

Supplemental Jurisdiction in Diversity-Only Class Actions After *Exxon Mobil Corp. v. Allapattah Services, Inc.*

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FOUR MONTHS AFTER THE enactment of the Class Action Fairness Act of 2005 (CAFA) wrought a sea change in the jurisdictional rules governing diversity-only class actions, the U.S. Supreme Court issued an important decision further modifying the scope of federal court jurisdiction in diversity cases. Resolving a 15-year-old controversy that had sharply divided the lower courts, the Court held in *Exxon Mobil Corp. v. Allapattah Services, Inc.*,¹ that the supplemental jurisdiction statute, 28 U.S.C. § 1367, abrogated the long-standing rule of *Zahn v. International Paper Co.*² that, in a diversity-only class action—such as an indirect purchaser class action brought under state antitrust laws—each class member must individually satisfy the amount-in-controversy requirement of the diversity jurisdiction statute. The Court held that so long as the other elements of diversity jurisdiction are present and at least one named plaintiff has claims sufficient to meet the required jurisdictional amount, Section 1367 authorizes the exercise of supplemental jurisdiction over the related claims of additional plaintiffs—including named and unnamed class members—even if those claims do not independently satisfy the jurisdictional minimum.

Like CAFA, the holding in *Exxon Mobil* is a victory for those favoring the increased availability of a federal forum for the efficient resolution of related state-law claims. CAFA, with its provisions for minimal (rather than complete) diversity and aggregation of claims, represents a much greater expansion of federal court jurisdiction, and thus supersedes to some extent the significance of *Exxon Mobil* in the class-action context. Nevertheless, many class actions will fall outside CAFA's ambit, either because the aggregate damages claim is below CAFA's threshold of \$5 million or because one of CAFA's several exceptions applies. Thus, while *Exxon Mobil* has limited applicability to the large multistate actions

to which CAFA is directed, the decision still has significant implications for whether class actions not covered by CAFA may be brought in, or removed to, federal court.

The Jurisdictional Backdrop

To appreciate the changes that CAFA and *Exxon Mobil* have made to the landscape of diversity jurisdiction, it is helpful to understand the legal setting in which these two developments arose. This backdrop included two well-settled rules concerning jurisdiction based on diversity of citizenship, both of which were based on interpretations of the diversity-jurisdiction statute and, therefore, susceptible to revision by Congress. First, the rule of "complete diversity" requires that all parties on the plaintiffs' side of a lawsuit be diverse from all parties on the defendants' side.³ Second, the nonaggregation principle prohibits courts from aggregating the claims of separate plaintiffs to satisfy the amount-in-controversy requirement of the diversity statute, requiring instead that, for jurisdictional purposes, each plaintiff's stake must individually rise above the jurisdictional amount.⁴

The federal courts had also developed rules to determine whether and when it is appropriate to exercise jurisdiction over claims that themselves are not independently within the courts' statutory grants of subject-matter jurisdiction but which relate in some specified degree to other, jurisdictionally sufficient claims properly pending in federal court. In an effort to avoid requiring parties to litigate such related claims in different fora, the Supreme Court had, by the early part of the 20th century, endorsed the common-law doctrines of pendent and ancillary jurisdiction in limited circumstances.⁵ During the 1960s and 1970s, moreover, the lower courts seized upon the Supreme Court's broad endorsement of pendent-claim jurisdiction in the seminal case of *United Mine Workers v. Gibbs*⁶ to permit expansive exercises of jurisdiction over nonfederal claims asserted by or against pendent parties or added to lawsuits by defendants and third parties. This heyday of the common-law doctrines now collectively grouped under the heading "supplemental jurisdiction" was short-lived, however, as subsequent Supreme Court cases took a more restrictive view and restrained the exercise of

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pendent-party and ancillary jurisdiction where such jurisdiction had not been authorized by Congress.⁷

The Supreme Court's pronouncements in this area were not always a model of consistency, particularly when the rules governing diversity jurisdiction and supplemental jurisdiction intersected in the class-action context. In the early case of *Supreme Tribe of Ben-Hur v. Cauble*,⁸ the Court held that in a diversity-only class action, the federal courts are permitted to exercise ancillary jurisdiction over the claims of nondiverse absent class members. As a result, the citizenship of absent class members has never been relevant to the federal courts' jurisdiction over Rule 23 class actions (although complete diversity has been required between the named plaintiffs and the defendants). Years later, however, the Supreme Court held in *Zahn* that ancillary jurisdiction could not be exercised over claims of absent class members that did not, on a per-plaintiff basis, separately satisfy the amount-in-controversy requirement.⁹ As a result, under *Zahn*, the claims of each individual class member in a diversity-only class action had to be above the jurisdictional amount for a federal court to have jurisdiction over those claims.

