" and that Congress' intent was not to overrule *Zahn*.¹⁵

In addition, it is noteworthy that the Supreme Court in *Free v. Abbott Laboratories, Inc.*¹⁶ granted certiorari on the issue of whether Section 1367 overruled *Zahn*. However, the opinion read as follows: "Judgment affirmed by an equally divided Court. Opinion *per curiam* announced by The Chief Justice. Justice O'Connor took no part in the consideration or decision of this

of draftsmanship"). In this author's opinion the drafters of Section 1367 could have easily inserted a statement directly into the statute which stated that the rules for class actions were not affected by this statute or the drafters clearly could have codified the holding of *Zahn*.

¹² See, e.g., *Abbott Lab. v. Free*, 51 F.3d 524, 529 (5th Cir. 1995) (interpreting Section 1367 as overruling *Zahn* under the plain meaning doctrine), *aff'd* by an equally divided court, 529 U.S. 333 (2000) (*per curiam*) (same); *Stromberg Metal Works v. Press Mechanical*, 77 F.3d 928, 930-31 (7th Cir. 1996) (expanding *Abbott Lab.* to apply to Rule 20 joinder cases); *Gibson v. Chrysler Corporation*, 261 F.3d 927, 938 (9th Cir. 2000) (same); *Romer v. Pfizer*, 263 F.3d 110, 114 (4th Cir. 2001) (same).

¹³ See, e.g., *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998) (holding Section 1367 did not overrule *Zahn* under the plain meaning doctrine); *Meritcare, Inc. v. St. Pauls Mercury Insurance Co.*, 166 F.3d 214, 218 (3d Cir. 1999) (reasoning the Section 1367 did not overrule *Zahn* based on legislative history); *Trimble v. ASARCO*, 232 F.3d 946, 962 (8th Cir. 2000) (same).

¹⁴ See Richard D. Freer, Essay, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L. REV. 445 (1991).

¹⁵ See Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 215 (1991).

¹⁶ 529 U.S. 333 (2000) (affirming the circuit court's ruling by a four-to-four *per curiam* opinion without Justice O'Connor taking any part in the Court's decision).

case.”¹⁷ Under long standing case law, an appellate court must affirm a lower court’s ruling if no majority opinion is produced.¹⁸ Most importantly, the four-to-four decision did not answer the question of whether Section 1367 overruled the Court’s prior holding in *Zahn*. This note examines whether Section 1367 was enacted with the intent to overrule the “no aggregation doctrine.” It also tracks the development of the doctrine from a historical prospective.

II. HISTORY OF THE “NO AGGREGATION DOCTRINE”

In 1911 the Supreme Court in *Troy Bank v. G.A. Whitehead & Co.*,¹⁹ established the meaning of the amount in controversy requirement.²⁰ The Court clarified its prior holding and stressed “when two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount.”²¹ However, in 1911, the Supreme Court recognized one clear exception to this rule. The majority stated that “when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.”²² This exception is very narrow and generally applies when two or more joint property owners or debt owners sue a third party for specific performance or enforcement of their debt; only then may the claims be aggregated for the purpose of establishing the requisite jurisdictional amount in controversy. This exception should be of no consequence in class actions brought under diversity jurisdiction. The members of a class typically do not have an undivided interest in the law suit, as do

¹⁷ *Id.*

¹⁸ *Etting v. President, Directors & Co. of Bank*, 24 U.S. 59, 78 (1826).

¹⁹ 222 U.S. 39 (1911).

²⁰ *Id.* at 40.

²¹ *Id.* At the time of this case the jurisdictional requirement was only \$2,000. *Id.*

²² *Id.* at 40-41.

joint property owners. The no aggregation rule set forth in *Troy Bank* is still responsible for the precedents that each party must meet their own jurisdictional amount in controversy, regardless of whether the suit was a class action or not.

Then, in 1916, the Supreme Court in *Pinel v. Pinel*,²³ again held “that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount.”²⁴ Thus the “no aggregation doctrine,” promulgated in *Troy Bank*, was re-affirmed by *Pinel*. It is important to note that neither *Troy Bank* nor *Pinel* involved class action diversity suits, but these cases were and are still relied on as precedent in the area of class actions.²⁵

Relying on the rationale of *Troy Bank* and *Pinel*, the Court in *Scott v. Frazier*²⁶ for the first time applied the “no aggregation doctrine” in a class action suit. In 1920 the Supreme Court in *Scott* held that the “no aggregation doctrine” was “deeply rooted” and “well settled” law.²⁷ The Court clearly announced that “[i]t is well settled that . . . the amount in controversy must equal the jurisdictional sum as to each complaint.”²⁸ In 1939, the Supreme Court in *Clark v. Paul Gray, Inc.*,²⁹ again applied the “no aggregation doctrine” to a multiple plaintiff suit.³⁰ The Court held that “[i]t is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount . . . and that those amounts cannot be added together to satisfy jurisdictional requirements.”³¹ This decision again

²³ 240 U.S. 594 (1916).

²⁴ *Id.* at 596.

²⁵ *See, e.g., Zahn*, 414 U.S. at 291.

²⁶ 253 U.S. 243 (1920).

²⁷ *Id.* at 244.

²⁸ *Id.*

²⁹ 306 U.S. 583 (1939). This case was the first to apply the “no aggregation doctrine” doctrine to class action suits after the Federal Rules of Civil Procedure was enacted in 1938.

³⁰ *Id.* at 589.

³¹ *Id.*

demonstrated the Supreme Court's continued reluctance to relax the amount in controversy requirement in diversity-based law suits.

During this period, class actions were difficult to bring. In an effort to conform the class action rules to liberal joinder rules, Congress, in 1966, acquiesced to the proposal for a drastic amendment to Rule 23 of the Federal Rules of Civil Procedure.³²

³² Pre-1966 Rule 23:

- a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
- b) (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

1966 Rule 23 is as follows:

- a) **PREREQUISITES TO A CLASS ACTION.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
- b) **CLASS ACTIONS MAINTAINABLE.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
 - 1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

The rule shifts the focus to the judgment in class actions and expands the reasons for allowing such actions. The rule was viewed as liberalizing the requirements needed to bring a class action. Unexpectedly, the amendment to Rule 23 caused somewhat of a stir amongst the circuit courts. Interestingly, in *Alvarez v. Pan American Life Insurance Co.*³³ and *Snyder v. Harris*,³⁴ the Fifth and Eighth Circuits, respectively, held that the “no aggregation doctrine” was unaffected by the congressional amendment of Rule 23.³⁵ However, in *Gas Service Co. v. Coburn*,³⁶ the Tenth Circuit held that separate and distinct claims brought together in a class action could now be aggregated for the

2) (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

³³ 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

³⁴ 390 F.2d 204 (8th Cir. 1968), *aff'd*, 394 U.S. 332 (1969).

