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Federal Jurisdiction: Federal Court Has Power to Hear Rule 14 Claim by Plaintiff against Nondiverse Third Party Defendant

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Kroger, an Iowa citizen, brought a wrongful death action in federal district court against a Nebraska corporation,[1] relying for jurisdiction on diversity of citizenship.[2] The defendant filed a third party complaint under Rule 14 of the Federal Rules of Civil Procedure[3] against Owen Equipment and Erection Company (Owen), another Nebraska corporation. Plaintiff also claimed against Owen under Rule 14. Thereafter, the original defendant was granted summary judgment,[4] and the case proceeded to trial with only Owen, the third party defendant, remaining as a defendant. On the third day of trial, Owen disclosed for the first time that its principal place of business was in Iowa rather than Nebraska and immediately moved for leave to file an amended answer asserting lack of diversity jurisdiction.[5] The motion was denied, and judgment was subsequently entered for plaintiff against Owen. On appeal, the Eighth Circuit Court of Appeals, one judge dissenting, affirmed, *holding* that a plaintiff's claim

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1. Another Nebraska corporation was originally named as a defendant, but was dismissed because of a jurisdictional defect, the details of which were not in the record before the court. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 429 app. (8th Cir. 1977), *cert. granted*, 98 S. Ct. 715 (1978) (No. 77-677).

2. *See* 28 U.S.C. § 1332(a) (1970), *as amended*, 28 U.S.C.A. § 1332(a) (West Supp. 1977).

3. The relevant portion of Rule 14 provides,

> (a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim . . . and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants . . . . The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses . . . and his counterclaims and cross-claims . . . .

FED. R. CIV. P. 14(a).

4. *See* Kroger v. Omaha Pub. Power Dist., 523 F.2d 161 (8th Cir. 1975).

5. Since corporations are citizens of both the state of their incorporation and the state in which they maintain their principal place of business, 28 U.S.C. § 1332(c) (1970), Owen was a citizen of both Iowa and Nebraska.

against a third party defendant is ancillary to the main action when both claims share "common and interrelated facts" and, as such, requires no independent jurisdictional support. The lack of diversity between the plaintiff and the third party defendant did not, therefore, defeat the court's *power* to hear the claim. Whether jurisdiction ought to be asserted in such cases, however, was held to be a matter of judicial discretion, dependent on considerations of judicial economy, convenience, and fairness to the litigants. *Kroger v. Owen Equipment & Erection Co.*, 558 F.2d 417 (8th Cir. 1977), *cert. granted*, 98 S. Ct. 715 (1978) (No. 77-677).

The jurisdiction of federal courts is limited by the Constitution of the United States[6] and acts of Congress.[7] Article III, section 2, of the Constitution specifically grants federal courts the power to resolve disputes "between Citizens of different States." Standing alone, this provision permits federal courts to hear state law claims whenever there is diversity of citizenship between at least one defendant and one plaintiff.[8] Since *Strawbridge v. Curtiss*,[9] however, the constitutional requirement of diversity has been interpreted in light of the statutory grant of general diversity jurisdiction[10] to require diversity of citizenship between *all* plaintiffs and *all* defendants.[11]

This requirement of complete diversity is not absolute, however. Federal courts may, for example, invoke the judicially constructed concept of ancillary jurisdiction to hear claims over which neither the Constitution nor Congress has conferred jurisdiction. The theory of ancillary jurisdiction derives from the historical power of an equity court "to bring before [it] all matters necessary to enable it fully to decide upon the rights of all the parties."[12] The power of a federal court to do complete justice between parties who are properly before

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6. *See* U.S. CONST. art. III, § 2.

7. It is "well established . . . that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." Aldinger v. Howard, 427 U.S. 1, 15 (1976). Statutes relating to the federal courts are codified in title 28 of the United States Code.

8. *See, e.g.*, State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967).

9. 7 U.S. (3 Cranch) 267 (1806) (Massachusetts plaintiffs sued defendants from both Massachusetts and Vermont on a state law claim).