Apart from its obvious tension with *Ben-Hur*, the Court's decision in *Zahn* soon had appreciable effects on the justiciability of antitrust class actions in federal court. After the Supreme Court rejected indirect purchaser standing under the federal antitrust laws in *Illinois Brick*,¹⁰ indirect purchaser actions proceeded almost entirely under state law. While *Ben-Hur* permitted these diversity-only actions to be brought in, or removed to, federal court without regard to the citizenship of absent class members, *Zahn* prevented the lawsuits from proceeding in federal court, unless each and every member of the plaintiff class had claims above the required jurisdictional amount. Because indirect purchaser class actions often involve end-user consumers with individual claims of small financial value, the rule of *Zahn* generally resulted in such lawsuits being heard in the state courts. Denied a federal forum, defendants were unable to take advantage of procedural mechanisms, such as multidistrict transfer and consolidation, that are available to deal with similar cases filed in multiple federal courts, and were forced to deal with the inefficiencies of litigating related cases separately.¹¹

Enactment of 28 U.S.C. § 1367 and the Decision in *Exxon Mobil*

The Supreme Court's growing hostility toward the judicially created doctrines of pendent and ancillary jurisdiction,¹² particularly in federal-question cases, eventually prompted Congress in 1990 to codify (and modify) the doctrines through the enactment of Section 1367. Subsection (a) of that statute broadly authorizes federal courts in any civil action over which a court already has original jurisdiction to further exercise supplemental jurisdiction over all other claims that are so related to the jurisdictionally proper claims "that they form part of the same case or controversy under Article III of the United States Constitution."¹³ Subsection

(b) of the statute narrows this broad authorization in diversity cases, however, by excluding from the courts' supplemental jurisdiction claims asserted by plaintiffs against persons made parties to the lawsuit under Rules 14 (third-party practice), 19 (compulsory joinder), 20 (permissive joinder), and 24 (intervention) of the Federal Rules of Civil Procedure, and claims asserted by would-be plaintiffs proposed to be joined under Rule 19 or seeking to intervene under Rule 24, "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of" the diversity statute.¹⁴

Controversy about the impact of Section 1367 on the rule of *Zahn* followed immediately after the statute's enactment. The disagreement centered around the propriety of exercis-

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ing supplemental jurisdiction over the claims of additional plaintiffs with jurisdictionally insufficient claims when those plaintiffs had been permissively joined pursuant to Rule 20 or were absent members of a Rule 23 class. Although Section 1367(b) expressly excludes from the federal courts' supplemental jurisdiction claims asserted *against* parties added to a lawsuit pursuant to Rule 20, and also excludes claims *by* parties added through other mechanisms (intervention and compulsory joinder), it does not similarly exclude claims asserted *by* parties permissively joined as plaintiffs under Rule 20 or joined as members of a plaintiff class certified under Rule 23.

Given that the rationale for this patchwork of exceptions is not readily apparent,¹⁵ a number of courts and commentators relied on a statement in the House Judiciary Committee Report that the statute was not intended to affect jurisdictional requirements as interpreted in *Zahn* and *Ben-Hur* to argue that, consistent with *Zahn*, the statute should not be read to authorize supplemental jurisdiction over the claims of any co-plaintiff or class member who did not independently satisfy the jurisdictional amount. The Supreme Court first tried to resolve the dispute in 1999, but with one Justice recused, it divided evenly and failed to issue a precedential ruling.¹⁶ The issue remained unresolved, with a sharp division among the courts of appeals, until the Court agreed to revisit it in *Exxon Mobil*.¹⁷

Exxon Mobil involved a breach of contract action brought by a certified class of approximately 10,000 of Exxon Corporation's current and former motor fuel dealers. While the named plaintiff's claims satisfied the amount-in-controversy requirement, the claims of many of the class members did

not, giving rise to the question whether those claims, which could not have been asserted under *Zahn*, were within the supplemental jurisdiction authorized by Section 1367. *Exxon Mobil* was consolidated with *Ortega v. Star-Kist Foods, Inc.*,¹⁸ a multiparty personal injury action in which the main plaintiff satisfied the jurisdictional amount but her co-plaintiffs, joined under Rule 20, did not.