³⁵ See *Alvarez*, 375 F.2d at 996; *Snyder*, 390 F.2d at 205.

³⁶ 389 F.2d 831 (10th Cir 1968), *rev'd*, 394 U.S. 332 (1969).

purpose of establishing the jurisdictional requirement in diversity cases.³⁷

However, the Supreme Court, in *Snyder v. Harris*,³⁸ quickly cleared up any alleged discrepancy caused by the congressional amendment to Rule 23 in class action suits. The Court held that “[we] have consistently interpreted the jurisdictional statute passed by Congress as not conferring jurisdiction where the required amount in controversy can be reached only by aggregating separate and distinct claims. The interpretation of that statute cannot be changed by a change in the Rules.”³⁹ The Court further reasoned that “[t]o allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law.”⁴⁰ Subject matter jurisdiction is limited to promote the policy that federal courts are courts of limited jurisdiction.⁴¹ Otherwise, to allow the federal courts to have such power would infringe on state sovereignty rights.⁴²

Notably, for the first time the Court had dissenting Justices who wanted to abandon the “no aggregation doctrine” in class actions.⁴³ Justices Fortas and Douglas viewed the amendment as shifting the focus to the judgment in a class action.⁴⁴ They noted that judgments in class actions include all members who are a part of the class.⁴⁵ They reasoned that it would be consistent with the amendment to aggregate the claims of the class members to meet the requisite amount in controversy.⁴⁶ In addition, the dissenters viewed 28 U.S.C.

³⁷ *Id.* at 833.

³⁸ 394 U.S. 332 (1969).

³⁹ *Id.* at 338.

⁴⁰ *Id.* at 340.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Snyder*, 394 U.S. at 353-54 (Fortas, J., dissenting).

⁴⁴ *Id.* at 352-53.

⁴⁵ *Id.* at 353.

⁴⁶ *Id.* at 354.

§ 2072⁴⁷ as controlling and stated that “all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”⁴⁸ They stated that since the “no aggregation doctrine” had never been codified by Congress and the 1966 version of Rule 23 had been codified, then section 2072 should be controlling and Rule 23 should trump the “no aggregation doctrine.”⁴⁹ However, this represents only the rationale of the dissenters in this case, and the majority was unpersuaded by these arguments.

In 1973, the Supreme Court in *Zahn v. International Paper Co.*,⁵⁰ held in class actions with multiple plaintiffs having separate and distinct claims, each member must satisfy the jurisdictional amount for diversity suits in federal courts.⁵¹ The majority had no difficulty basing their decision on the historical interpretation of the “matter in controversy” requirement coupled with firmly rooted judicial precedents.⁵² This case established the “no aggregation doctrine” in class action.⁵³

Seventeen years after the decision in *Zahn*, Congress passed 28 U.S.C. § 1367, which was drafted with the explicit

⁴⁷ 28 U.S.C. § 2072 states:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

⁴⁸ *Snyder*, 394 U.S. at 350-51 (Fortas, J., dissenting) (quoting 28 U.S.C. § 2072).

⁴⁹ *Id.*

⁵⁰ 414 U.S. 291 (1973).

⁵¹ *Id.* at 300-01.

⁵² *Id.*

⁵³ *Id.* at 301.

intent of overruling *Finley v. United States*.⁵⁴ In *Finley*, the plaintiff brought an action under the Federal Tort Claims Act⁵⁵ against the United States, alleging negligence on the part of the Federal Aviation Administration.⁵⁶ *Finley* then moved to amend her federal complaint to include an additional state law claim against non-diverse parties.⁵⁷ There was no independent basis for federal jurisdiction over this additional state law claim against the new defendants.⁵⁸ The Court held that the state law claim did not belong in federal court.⁵⁹ The majority, in essence, wanted *Finley* to sue in federal court for the federal claim and in state court for the state law claim.⁶⁰ *Finley*'s other alternative would have been to bring both claims in state court.⁶¹ This decision was absurd in that *res judicata*⁶² would not bar a state law claim that did not satisfy the "matter in controversy" in federal court. However, it would bar a state or federal claim that was not asserted in the state court. Moreover, the Court stated that if this was not Congress' intention then "whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress."⁶³

To correct the problem presented in *Finley*, Congress enacted Section 1367.⁶⁴ However, vague congressional intent, coupled with confusion in the circuit courts, unexpectedly called into question the continuing validity of *Zahn* in light of the new

⁵⁴ 490 U.S. 545 (1989).

⁵⁵ Pub. L. No. 89-506, §§ 1-5(a), 8, 9, 80 Stat. 306-308 (codified at 28 U.S.C. §§ 1346(b), 2671, 2672, 2675, 2677 to 2679) (2000)).

⁵⁶ *Finley*, 490 U.S. at 546.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 555-56.

⁶⁰ *Id.*

⁶¹ *Finley*, 490 U.S. at 555-56.

⁶² "A rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties, their privies, and so as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

⁶³ *Finley*, 490 U.S. at 556.

⁶⁴ See 136 Cong. Rec. § 17577 (daily ed. Oct. 27, 1990).

statute. Was nearly a century of judicial precedent about to be overturned by the ambiguity of congressional intent in enacting Section 1367? Or was Section 1367 drafted by Congress with the intent of preserving the holding in *Zahn*?

III. CASELAW FINDING THAT SECTION 1367 OVERTURNED ZAHN

After the enactment of Section 1367, several circuits and commentators interpreted the statute as either implicitly, or explicitly overruling *Zahn*.⁶⁵ A string of circuit court cases have interpreted Section 1367 as overruling *Zahn* by invoking the plain meaning doctrine.⁶⁶ This doctrine requires the application of a statute's plain and customary meaning without analyzing legislative history.⁶⁷ At least one Supreme Court Justice has not hidden his disdain for the use of such legislative history.⁶⁸ Justice Scalia would be content if Congress provided no legislative history at all.⁶⁹ In addition, in his view such history has no place in determining the plain meaning or the constitutionality of a statute.⁷⁰

⁶⁵ See, e.g., *Abbott Lab. v. Free*, 51 F.3d 524, 529 (5th Cir. 1995) (interpreting Section 1367 as overruling *Zahn* under the plain meaning doctrine), *aff'd*, 529 U.S. 333 (2000) (per curiam) (same); *Romer v. Pfizer*, 263 F.3d 110, 114 (4th Cir. 2001) (same); *Gibson v. Chrysler Corporation*, 261 F.3d 927, 938 (9th Cir. 2000) (same); *Stromberg Metal Works v. Press Mechanical*, 77 F.3d 928, 930-31 (7th Cir. 1996) (expanding *Abbott Lab.* to apply to Rule 20 joinder cases); *Freer*, *supra* note 13.