10. The current statutory provision is found at 28 U.S.C.A. § 1332 (West 1966 & Supp. 1977).

11. The rule of complete diversity has remained constant through successive reenactments of the grant of diversity jurisdiction. *See* Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1258 (3d Cir. 1977).

12. 1 J. SMITH, TREATISE ON PRACTICE OF COURT OF CHANCERY 460 (2d ed. 1842) (1st ed. London 1837); *see* Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1860); 1 J. STORY, COMMENTARIES ON EQUITY JURISDICTION AS ADMINISTERED IN ENGLAND AND AMERICA 30 n.1 (14th ed. 1918) (1st ed. Boston 1836) ("Where equity has acquired jurisdiction of a case, it may decide all matters incidentally connected with it, so as to make a final determination of the whole subject . . . .").

it was recognized by the first Supreme Court decision on ancillary jurisdiction.[13] Since then, ancillary jurisdiction has been invoked to permit federal courts to hear claims not otherwise cognizable in a federal forum when they are brought in aid of or subordinate to principal actions and when the assertion of jurisdiction is necessary to do complete justice between parties who are already before a federal court.[14]

The Federal Rules of Civil Procedure strongly encourage, and sometimes require, the assertion of ancillary claims.[15] Nowhere is this policy more evident than in Rule 14, which permits defendants to implead third parties and allows plaintiffs to assert against the third parties "any claim . . . arising out of the transaction or occurrence that is the subject matter" of the original action.[16] The permissive language of Rule 14 suggests no jurisdictional limits on third party actions.[17] Since the Federal Rules do not themselves constitute an independent basis of federal jurisdiction,[18] however, Rule 14 has generated considerable controversy regarding the reach of federal ancillary jurisdiction.[19]

With the exception of the Eighth Circuit in *Kroger*, federal appellate courts have uniformly taken the position that a plaintiff's

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13. In Freeman v. Howe, 65 U.S. (24 How.) 450 (1860), the Court held that a federal court sitting in a diversity of citizenship case has the power to permit parties claiming an interest in the property at issue to intervene although their presence destroys complete diversity. In so holding, the Court reasoned that

> a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage . . . is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.

Id. at 460.

14. *See, e.g.*, Alexander v. Hillman, 296 U.S. 222 (1935); Moore v. New York Cotton Exch., 270 U.S. 593 (1926); White v. Ewing, 159 U.S. 36 (1895); Root v. Woolworth, 150 U.S. 401 (1893).

15. *See* FED. R. CIV. P. 13 (compulsory and permissive counterclaims); *id.* 14 (third party practice); *id.* 19 (necessary joinder of parties); *id.* 20 (permissive joinder of parties); *id.* 24 (intervention). *See generally* UMW v. Gibbs, 383 U.S. 715, 724 (1966) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.")

16. FED. R. CIV. P. 14(a). A partial text of Rule 14(a) appears in note 3 *supra*.

17. The authors of Rule 14, however, assumed that a plaintiff's claim against a third party defendant would require independent jurisdictional support. *See Report of Advisory Committee on Rules for Civil Procedure*, 5 F.R.D. 433, 447-48 (1946).

18. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." FED. R. CIV. P. 82.

19. According to Professor Moore, "[m]ore than any other provision of the Federal Rules, Rule 14 raises troublesome questions with respect to jurisdiction and venue, particularly in diversity of citizenship cases . . . ." 3 MOORE'S FEDERAL PRACTICE ¶ 14.25, at 14-491 (2d ed. 1974).

claim against a third party defendant under Rule 14 must be supported by an independent source of jurisdiction.[20] This position accords with the traditional purpose of ancillary jurisdiction: although resolution of a plaintiff's claim against a third party defendant may involve the same facts as the main action, it is not dependent upon the resolution of the controversy *between the original parties,*[21] and

20. *See, e.g.*, Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Parker v. W.W. Moore & Sons, Inc., 528 F.2d 764 (4th Cir. 1975); McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960); Patton v. Baltimore & O.R.R., 197 F.2d 732 (3d Cir. 1952); *Report of Advisory Committee on Rules for Civil Procedure*, 5 F.R.D. 433, 447-48 (1946); Annot., 37 A.L.R.2d 1411, 1430-31 (1954).