In a five-to-four decision, the Supreme Court concluded that the supplemental jurisdiction authorized by the statute extended, in diversity cases, to claims brought by plaintiffs joined under Rule 20 or by members of a class certified under Rule 23, thus overruling *Zahn*.¹⁹ The Court first noted that Section 1367(a) provides for supplemental jurisdiction whenever the district court has “original jurisdiction” over “a civil action,” and that this requirement is satisfied “[i]f the court has original jurisdiction over a single claim in the complaint, . . . even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint.”²⁰ The Court rejected the argument that this reading of the statute is incompatible with the complete-diversity requirement. The Court explained that, although the presence of a nondiverse party in a complaint “destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere,” the amount-in-controversy requirement can be analyzed claim by claim.²¹ For this reason, with respect to original jurisdiction, the presence in the action of claims below the jurisdictional amount is “of no moment.”²² Accordingly, the Court held, because claims asserted by plaintiffs joined permissively under Rule 20 or by absent class members under Rule 23 were not among the claims excluded by Section 1367(b) from the district courts’ supplemental jurisdiction, those claims are within the supplemental jurisdiction authorized by Section 1367(a).²³

The Impact of the Supreme Court’s Decision on Antitrust Class Actions

Although the question whether Section 1367 overruled *Zahn* was, for many years, a matter of significant interest, the passage of CAFA just a few months before the Supreme Court finally provided the answer lessened its importance to a degree. In particular, by the time *Exxon Mobil* was decided, CAFA had already (with some important exceptions) expanded federal court diversity jurisdiction to encompass class action lawsuits in which both the aggregate amount at stake is over \$5 million (even if no single plaintiff has claims in excess of \$75,000) and any one class member is diverse from any one defendant.

Section 1367 still has a role to play in class actions that fall outside CAFA’s threshold requirements. After *Exxon Mobil*, the rules governing diversity-only class actions that are not covered by CAFA are as follows:

- For federal court jurisdiction to exist, there must be complete diversity between the named parties, i.e., no named plaintiff can be a citizen of the same state as any named defendant.
 - For federal court jurisdiction to exist, at least one named plaintiff must have a claim in excess of the jurisdictional amount (currently \$75,000). The claims of separate plaintiffs or class members cannot be aggregated to meet the jurisdictional amount.
 - The citizenship of absent class members is irrelevant for jurisdictional purposes.
 - The size of the separate claims of the absent class members is irrelevant for jurisdictional purposes.
- Under this new regime, at least some indirect purchaser class actions that previously could not be brought in or removed to federal court and are not covered by CAFA will now be within the jurisdiction of the federal courts. Moreover, the Supreme Court’s resolution of the issue ought to have a salutary effect on the horizontal forum shopping that likely occurred when the circuit courts were split over the impact of Section 1367 on *Zahn*. As one commentator has suggested, the likely result of this division among the circuits had been for plaintiffs seeking to insulate their cases from removal to gravitate towards state courts within the Third, Eighth, and Tenth Circuits, where *Zahn* had been expressly held to remain good law.²⁴
- Finally, while the ruling in *Exxon Mobil* broadens the availability of the federal courts for indirect purchaser class actions, that ruling has no effect on another well-settled rule: that the claims of multiple plaintiffs (or multiple class members) may not be aggregated to meet the jurisdictional amount. Indeed, both the language of Section 1367 and the Supreme Court’s opinion in *Exxon Mobil* make clear that the federal court’s supplemental jurisdiction cannot be invoked unless the lawsuit contains at least one claim that on its own would be within the original jurisdiction of the federal courts. Accordingly, aggregation is relevant only to the extent that it brings a lawsuit within the scope of CAFA. Plaintiffs whose lawsuits fall outside CAFA can still seek to avoid removal to federal court by alleging that none of the class members has claims worth more than \$75,000, or by disclaiming any award above the jurisdictional amount.²⁵ ■

¹ 125 S. Ct. 2611 (2005) (consolidated with *Ortega v. Star-Kist Foods, Inc.*, No. 04-79).

² 414 U.S. 291 (1973).

³ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

⁴ See *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40 (1911). The current amount-in-controversy requirement of the diversity statute is \$75,000. See 28 U.S.C. § 1332(a).

⁵ See, e.g., *Hurn v. Oursler*, 289 U.S. 238 (1933) (pendent claims seeking relief for same wrong); *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593 (1926) (compulsory counterclaims); *Dewey v. West Fairmont Gas Coal Co.*, 123 U.S. 329, 333 (1887) (defendant’s related claims against third-party defendant); *Freeman v. Howe*, 65 U.S. (24 How.) 450, 460 (1861) (intervention of party asserting claim to property held by court).

⁶ 383 U.S. 715 (1966).