⁶⁶ See, e.g., *Abbott Lab. v. Free*, 51 F.3d 524, 529 (5th Cir. 1995) (interpreting Section 1367 as overruling *Zahn* under the plain meaning doctrine), *aff'd*, 529 U.S. 333 (2000) (per curiam) (same); *Romer v. Pfizer*, 263 F.3d 110, 114 (4th Cir. 2001) (same); *Gibson v. Chrysler Corporation*, 261 F.3d 927, 938 (9th Cir. 2000) (same); *Stromberg Metal Works v. Press Mechanical*, 77 F.3d 928, 930-31 (7th Cir. 1996) (expanding *Abbott Lab.* to apply to Rule 20 joinder cases).

⁶⁷ See BLACK'S LAW DICTIONARY 1170 (7th ed. 1999).

⁶⁸ Arthur Stock, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L. REV. 160, 160-62.

⁶⁹ *Id.*

⁷⁰ *Id.*

Five years after the enactment of Section 1367, the validity of *Zahn* was first called into question in the circuit courts. In *Abbott Laboratories v. Free*,⁷¹ the Fifth Circuit was the first circuit court to hold that Section 1367 explicitly overruled *Zahn*.⁷² Free brought a class action under state antitrust laws in state court.⁷³ Abbott Laboratories removed the case to federal court under 28 U.S.C. § 1441.⁷⁴ It was determined that a Louisiana statute gave Free the right to add attorney's fees to the "amount in controversy" requirement as a named class representative.⁷⁵ Free's claim was for \$20,000, but when attorney's fees were added the amount was in excess of \$50,000.⁷⁶ Thus, Free's claim when swelled together with the attorney's fees satisfied the amount in controversy requirement.⁷⁷ The district court ruled that supplemental jurisdiction was proper over the claims of all the unnamed class members, despite their failing to meet the amount in controversy requirement.⁷⁸ However, the district court exercised its discretion and declined to use supplemental jurisdiction because the underlying issue in dispute involved "complex and novel issues of state law."⁷⁹

On appeal, the Fifth Circuit held that diversity jurisdiction was proper and conferred by supplemental jurisdiction over the

⁷¹ 51 F.3d 524 (5th Cir. 1995).

⁷² *Id.* at 529.

⁷³ *Id.* at 525.

⁷⁴ *Id.* 28 U.S.C. § 1441 reads in pertinent part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United State have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

⁷⁵ *Id.* at 526.

⁷⁶ *Abbott*, 51 F.3d at 526. The "matter in controversy" requirement under Section the time of this case stated that a plaintiff's claim must be in excess of \$50,000 and the parties must be diverse.

⁷⁷ *Id.*

⁷⁸ *Id.* at 526.

⁷⁹ *Id.* at 529.

claims of the unnamed plaintiffs.⁸⁰ The court stated that the need to look at legislative history exists only when a statute was unclear or ambiguous.⁸¹ Section 1367(a) grants broad discretion for the district courts to exercise supplemental jurisdiction over related claims, and Section 1367(b) carves out the exceptions in diversity cases.⁸² Notably, Rule 23 regarding class action is absent from those exceptions.⁸³ Accordingly, the court found Section 1367 is neither ambiguous nor unclear in any way.⁸⁴ However, the majority further reasoned that the plain meaning doctrine should not apply if it would create a “positively absurd” result.⁸⁵ The court stated that interpreting Section 1367 as overruling *Zahn* would not create an absurd result.⁸⁶ Questionably, the majority was persuaded by commentators that would applaud the demise of *Zahn* because “doing so would harmonize case law and enable federal courts to resolve complex interstate disputes in mass tort situations.”⁸⁷

In addition, the Seventh Circuit in *Stromberg Metal Works v. Press Mechanical*⁸⁸ expanded the aggregation doctrine under Section 1367 to include Rule 20 joinder cases as well.⁸⁹ Stromberg entered into a contract requiring subcontractors to be bound by the main contract.⁹⁰ Press Mechanical issued purchase orders, providing that the work was to be done in strict accordance with the master contract.⁹¹ Stromberg and Comfort

⁸⁰ *Id.*

⁸¹ *Abbott*, 51 F.3d at 528-29 (citing *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991) (refusing to permit the “perception of the policy of the statute to overcome its plain language”).

⁸² *Id.* at 527.

⁸³ *Id.* at 527 (Section 1367 (b) explicitly mentions Rules 14, 19 and 20, but not 23).

⁸⁴ *Id.* at 528.

⁸⁵ *Id.* at 529 (quoting *United States v. X-Citement Video, Inc.*, 534 U.S. 64, 69 (1994)).

⁸⁶ *Abbott Lab.*, 51 F.3d at 529.

⁸⁷ *Id.* at 529. See also *Arthur & Freer*, *supra* note 11 at 1008 n. 6.

⁸⁸ 77 F.3d 928 (7th Cir. 1996).

⁸⁹ *Stromberg*, 77 F.3d at 932.

⁹⁰ *Id.* at 929.

⁹¹ *Id.* at 929-30.

Control, another subcontractor, filed a diversity contract action alleging Press Mechanical fraudulently represented that it had paid the contractors.⁹² Stromberg's claim was above the jurisdictional requirement but Comfort Control's was not.⁹³

On appeal, the Seventh Circuit reasoned that "if §1367(a) allows suit by a pendant plaintiff who meets the jurisdictional amount but not the diversity requirement, it also allows suit by a pendant plaintiff who satisfies the diversity requirement but not the jurisdictional amount."⁹⁴ The court further stated that the reasoning of *Zahn* was not limited to class action suits.⁹⁵ Notably, *Zahn* relied on long standing precedents such as *Clark v. Paul Gray, Inc.*⁹⁶ The court then reasoned that if Section 1367 overruled *Zahn*, it also overruled *Clark*,⁹⁷ stating that "claims against persons made parties under Rule 20 are forbidden, but claims by parties who join under Rule 20 are allowed."⁹⁸ Judge Easterbrook stated that "claims by parties joined under Rule 19 . . . are forbidden [if that would spoil diversity], but claims by parties joined under Rule 20 for convenience are allowed."⁹⁹

⁹² *Id.* at 930.