21. The considerations that militate against asserting ancillary jurisdiction over a plaintiff's claim against a third party defendant should be contrasted with those in cases where ancillary jurisdiction is commonly conceded to be appropriate. Consider, for example, a situation in which a citizen of state *X* sues a citizen of state *Y*, who impleads a third party defendant, also a citizen of state *Y*. The majority rule is that the lack of diversity between the defendant and the third party defendant is not fatal to the exercise of federal jurisdiction over the third party action. *See* 3 MOORE'S FEDERAL PRACTICE ¶ 14.26, at 14-527 (2d ed. 1974). Since a defendant may bring in a third party only when the third party "is or may be liable to him for all or part of the plaintiff's claim against him," FED. R. CIV. P. 14(a), resolution of the dispute between the defendant and the third party defendant depends upon the resolution of the main action. The court thus has jurisdiction over the subsidiary claim. *See, e.g.*, Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959); Waylander-Peterson Co. v. Great N. Ry., 201 F.2d 408 (8th Cir. 1953); Chestnut Run Fed. Credit Union v. Employers Mut. Life Ins., 392 F. Supp. 76 (D. Del. 1975); Merchants Nat'l Bank v. Hartford Accident & Indem. Co., 377 F. Supp. 1344 (D. Minn. 1974).

Similarly, consider a situation in which a citizen of state *X* sues a citizen of state *Y*, who impleads a third party defendant, also a citizen of state *X*. In the absence of a claim by plaintiff against the third party defendant, there is no reason why there must be diversity of citizenship between plaintiff and third party defendant: "[T]he plaintiff has no direct concern with [the third party defendant]: the third party is brought in solely to answer a claim by the defendant that he is or may be liable over to the defendant, and he cannot be held liable to the plaintiff." 3 MOORE'S FEDERAL PRACTICE ¶ 14.26, at 14-525 to -526 (2d ed. 1974).

When, as in *Kroger*, the plaintiff asserts a claim directly against the third party defendant, however, a different issue is presented since the plaintiff's claim does not depend for its resolution upon the resolution of the main claim. In such cases, the vast weight of authority contravenes *Kroger* and requires an independent basis for federal jurisdiction. *See id.* ¶ 14.27[1], at 14-565 to -566, and cases cited therein. As this Comment suggests, there are strong statutory and policy justifications for the position taken by the majority of jurisdictions.

A more difficult case is presented, however, when a third party defendant asserts a claim against the plaintiff. In this situation, the courts disagree with respect to the power of a federal court to hear the third party's claim against the plaintiff absent an independent basis of jurisdiction. *See id.* ¶ 14.27[2], at 14-575. Courts that require such an independent basis reason that this position follows logically from the fact that an independent jurisdictional ground is required in the converse situation in which a plaintiff claims against a third party defendant. *See, e.g.*, James King & Son, Inc. v. Indemnity Ins. Co., 178 F. Supp. 146 (S.D.N.Y. 1959); Shverha v. Maryland Cas. Co.,

the plaintiff's claim cannot be held to fall within a court's authority to insure "complete justice in the chief controversy."[22] Therefore, plaintiffs' claims against third party defendants require independent jurisdictional support.[23] In addition to this theoretical justification for refusing to hear claims against a third party defendant absent independent jurisdictional support, courts have emphasized that allowing plaintiffs to litigate such claims might encourage collusion between plaintiffs and original defendants to bring claims not otherwise cognizable by the federal courts under federal jurisdiction.[24]

The doctrine of pendent jurisdiction, frequently defined as "a species of ancillary jurisdiction,"[25] is a second method by which the requirement of complete diversity is sometimes diluted. Pendent jurisdiction exists when the plaintiff joins a state claim, for which there is no independent jurisdictional support, with a claim brought under federal question jurisdiction.[26] The standard governing pendent jurisdiction was set out in *UMW v. Gibbs*:[27]