⁷ See *Finley v. United States*, 490 U.S. 545 (1989) (pendent-party claims in

federal-question case); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978) (third-party claims in diversity case); *Aldinger v. Howard*, 427 U.S. 1 (1976) (pendent-party claims in federal-question case); *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (claims of absent class members in diversity-only class action).

⁸ 255 U.S. 356 (1921).

⁹ 414 U.S. 291, 294–96 (1973).

¹⁰ *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹¹ See, e.g., Andrew I. Gavil, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, 69 GEO. WASH. L. REV. 860, 875–78 (2001); Jonathan T. Tomlin & Dale J. Giali, *Federalism and the Indirect Purchaser Mess*, 11 GEO. MASON L. REV. 157, 177–78 (2002).

¹² See *supra* note 7.

¹³ 28 U.S.C. § 1367(a).

¹⁴ 28 U.S.C. § 1367(b). Like CAFA, the supplemental jurisdiction statute also gives the district courts discretion to decline to exercise jurisdiction under certain circumstances. See *id.* § 1367(c).

¹⁵ The apparent purpose of Section 1367(b) is to prevent plaintiffs from evading the complete-diversity requirement of *Strawbridge* by omitting nondiverse parties from the complaint with the anticipation that those parties will later be permitted to intervene or join the lawsuit on a supplemental basis. The Supreme Court addressed similar concerns, prior to the enactment of the statute, in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

¹⁶ See *Free v. Abbott Labs., Inc.*, 528 U.S. 1018 (1999).

¹⁷ By the time the Supreme Court heard arguments in *Exxon*, six circuits (the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh) had read Section 1367 to abrogate *Zahn*, while four circuits (the First, Third, Eighth, and Tenth) had held that *Zahn* remained good law. See *Exxon Mobil*, 125 S. Ct. at 2616.

¹⁸ No. 04-79.

¹⁹ Justice Kennedy authored the opinion of the Court for himself, Chief Justice Rehnquist and Justices Scalia, Souter, and Thomas. Justice Ginsburg authored the principal dissent for herself and Justices Stevens, O'Connor, and Breyer.

²⁰ 125 S. Ct. 2620–21.

²¹ *Id.* at 2618.

²² *Id.* at 2620.

²³ The Court rejected the committee report's observation that *Zahn* was preserved on the grounds that another statement elsewhere in the legislative history was to the contrary and the statement in the committee report appeared to be a post hoc attempt by certain law professors to alter the meaning of the statute. *Id.* at 2626–27.

²⁴ See Gavil, *supra* note 11, at 875. Professor Gavil identified Kansas, Minnesota, New Mexico, and South Dakota as states authorizing indirect-purchaser lawsuits and lying within circuits in which *Zahn* had been held to remain good law. See *id.* tbl. 1.

²⁵ *Exxon Mobil* is unlikely to alter the existing methodologies used to determine the amount in controversy where a lawsuit seeks equitable relief. Courts are sharply divided over whether, in such cases, the amount must be measured by the value to the plaintiff of the relief sought (in which case, because of the rule against aggregation, the value to at least one plaintiff must be above the jurisdictional amount), or whether it is appropriate to look as well to the cost to the defendant of compliance. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 609–10 (7th Cir. 1997) (Posner, J.) (describing debate). By contrast, in cases brought under CAFA, that Act's aggregation provision will permit plaintiffs in courts that rely on the "plaintiff viewpoint" test to satisfy the jurisdictional amount by aggregating the value of the equitable relief to each class member.

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CONSUMER PROTECTION FELLOWSHIPS

THIS IS THE SECOND YEAR OF THE PROJECT, which placed eight law students this past summer in state offices in Connecticut, Delaware, Georgia, Mississippi, Oregon, South Dakota, Vermont, and Wisconsin. This is an important consumer protection outreach initiative of the Section to honor the memory of the late Janet D. Steiger, former Chairman of the Federal Trade Commission, who, during her tenure as Chairman, was so instrumental in improving the level of communication, cooperation, and coordination between state and federal antitrust and consumer protection agencies.

SUMMER 2005 STEIGER FELLOWS

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The Council has authorized the expansion of the project for the summer of 2006. Fifteen law students will be placed in the Consumer Protection Departments of the Offices of State Attorney General offices of Illinois, Iowa, Mississippi, Montana, Nevada, the Northern Mariana Islands, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Virginia, Washington State, and Wisconsin. Each student will receive a stipend of \$5,000. Student applications must be received no later than February 6, 2006. For more information about the project and the application process, contact Deborah Douglas at 312.988.5606, or e-mail douglasd@staff.abanet.org, or visit the Section's Steiger Fellowship link on the Section Web site at: <http://www.abanet.org/antitrust/at-law-student/at-js-project.html>