⁹³ *Stromberg*, 77 F.3d at 930.

⁹⁴ *Id.* at 931.

⁹⁵ *Id.* at 930-32.

⁹⁶ *Id.* at 931; 306 U.S. 583 (1939).

⁹⁷ *Stromberg*, 77 F.3d at 931.

⁹⁸ *Id.*

- (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join

The court refused to look to the congressional intent of the statute holding that Section 1367 if not intentionally, then implicitly overruled *Zahn* and its predecessors.¹⁰⁰

Similarly, the Court of Appeals for the Fourth Circuit in *Romer v. Pfizer*,¹⁰¹ also held that the plain meaning of Section 1367 overruled *Zahn*.¹⁰² Romer sued Pfizer, a drug manufacturer in state court on behalf of herself and as a class representative.¹⁰³ Romer alleged state law claims arising from injuries to her husband as a result of a drug named Trovan, manufactured by

as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

- (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
- (c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.
- (d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 931-32.

¹⁰¹ 263 F.3d 110 (4th Cir. 2001).

¹⁰² *Id.* at 112.

¹⁰³ *Id.*

Pfizer.¹⁰⁴ Pfizer removed the case to federal court under Section 1441.¹⁰⁵ The district court held that Section 1367 conferred jurisdiction over the claims of unnamed class members, provided the named class representative satisfied the amount in controversy requirement of Section 1332.¹⁰⁶ Romer's claim was in excess of \$75,000 and the parties were diverse.¹⁰⁷

On appeal, the Fourth Circuit reasoned that Section 1367(a) "is broadly phrased to provide for supplemental jurisdiction over claims appended to any civil action over which the court has original jurisdiction."¹⁰⁸ Section 1367, in clear language, states that a federal court may exercise supplemental jurisdiction over those claims that "'form part of the same case or controversy' as the claim over which 'the district courts have original jurisdiction.'"¹⁰⁹ The court reasoned that since Section 1367(a) does not limit supplemental jurisdiction to cases founded solely on federal question jurisdiction, then Section 1367(a) must be viewed as conferring supplemental jurisdiction in both diversity cases and federal question cases.¹¹⁰ Applying the rationale of *Abbott Laboratories*, the Fourth Circuit focused on the absence from Section 1367(b) of Rule 23, regarding class actions.¹¹¹ Similarly, the court stated that "nowhere in §1367(b) does it exempt from the normal rules of supplemental jurisdiction persons made parties under Rule 23 [in diversity cases]."¹¹² The court further reasoned that since original jurisdiction was satisfied under Section 1332 over Romer's claim, then the claims of the absent class members fell within supplemental jurisdiction

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Romer*, 51 F.3d at 112.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 114 (quoting *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995) (quoting 28 U.S.C §1367)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Romer*, 51 F.3d at 115.

¹¹² *Id.*

because they were so related by a common question of law and fact.¹¹³

Likewise, the Ninth Circuit in *Gibson v. Chrysler Corp.*,¹¹⁴ also held that the enactment of Section 1367 overruled *Zahn*.¹¹⁵ A class of consumers sued Chrysler Corporation for using a process known as “electrocoat” for finishing their cars.¹¹⁶ This process resulted in the exterior paint peeling from the primer coat, especially after exposure to sun light.¹¹⁷ The class claims were based on breach of various warranties and unfair trade and business practices.¹¹⁸ Chrysler removed the case to federal court, but the federal court remanded it back to state court for lack of satisfying the amount in controversy requirement.¹¹⁹ The consumers amended their complaint to add another claim based on California’s Consumer Legal Remedies Act,¹²⁰ which allowed for punitive damages.¹²¹ Based on the amended complaint, Chrysler again sought to remove the claim to federal court contending that the claims of the named class representatives now satisfied the amount in controversy.¹²² The district court found that the second attempted removal was mostly frivolous and awarded sanctions and attorney’s fees.¹²³ Chrysler then appealed the award of sanctions and attorney’s fees.¹²⁴

On appeal, the Ninth Circuit applied the rationale of *Abbott Laboratories* and interpreted Section 1367 as overruling *Zahn*.¹²⁵ However, the court refused to grant supplemental jurisdiction over the unnamed class members because the class representatives did not satisfy the amount in controversy

¹¹³ *Id.* at 114-15.

¹¹⁴ 261 F.3d 927 (9th Cir. 2000).

¹¹⁵ *Id.* at 938.

¹¹⁶ *Id.* at 931.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Gibson*, 261 F.3d at 931.

¹²⁰ CAL. CIV. CODE § 1750 (Deering’s 2003).

¹²¹ *Id.*

¹²² *Id.* at 932.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Gibson*, 261 F.3d at 934.

requirement.¹²⁶ The court stated that “[o]ur own analysis convinces us that *Abbott Laboratories* properly understood the plain meaning of the text of § 1367, and correctly held that the claims of unnamed class members in a diversity class action need not satisfy the amount-in-controversy requirement.”¹²⁷ However, the court then searched the legislative history anyway, noting that this is an “unusual case.”¹²⁸ The majority then stated “that the omission of . . . Rule 23 . . . from 1367(b), and . . . overruling *Zahn*, was an oversight.”¹²⁹ It was also noted that the House Judiciary Committee report contained language “that § 1367 was not intended to affect the jurisdiction requirements of § 1332 in diversity-only class actions” and then cited *Zahn* in a footnote.¹³⁰ In contrast, the court stated there was evidence in the Working Paper of the Federal Courts Study Committee¹³¹ that “those involved in drafting §1367 both knew that the language chosen for §1367 would overrule *Zahn* and approved of that result on policy grounds.”¹³² The court then noted that it was not persuaded enough to disregard the plain meaning of Section 1367.¹³³ The majority reasoned that to abrogate the plain meaning doctrine would put many statutes in jeopardy of inconsistent interpretation.¹³⁴

¹²⁶ *Id.* at 943.

¹²⁷ *Id.*

¹²⁸ *Id.* at 938-39 (reasoning that “four courts have held that the text of §1367 is clear, but they split evenly on what that text means).

¹²⁹ *Id.* at 939. The court stated that Senator Grassley, who sponsored the Judicial Reform Act of 1990 repeatedly described the amendment of §1367 as “noncontroversial” and “quite modest.” *Id.* (citing 136 Cong. Rec. §17577 (Oct. 27, 1990)). The court then went on to say that “this is an unlikely characterization for a provision that would open the federal courts to a significant number of additional diversity class actions.” *Gibson*, 261 F.3d at 939.