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110 F. Supp. 173 (E.D. Pa. 1953). As suggested by at least one court, however, the two situations are distinguishable in a number of ways:

> First of all, the plaintiff has the option of selecting the forum where he believes he can most effectively assert his claims, [*sic*] he has not been involuntarily brought to a forum, faced with the prospect of defending himself as best he can under the rules that forum provides, or defending himself not at all. Since a plaintiff could not initially join a non-diverse defendant, it is arguable he should not be allowed to do so indirectly by way of a fortuitous impleader. Moreover, there is the possibility, whether real or fanciful, of collusion between the plaintiff and an overly cooperative defendant impleading just the right third party. Whatever the merit or demerit of these reasons, they point to a sufficient difference to require that the application of ancillary jurisdiction to each type of claim must be decided separately.

Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 716 (5th Cir. 1970).

22. Cooperative Transit Co. v. West Penn Elec. Co., 132 F.2d 720, 723 (4th Cir.), *cert. denied*, 318 U.S. 779 (1943).

23. *See* Note, *The Ancillary Concept and the Federal Rules*, 64 HARV. L. REV. 968, 974 (1951); Note, *Ancillary Jurisdiction of the Federal Courts*, 48 IOWA L. REV. 383, 392 (1963).

24. *See, e.g.*, Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893-94 (4th Cir. 1972); Hoskie v. Prudential Ins. Co., 39 F. Supp. 305, 306 (E.D.N.Y. 1941). *But see* 3 MOORE'S FEDERAL PRACTICE ¶ 14.27[1], at 14-571 (2d ed. 1974); Note, *Rule 14(a) and Ancillary Jurisdiction: Plaintiff's Claim Against Non-Diverse Third-Party Defendant*, 33 WASH. & LEE L. REV. 796, 805-06 (1976); Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A. L. REV. 1263, 1283 (1975).

25. Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 657 n.1 (1968).

26. *See, e.g.*, UMW v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 238 (1933). In *Gibbs*, for example, the plaintiff brought an action against the United Mine Workers for violation of the Labor Management Relations Act, 29 U.S.C. § 187 (1970). The plaintiff joined with this claim a state common law claim against the Mine Workers for contract interference. The Court upheld federal jurisdiction over the state law claim, but reversed on the merits.

27. 383 U.S. 715 (1966).

> 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 . . . ," 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 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 . . . there is *power* in federal courts to hear the whole.[28]

The Court went on to caution that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. . . . Its justification lies in considerations of judicial economy, convenience and fairness to litigants . . . ."[29]

In *Kroger*, the Eighth Circuit became the first federal court of appeals to allow a plaintiff to assert a claim against a third party defendant in the absence of independent jurisdictional support.[30] In so doing, the court incorporated into the standards governing ancillary jurisdiction the power-discretion analysis articulated in *Gibbs*. Reading *Gibbs* as a " 'reemphasi[s of] the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case, i.e.*, all claims, state or federal, which derive from a common nucleus of operative facts,' "[31] the court reasoned that the *Gibbs* standard was appropriate to issues of ancillary jurisdiction because the same considerations of judicial economy, convenience, and fairness to litigants found to support the assertion of pendent jurisdiction in *Gibbs* also apply to the assertion of ancillary jurisdiction.[32] Thus, " 'if [*Gibbs* signals a] relaxation of the prohibitory rule as to original joinder of claims and parties, then, consequently its corollary rule forbidding ancillary jurisdiction of a claim by the plaintiff against the third-party defendant must also be relaxed.' "[33]

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28. *Id.* at 725 (citations and footnotes omitted).

29. *Id.* at 726 (footnotes omitted).

30. A number of lower courts have, however, permitted claims by plaintiffs against third party defendants in the absence of independent jurisdictional support. *See, e.g.*, Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D. Kan. 1975); Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972); Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968); Myer v. Lyford, 2 F.R.D. 507 (M.D. Pa. 1942); Sklar v. Hayes, 1 F.R.D. 594 (E.D. Pa. 1941).

31. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 423 (8th Cir. 1977) (quoting 3 MOORE'S FEDERAL PRACTICE ¶ 14.27[1], at 14-569 (2d ed. 1974)), *cert. granted*, 98 S. Ct. 715 (1978) (No. 77-677).

32. *See id.* at 424-425. For a similar analysis, see Buresch v. American LaFrance, 290 F. Supp. 265, 267 (W.D. Pa. 1968).

33. 558 F.2d at 423 (quoting 3 MOORE'S FEDERAL PRACTICE ¶ 14.27[1], at 14-570 (2d ed. 1974)).

Having found in *Gibbs'* expansion of pendent jurisdiction authorization for an expansion of ancillary jurisdiction, the *Kroger* court had little difficulty justifying the assertion of jurisdiction over Owen as a proper exercise of judicial discretion. First, had the action been dismissed, the plaintiff might have been barred by Iowa's statute of limitations from asserting her claim against the third party defendant in any court.[34] Second, Owen had apparently violated the rules of pleading by misleading the plaintiff into believing that diversity existed.[35] Third, since the plaintiff was apparently not aware of the lack of diversity between her and the third party defendant until near the end of trial,[36] there was little possibility that she had conspired with the original defendant to bring Owen under federal jurisdiction.[37] Finally, the motion to dismiss came after the parties and the trial court had expended considerable energy on the controversy. Thus, even though the plaintiff's claim against the original defendant had been dismissed prior to trial,[38] the court considered

34. The trial court believed that, had the action been dismissed, Iowa's statute of limitations would have precluded the plaintiff from proceeding in Iowa court. *See id.* at 420. The *Kroger* majority declined to express an opinion on the matter, *see id.* at 420 n.5, but Judge Bright, in his dissent, disagreed with the trial court's assessment. Instead, he argued that Iowa's "savings statute" would have allowed the plaintiff to bring her action in Iowa state court: "If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first." IOWA CODE § 614.10 (1971); *see* 558 F.2d at 432 & n.42. Moreover, it appears likely that the third party defendant would have been estopped by his misconduct, *see* note 35 *infra*, from raising the statute of limitations issue. *See* DeWall v. Prentice, 224 N.W.2d 428 (Iowa 1974).

35. *See* 558 F.2d at 419. Rule 8(b) provides that "[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and deny only the remainder." The plaintiff's claim against Owen described Owen as " 'a Nebraska corporation with its principal place of business in Nebraska.' " *Id.* Owen's answer admitted that it was " 'a corporation organized and existing under the Laws of the State of Nebraska' " and generally denied all other allegations. *Id.* This use of a general denial, according to the *Kroger* court, did not make clear to the plaintiff that Owen had admitted only half of plaintiff's jurisdictional averment. That Owen had pleaded in bad faith was demonstrated by Owen's decision to wait until near the end of trial to raise the jurisdictional issue. *See id.*

36. *See id.*

37. *See generally* sources cited in note 24 *supra.*

38. Though the dismissal of the original defendant from the action starkly illustrates the anomaly of the result in *Kroger*, *see* text accompanying notes 46-47 *infra*, it was irrelevant to the decision. The question before the court was whether there was jurisdiction over the plaintiff's claim against Owen. Clearly the dismissal of the original defendant could not have *created* jurisdiction over that claim. It is just as clear, however, that jurisdiction, had it existed at the outset, would not have been impaired by the dismissal. As the court noted,

"[g]enerally, in a diversity action, if jurisdictional prerequisites are satis-

assertion of jurisdiction over the plaintiff's claim against Owen to be an appropriate exercise of judicial discretion.[39]