¹³⁰ *Id.*

¹³¹ For the purposes of this paper this is the committee involved with the drafting of Section 1367. The committee consisted of scholars such as Judge Joseph Weis and Professors Thomas Mengler, Thomas Rowe, Stephen Burbank and Larry Kramer. *See* 136 Cong. Rec. §17577 (Oct. 27, 1990).

¹³² *Gibson*, 261 F.3d at 940.

¹³³ *Id.*

¹³⁴ *Id.*

IV. CASELAW FINDING THAT SECTION 1367 HAS NOT OVERRULED ZAHN

While some circuit courts have interpreted Section 1367 as overruling *Zahn*, others have held that Section 1367 left the reasoning of *Zahn* undisturbed.¹³⁵ In addition, the circuit courts that hold *Zahn* is undisturbed refuse to accept that Congress intended to overrule nearly a hundred years of precedents by virtue of a “clinical error.”¹³⁶ The congressional committee notes suggest that Congress had no intention of overruling *Zahn* or its predecessors.¹³⁷

The precedents relied upon by the Courts of Appeal for the Eighth¹³⁸ and Tenth¹³⁹ Circuits for holding *Zahn* had not been overruled, stemmed from the historical judicial interpretation of what the matter in controversy had come to mean in Section 1332. In *Troy Bank v. G.A. Whitehead & Co.*¹⁴⁰ the Supreme Court held “when two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount.”¹⁴¹ The Supreme Court in *Snyder v.*

¹³⁵ See, e.g., *Abbott Lab. v. Free*, 51 F.3d 524, 529 (5th Cir. 1995) (interpreting Section 1367 as overruling *Zahn* under the plain meaning doctrine), *aff'd*, 529 U.S. 333 (2000) (per curiam) (same); *Romer v. Pfizer*, 263 F.3d 110, 114 (4th Cir. 2001) (same); *Gibson v. Chrysler Corporation*, 261 F.3d 927, 938 (9th Cir. 2000) (same); *Stromberg Metal Works v. Press Mechanical*, 77 F.3d 928, 930-31 (7th Cir. 1996) (expanding *Abbott* to apply to Rule 20 joinder cases); *but see Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998) (holding Section 1367 did not overrule *Zahn* under the plain meaning doctrine); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000) (same); *Meritcare, Inc. v. St. Paul's Mercury Insurance Co.*, 166 F.3d 214, 218 (3d Cir. 1999) (reasoning the Section 1367 did not overrule *Zahn* based on legislative history).

¹³⁶ See *Trimble*, 232 F.3d at 962.

¹³⁷ See 136 Cong. Rec. §17577 (Oct. 27, 1990).

¹³⁸ See *Trimble*, 232 F.3d at 962.

¹³⁹ See *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998).

¹⁴⁰ 222 U.S. 39 (1911).

¹⁴¹ *Id.* at 40.

*Harris*¹⁴² applied the “no aggregation doctrine” to class actions suits.¹⁴³

Similarly, *Zahn* held that members of a class action must each independently satisfy the amount in controversy, or be dismissed from the lawsuit.¹⁴⁴ The Court reasoned that it was well founded and deeply rooted in judicial precedence that Section 1332’s matter in controversy requirement was defined to prohibit aggregation of claims in an attempt to satisfy the jurisdictional requirement.¹⁴⁵ Thus, Section 1332 has been judicially interpreted as encompassing the “no aggregation doctrine” within it.¹⁴⁶

In *Leonhardt v. Western Sugar Co.*¹⁴⁷ the Tenth Circuit was the first circuit court to hold that the ruling in *Zahn* was unaffected by the enactment of Section 1367.¹⁴⁸ The plaintiffs were farmers who contracted to grow sugar beets for Western Sugar Co.¹⁴⁹ Plaintiffs alleged that the manufacturing process used by the company permitted too many adulterants to adhere to the beets that were used for the measuring samples.¹⁵⁰ The presence of these adulterants lowered the sugar content and the amount they received for payment under the contract.¹⁵¹ The plaintiffs then brought this suit on behalf of themselves and all persons similarly situated for various breach of contract theories.¹⁵² The named class representatives satisfied the amount in controversy requirement, but the other class members did not.¹⁵³ The district court ruled that supplemental jurisdiction did not confer jurisdiction over the unnamed class members for

¹⁴² 394 U.S. 332 (1969).

¹⁴³ *Id.* at 338-40.

¹⁴⁴ 414 U.S. at 300-01.

¹⁴⁵ *Id.*; see also *Snyder*, 394 U.S. at 335.

¹⁴⁶ See *Zahn*, 414 U.S. at 300-01.

¹⁴⁷ 160 F.3d 631 (10th Cir. 1998).

¹⁴⁸ *Id.* at 641.

¹⁴⁹ *Id.* at 633.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Leonhardt*, 160 F.3d at 633.

¹⁵³ *Id.* at 633.

claims that do not satisfy the amount in controversy requirement.¹⁵⁴

On appeal, the Tenth Circuit reasoned that the “omission of Rule 23 from §1367(b) had no bearing on whether Congress intended to change the rules about when a plaintiff can bring an initial diversity-based class action upon original jurisdiction under §1332.”¹⁵⁵ Section 1332’s amount in controversy requirement has been judicially interpreted as containing the “no aggregation doctrine” within it.¹⁵⁶ Based on this interpretation, Section 1367(a) can be read as supporting the “no aggregation doctrine” in class actions.¹⁵⁷ The language of both Section 1367(a) and Section 1367(b) coincide to support each other and are evidence “for preserving the historical and well established rules of diversity.”¹⁵⁸ Contrary to what the Courts of Appeal for the Fifth and Seventh Circuits held, this court read the plain meaning of the statute to support *Zahn* and not overrule it.¹⁵⁹

However, the court stated that “[w]e find it difficult to argue persuasively that the statute is truly unambiguous when two circuit courts of appeal have reached the opposite conclusion from us, when a majority of district courts are in agreement with us, and when commentators are divided.”¹⁶⁰ The court then followed judicial precedent in the circuit and reasoned that when a statute is truly ambiguous we may “resort to legislative history as an aid to interpretation.”¹⁶¹ The court looked to the legislative history to explain the reasons for the exceptions.¹⁶² The court reasoned that Congress did not intend to subvert the long standing judicial interpretation of what the amount in controversy

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 640.

¹⁵⁶ *Id.*

¹⁵⁷ *Leonhardt*, 160 F.3d at 640.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 638 (quoting *United States v. Simmonds*, 111 F.3d 737, 742 (10th Cir. 1997)).