Although *Kroger*'s expansion of ancillary jurisdiction arguably advances the interests of convenience, economy, and fairness to litigants,[40] such considerations cannot alone sustain the court's decision if it conflicts with the congressional policies embodied in the jurisdictional statutes.[41] In *Gibbs*, the Court had no occasion to consider statutory limits on federal jurisdiction because the statute upon which jurisdiction was based dealt only with a federal cause of action and implied no limitation on federal jurisdiction over pendent state law claims.[42] By contrast, the statute upon which jurisdiction was based in *Kroger* has been specifically construed to limit federal jurisdiction over state law claims through the requirement of complete diversity of citizenship.[43] While courts faced with traditional Rule 14

> fied when the suit is begun, subsequent events will not work an ouster of jurisdiction. . . . This result is not attributable to any specific statute or to any language in the statutes which confer jurisdiction. It stems rather from the general notion that the sufficiency of jurisdiction should be determined once and for all at the threshold and if found to be present then should continue until final disposition of the action."

558 F.2d at 426 n.36 (quoting Dery v. Wyer, 265 F.2d 804, 808 (2d Cir. 1959)) (citations omitted).

39. Most courts have regarded the issue of discretion over ancillary claims as primarily dependent on considerations of convenience to litigants and judicial economy. *See, e.g.*, Dery v. Wyer, 265 F.2d 804, 808 (2d Cir. 1959). By emphasizing the egregious nature of the third party defendant's conduct, however, the court in *Kroger* may have intended to suggest that considerations of economy and convenience will not alone justify hearing claims by plaintiffs against third party defendants absent independent jurisdictional support. Unfortunately, the court did not articulate a general standard to be applied in future cases involving plaintiff claims against nondiverse third party defendants.

40. The benefits of convenience, economy, and fairness would have been more readily apparent had the original defendant not been dismissed from the action prior to trial. In cases where the original defendant remains in the action, dismissal of a plaintiff's claim against a third party defendant may force the plaintiff and the third party defendant to duplicate their efforts in state and federal court. As noted earlier, however, the presence of the original defendant in the suit will not, even given the stronger policy basis, materially affect the determination of whether the court has the *power* to dispose of the claim. *See* note 38 *supra*.

41. *See* note 7 *supra*. *See generally* Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (4th Cir. 1972) ("The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction.").

42. *See* text accompanying note 63 *infra*. Indeed, it appears that by asserting federal jurisdiction over a pendent state claim, the Court in *Gibbs* may have furthered a congressional policy in favor of providing a convenient forum for the resolution of federal claims. *See* Note, *supra* note 25, at 667-71.

43. *See* notes 9-11 *supra* and accompanying text.

actions involving a claim by an original defendant against a third party defendant typically do not apply the rule of complete diversity to the third party, that result is justified only because the third party action is dependent upon resolution of the main claim.[44] This justification cannot encompass claims, such as the plaintiff's claim against the third party defendant in *Kroger*, that do not depend for their resolution upon adjudication of the main claim.[45]

As the dissent in *Kroger* noted,[46] had the plaintiff named Owen as an original defendant, the case would have fallen under the precise facts of *Strawbridge v. Curtiss*.[47] The statutory issue presented in *Kroger*, therefore, was whether allowing a Rule 14 claim by a plaintiff against a nondiverse third party defendant violates a congressional intent to maintain the rule of complete diversity in actions predicated on diversity jurisdiction.

In assessing this question, it is important to note that Congress has acquiesced in the complete diversity rule of *Strawbridge v. Curtiss* for over 170 years.[48] Such acquiescence on jurisdictional matters has, in other contexts, been interpreted as tacit endorsement of settled statutory interpretation.[49] The Court has also traditionally ascribed to Congress an intention to restrict the reach of diversity jurisdiction.[50] Evidence of such an intent may be found in congressional action increasing the jurisdictional amount requirement to $10,000,[51] imposing dual citizenship on corporations,[52] and making

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44. *See* note 21 *supra*.

45. Judge Bright, in his *Kroger* dissent, similarly distinguished *Gibbs* and the Rule 14 cases. *See* 558 F.2d at 430; *cf.* Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977) (plaintiff in a state law negligence action not permitted to claim against a third party defendant in the absence of independent jurisdictional support).