¹⁶² *Leonhardt*, 160 F.3d at 640.

requirement stood for.¹⁶³ The legislative history “cites *Zahn* as an example of the pre-*Finley* interpretation of the jurisdictional requirements of §1322 that is not to be disturbed.”¹⁶⁴ The court stated that the legislative history clearly supports the conclusion that *Zahn* and its predecessors were not to be changed by the enactment of Section 1367.¹⁶⁵

Similarly, in *Meritcare, Inc. v. St. Paul's Mercury Insurance Co.*,¹⁶⁶ the Third Circuit also held that “no aggregation doctrine” was unaffected by the enactment of Section 1367.¹⁶⁷ This case arose when Meritcare was advised “that the roof on the nursing home was structurally unsound and posed a safety hazard.”¹⁶⁸ The facility was closed to fix the damaged roof and accommodations were made for residents with other institutions.¹⁶⁹ St. Paul's Mercury Insurance Co. issued policies to plaintiffs that provided for property damage and business interruption coverage.¹⁷⁰ The insurance company denied plaintiffs' claims stating that the policies covered losses from a “roof collapse.”¹⁷¹ The three policy holders filed suit in state court which was later removed to federal district court.¹⁷² The parties met the diversity requirement of Section 1332, but only one plaintiff met the amount in controversy requirement.¹⁷³ The district court held that supplement jurisdiction did not confer jurisdiction over parties that do not satisfy the amount in controversy.¹⁷⁴

On appeal, the Third Circuit reasoned that Section 1367(a) was broader than Section 1367(b).¹⁷⁵ Section 1367(a) was viewed

¹⁶³ *Id.* at 640-41.

¹⁶⁴ *Id.* at 640.

¹⁶⁵ *Id.* at 640-41.

¹⁶⁶ 166 F.3d 214 (3d Cir. 1999).

¹⁶⁷ *Id.* at 222.

¹⁶⁸ *Id.* at 216.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Meritcare*, 166 F.3d at 216.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 221.

in terms of federal question and diversity jurisdiction and granted broad discretion for the district courts to grant supplement jurisdiction, while Section 1367(b) was narrow in its application to federal diversity-based jurisdiction only.¹⁷⁶ The court stated that Rule 20 was absent from Section 1367(b) in terms of whether a Rule 20 plaintiff may assert a claim against a defendant.¹⁷⁷ Unlike the Tenth Circuit and Eight Circuits, which held that the plain meaning of the statute supported a consistent interpretation of *Zahn*, this court held the opposite.¹⁷⁸ However, the court reasoned that this is one of those “rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.”¹⁷⁹ The court then searched through the legislative history and reasoned that it supported the “no aggregation doctrine” outlined in *Zahn*.¹⁸⁰

Finally, in *Trimble v. Asarco, Inc.*,¹⁸¹ the Eighth Circuit also held that the enactment of Section 1367 had no effect on the *Zahn* holding.¹⁸² Trimble brought this class action against Asarco alleging that their properties were contaminated by various environmental pollutants from the Asarco site.¹⁸³ They filed several amended complaints, setting forth a CERCLA¹⁸⁴ private cost-recovery claim, as well as state law claims.¹⁸⁵ Trimble and the other named plaintiffs purported to represent thousands of individuals who owned or rented property in a specified area surrounding the site.¹⁸⁶ Trimble asserted that the district court

¹⁷⁶ *Meritcare*, 166 F.3d at 221.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 222.

¹⁷⁹ *Id.* (quoting *United States v. Sherman*, 150 F.3d 306, 313 (3d Cir. 1998)); see also *United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235, 242 (1989); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

¹⁸⁰ *Id.*

¹⁸¹ 232 F.3d 946 (8th Cir. 2000).

¹⁸² *Id.* at 963.

¹⁸³ *Id.* at 950.

¹⁸⁴ Comprehensive Environmental Response Compensation and Liability Act of 1980, Pub. L. No. 96-510 (codified as amended in 42 U.S.C. §§ 9601-9675) (2000)).

¹⁸⁵ *Trimble*, 232 F.3d at 950.

¹⁸⁶ *Id.*

had subject matter jurisdiction based on diversity and supplemental jurisdiction.¹⁸⁷ The district court held that Section 1367 did not confer supplemental jurisdiction over claims of unnamed class members that did not satisfy the amount in controversy requirement.¹⁸⁸

On appeal, the court applied the reasoning of the *Leonhardt* court.¹⁸⁹ The court reasoned that the “Tenth Circuit decision in *Leonhardt* states the better view.”¹⁹⁰ Section 1367(b) considers “any civil action of which the district courts have original jurisdiction founded solely on § 1332 of this title.”¹⁹¹ The statute provides that in diversity cases the claim must first comply with Section 1332 before a court can exercise supplemental jurisdiction.¹⁹² For nearly a hundred years, courts have applied the “no aggregation doctrine” to define the amount in controversy requirement of Section 1332.¹⁹³ “While § 1332 does not expressly refer to class actions, the Supreme Court noted that periodic congressional amendment of the diversity statute to alter only the amount in controversy evidences congressional agreement with the Court’s holding that “matter in controversy” does not encompass the aggregation of separate and distinct claims.”¹⁹⁴ This language of Section 1367 is plain and unambiguous on its face, and supports the conclusion that Congress intended to keep well-established judicial precedence untouched in diversity cases.¹⁹⁵

V. ANALYSIS

How should this blatant conflict be resolved? Upon closer inspection, it is not as complicated as the circuit courts have made

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 961-62.

¹⁹⁰ *Trimble*, 232 F.3d at 961.

¹⁹¹ *See* 28 U.S.C. § 1367.

¹⁹² *Trimble*, 232 F.3d at 962.

¹⁹³ *Id.*

¹⁹⁴ *Id.* (quoting *Leonhardt*, 160 F.3d at 637-40).

¹⁹⁵ *Id.*

it. One can begin the analysis as follows: 1) What is the proper standard to be applied when interpreting a statute?; 2) and what was Congress' intention in creating the statute? The Supreme Court held that if the statutory will of Congress has been reasonably expressed in a statute, then that statute will be regarded as conclusive.¹⁹⁶ This is known as the "plain meaning doctrine." However, the Court carved out three exceptions to the rule. The first exception is when a statute is ambiguous. Moreover, the Court stated that "there is no errorless test for recognizing ambiguity."¹⁹⁷ This means that since a district court is afforded broad discretion for recognizing ambiguity in a statute, then that discretion would only be reversed for abuse thereof. The second exception is in one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."¹⁹⁸ The third exception is when applying the plain meaning doctrine would create a "positively absurd" result.¹⁹⁹

The text of Section 1367(a) reads as follows:

Except as provided in subsection (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.²⁰⁰

¹⁹⁶ See *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982).

¹⁹⁷ See *United States v. Turkette*, 452 U.S. 576, 580 (1981).

¹⁹⁸ See *Griffin*, 458 U.S. at 571.

¹⁹⁹ *United States v. X-Citement Video*, 534 U.S. 64, 69 (1994).

²⁰⁰ 28 U.S.C. § 1367(a).

Applying the plain meaning doctrine, Section 1367(a) confers supplemental jurisdiction over all claims that a district court would have “original jurisdiction over,” provided those claims satisfy Article III’s case in controversy requirement.²⁰¹ The district courts have original jurisdiction over diversity cases and federal question cases. Once the requirements of Section 1331 and Section 1332 are satisfied, a district court is granted broad discretion in applying supplemental jurisdiction. For example, if a district court has original jurisdiction over the named class representative(s) under Section 1332, then a district court would be free to exercise supplemental jurisdiction over the other class members’ claims joined to the law suit.

However, Section 1367(b) states:

In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under sub-section (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20 or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplement jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.²⁰²

Applying the “plain meaning doctrine,” this part of the statute sets forth clear exceptions to 1367(a) in diversity-based litigation in federal court. However Rule 23 is completely absent from Section 1367(b). Moreover, Section 1367(b) is silent as to whether a plaintiff joined under Rule 20 can use supplemental jurisdiction and assert a claim against a party already in the

²⁰¹ *Id.*

²⁰² 28 U.S.C. § 1367(b).

lawsuit. Applying the “plain meaning doctrine” would mean that the use of supplemental jurisdiction is not limited in federal diversity class actions. This would also allow a plaintiff who was joined under Rule 20 to aggregate his claim with some other plaintiff who already satisfied the amount in controversy, and sue a defendant already in the litigation. Moreover, the Fourth, Fifth, Seventh, Ninth, and Third Circuits would agree with me in this interpretation. This would mean that Section 1367 overrules that “no aggregation doctrine.”

However, one of the exceptions stated above is clearly applicable to the issue of whether Section 1367 overruled the “no aggregation doctrine.” The exception is when the application of the plain meaning doctrine will cause a result demonstrably at odds with the intent of the drafters, then the intent will be viewed as controlling.²⁰³ If one were to read the legislative history for Section 1367, the intent of the drafters is clear, despite the mere two pages of legislative history enacted for such an important statute.²⁰⁴ “In diversity-only actions the district court may not hear plaintiff’s supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdictional requirement of Section 1332.”²⁰⁵ “The section is not intended to affect the jurisdictional requirements of Section 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*.”²⁰⁶ The legislative history then cites *Zahn* as a case which was intended to be preserved.²⁰⁷ In viewing the legislative intent together with the “plain meaning doctrine,” it is clear that the intent of the drafters was to preserve the long standing “no aggregation doctrine.” Clearly, the “plain meaning doctrine” would cause a result demonstrably at odds with the intent of the drafters. As such, the legislative history should be viewed as controlling the statutory interpretation of Section 1367. This analysis seems clear and to the point.

²⁰³ See *Griffin*, 458 U.S. at 571.

²⁰⁴ See 136 Cong. Rec. § 17577 (daily ed. Oct. 27, 1990).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

A similar conclusion could also be arrived at by invoking the ambiguity exception to the “plain meaning doctrine.” Several circuits have adopted a test for recognizing ambiguity. In short, the essence of the test states that a split in circuits is evidence enough of statutory ambiguity.²⁰⁸ Once ambiguity is recognized, the Supreme Court stated that the lower courts may then review the legislative intent or history to help determine the true statutory meaning.²⁰⁹ As stated above, once the legislative history is probed, it is clear that Congress had no intention of overruling the “no aggregation doctrine.”²¹⁰

VI. CONCLUSION

Following the framework for statutory interpretation outlined above, most circuit courts have properly interpreted the statutory text as overruling the “no aggregation doctrine.” However, in *Leonhardt v. Western Sugar Co.*²¹¹ and *Trimble v. Asarco, Inc.*,²¹² the Tenth and Eighth Circuits, respectively, have interpreted the text of 1367 as not overruling the “no aggregation doctrine.”²¹³ As *Trimble* merely adopted the *Leonhardt* court’s reasoning in every aspect, the focus here will be on *Leonhardt*. In the author’s opinion, the *Leonhardt* court’s decision is flawed in two ways. First, *Leonhardt* stated that the term “original jurisdiction” in Section 1367(a) incorporated the “no aggregation doctrine” into it. Thus, Section 1367(a) specifically “excepted claims brought under §1332.”²¹⁴ However, the text of Section 1367(a) makes it clear that it includes both Section 1332 and Section 1331. The text also makes it clear that Section 1367(b) was intended to create exceptions in federal diversity-based litigation. If *Leonhardt* was correct, there would be no reason

²⁰⁸ See, e.g., *United States v. Simmonds*, 111 F.3d 737, 742 (10th Cir. 1997).

²⁰⁹ See, e.g., *Chapman v. United States*, 500 U.S. 453 (1991).

²¹⁰ See 136 Cong. Rec. §17577 (Oct. 27, 1990).

²¹¹ 160 F.3d at 631.

²¹² 232 F.3d at 946.

²¹³ *Leonhardt*, 160 F.3d at 641; *Trimble*, 232 F.3d at 963.

²¹⁴ *Leonhardt*, 160 F.3d at 640.

whatsoever for Section 1367(b). “Such a reading of the statute adds an exception that the language and the structure of the Act cannot bear.”²¹⁵ The text does not create such hidden barriers for claims brought under Section 1332.

Second, the *Leonhardt* court read Section 1367(a) as conferring original jurisdiction over a civil action as requiring the district court to have original jurisdiction over the entire complaint at the time it was filed. If this were true, it would render the phrase “over all other claims that are so related to claims in the action” as virtually meaningless. Congress’ language does not restrict Section 1367(a) to limit the use of supplemental jurisdiction in diversity cases. Interestingly enough, if *Leonhardt* was correct it would mean that 1367(a) would not even apply to *Finley* a decision which was intended to be overruled.²¹⁶ For example, if a plaintiff brings a federal law claim and a state law claim in federal court, and the district court does not have original jurisdiction over the state law claim at the time of the complaint, then supplemental jurisdiction would not attach to the state law claim. Obviously, the *Leonhardt* court did not adequately consider this decision before rendering it. Although *Leonhardt* probably rendered the correct decision, the reasoning employed was faulty.

Surprisingly enough, most of the circuit courts end their inquiry by stating that the plain meaning of Section 1367 overrules the “no aggregation doctrine.”²¹⁷ While it seems clear that the plain meaning of Section 1367 overrules the “no aggregation doctrine,” the inquiry cannot end there. *Abbott Laboratories v. Free*²¹⁸ and *Stromberg Metal Works v. Press*

²¹⁵ *Romer*, 263 F.3d at 116.

²¹⁶ See 136 Cong. Rec. § 17577 (daily ed. Oct. 27, 1990).

²¹⁷ See, e.g., *Abbott Lab. v. Free*, 51 F.3d 524, 529 (5th Cir. 1995) (interpreting Section 1367 as overruling *Zahn* under the plain meaning doctrine), *aff’d*, 529 U.S. 333 (2000) (per curiam) (same); *Stromberg Metal Works v. Press Mechanical*, 77 F.3d 928, 930-31 (7th Cir. 1996) (expanding *Abbott* to apply to Rule 20 joinder cases).

²¹⁸ 51 F.3d 524 (5th Cir. 1995) (reasoning that legislative history should not be viewed if the statute is clear).

*Mechanical*²¹⁹ should have continued their analysis and looked to legislative history to see if the result of overruling the “no aggregation doctrine” would be at odds with the intent of the drafters. If either of these two circuits would have looked to the legislative history, the answer would be clear. Once the legislative history of Section 1367 is viewed, there should be no question that the drafters of the statute intended the long standing and historical “no aggregation doctrine” to remain intact. When the plain meaning doctrine would produce a result that is demonstrably at odds with the intent of the drafters, the intent should control. However, the only way to know the intent of the drafters is to search the legislative history. It is this that the Fifth and Seventh Circuits failed to do.

Moreover, failing to look to the legislative history, *only* when it is at odds with the “plain meaning doctrine” is the equivalent of a judicial slap in Congress’ face. As one court put it:

To retain this case in this court is to say to Congress: we know what you meant to say, but you didn’t quite say it. So the message from us in the judicial branch to you in the legislative branch is Gotcha! And better luck next time. Such a message is not required by the separation of powers. Nor is it in harmony with the fact that Congress and the courts, however different their respective roles, are part of a single government.²²⁰

The judicial branch should not act as a super-legislator by substituting its intent for that of Congress. Some circuit courts

²¹⁹ 77 F.3d 928 (7th Cir. 1996) (reasoning that legislative history should not be viewed if the statute is clear).

²²⁰ *Id.*

have agreed with this aspect of the argument, but have decided to disregard it anyway.²²¹

Clearly, in *Meritcare, Inc. v. St. Paul's Mercury Insurance Co.*,²²² third Circuit Court did a thorough job in deciding the issue of whether Section 1367 overrules the “no aggregation doctrine.” The court correctly stated that under the “plain meaning doctrine,” the text of Section 1367 specifically overruled the “no aggregation doctrine,” but refused to end the inquiry there.²²³ The court then probed the legislative history and concluded that the intent of Congress was not to overrule the “no aggregation doctrine.”²²⁴

In contrast, many commentators and courts have criticized Congress as failing to do its job in drafting Section 1367. Thomas Arthur and Richard Freer state that the courts must be forced to pick up the slack where Congress left off. They blame Congress for its rush job in passing the statute.²²⁵ They further argue that “§1367(b) is a nightmare of draftsmanship.”²²⁶ They

²²¹ See, e.g., *Gibson v. Chrysler Corporation*, 261 F.3d 927, 940 (9th Cir. 2000).

²²² 166 F.3d 214 (3d Cir. 1999).

²²³ *Id.* at 222.

²²⁴ *Id.*

²²⁵ See *Freer & Arthur supra* note 11, at 1013 n. 34.

This process amounted to less than one day's hearing by one subcommittee of one house of Congress, and cursory consideration on the floors of both houses. The Senate Judiciary Committee never considered Section 1367 at all. The full Senate adopted the measure as an obscure part of an omnibus “judicial reform” bill which created new judgeships (and patronage for the Senators), based only on Senator Grassley's assurance that no controversial changes were being made. Senator Grassley's brief remarks on the Senate floor contained no mention, much less analysis, of the supplemental jurisdiction provisions. The statute was not read on the Senate floor and the whole business occupied a few minutes at the end of the 1990 congressional session, which was dominated by a budget confrontation between Congress and the President.” *Id.*

²²⁶ See *Freer & Arthur supra* note 11, at 1007.

explain that the statute creates problems in an area that should be problem-free and causes wasteful litigation over jurisdictional issues.²²⁷ As one Judge put it, “[t]he more precise and coherent a statute, the less it permits and requires creative judicial interpretation We are choking, not on statutes in general, but on ambiguous and internally inconsistent statutes.”²²⁸ They further argue that the precedents in the area were clear before the enactment of the statute, and that the statute itself has left open a slew of ambiguities that cost litigating parties wasteful amounts of money.²²⁹

In addition, Arthur and Freer argue that the question of whether Section 1367 overruled the “no aggregation doctrine” is one that involves simply a debate in politics.²³⁰ On one side lies the policy of judicial economy and on the other side lies the issue of state sovereignty. They contend that judges that seem to favor state sovereignty would not overrule *Zahn*, because it would force possible complicated unresolved state issues to be settled in federal court instead of state court.²³¹ The Supreme Court held in *Snyder* that “[t]o allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law.”²³²

Since the enactment of Section 1367 the circuit courts have refused to come to any agreement on whether the “no aggregation doctrine” has been overruled. While Congress was not explicit in the design of the statute itself, Congress was explicit in its legislative history. Its intention was not to overrule *Zahn* and its predecessors. To preserve the integrity between the judicial and legislative branches, courts should give great deference to the legislative history, *only* when the “plain meaning

²²⁷ See Freer & Arthur *supra* note 11, at 1007.

²²⁸ See Freer & Arthur *supra* note 11, at 1007 (quoting J. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 424-25 (1983-1984).

²²⁹ See Freer & Arthur *supra* note 11, at 1009.

²³⁰ See Freer & Arthur *supra* note 11, at 1008.

²³¹ See Freer & Arthur *supra* note 11, at 1008 n. 6.

²³² 394 U.S. at 340.

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doctrine” would create a result that is at odds with the intent if the drafters.²³³ Anything other than deference to the legislative history in these rare cases would be potentially embarrassing to the legislative branch.

²³³ See *Griffin*, 458 U.S. at 571.

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