46. 558 F.2d at 430 (Bright, J., dissenting).

47. 7 U.S. (3 Cranch) 267 (1806).

48. *See* notes 9-11 *supra* and accompanying text.

49. For instance, in disallowing an attempted aggregation of claims to meet the $10,000 jurisdictional requirement of 28 U.S.C. § 1332 (1970), the Supreme Court declined to alter its interpretation of the phrase "matter in controversy," reasoning that "[w]here Congress has consistently re-enacted its prior statutory language . . . in the face of a settled interpretation of that language, it is perhaps not entirely realistic to designate the resulting rule a 'judge-made formula.' " Snyder v. Harris, 394 U.S. 332, 339 (1969).

50. "The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction . . . ." City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941); *see* Thomson v. Gaskill, 315 U.S. 442 (1942); McCoy v. Siler, 205 F.2d 498, 500-01 (3d Cir. 1953). *But see* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 n.6 (1967) ("Subsequent decisions of this Court indicate that *Strawbridge* is not to be given an expansive reading.").

51. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415 (codified at 28 U.S.C. § 1332(a) (1970)). The increase in the jurisdictional amount requirement also applied to federal question jurisdiction. *Id.* § 1 (codified at 28 U.S.C. § 1331(a) (1970)).

52. *Id.* § 2 (codified at 28 U.S.C. § 1332(c) (1970)); *see* note 5 *supra*.

insurance firms doing business in states that permit direct actions against insurers citizens of those states.[53] These amendments to the general diversity jurisdiction statute were enacted primarily to reduce the diversity caseload of federal courts.[54] Moreover, Congress' decision to allow only minimal diversity[55] in certain limited situations, most notably in the areas of statutory interpleader[56] and removal,[57] suggests a congressional determination that the rule of complete diversity is to control in all other situations.[58] Taken together, the evidence strongly suggests that the *Kroger* court's assertion of jurisdiction contravenes a clear congressional policy to limit federal diversity-based jurisdiction over state law claims.

That the federal courts cannot thus ignore potential statutory roadblocks to any extension of jurisdiction was recently reaffirmed by the Supreme Court in *Aldinger v. Howard,*[59] a case dealing with pendent jurisdiction. In *Aldinger,* plaintiff brought suit against her supervisor under section 1983,[60] alleging that she had been unconstitutionally deprived of her position in the county bureaucracy. Relying on the doctrine of pendent jurisdiction, plaintiff joined with her claim against the supervisor a state law claim against the county.[61] In ana-

53. Act of Aug. 14, 1964, Pub. L. No. 88-439, § 1, 78 Stat. 445 (codified at 28 U.S.C. § 1332(c) (1970)).

54. *See* S. REP. No. 1308, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2778; S. REP. No. 1830, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099.

55. Minimal diversity, unlike complete diversity, requires only that there be diversity of citizenship between at least one defendant and one plaintiff. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530 (1967).

56. 28 U.S.C. § 1335(a)(1) (1970) (jurisdiction exists whenever there are "[t]wo or more adverse claimants, of diverse citizenship," asserting claims to the disputed property).

57. 28 U.S.C. § 1441(c) (1970) ("Whenever a separate and independent claim . . . , which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims . . . , the entire case may be removed . . . ."). For an example of how the operation of the removal statute may result in minimal diversity, see Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D.N.Y. 1965). Plaintiff, a Delaware firm, brought action in state court against Richard Burton, an alien, and Elizabeth Taylor, a United States citizen. A federal court would have had original jurisdiction over the state law claim against Burton under section 1332, but not over the state law claim against Taylor; although Taylor was a naturalized American citizen, she was not a citizen of any state. Burton was permitted, however, to invoke section 1441(c) to remove the entire action to federal court. This resulted in minimal diversity: plaintiff and Burton were of diverse citizenship, but plaintiff and Taylor were not. *See* note 55 *supra.*

58. *See generally* Bratton, *Pendent Jurisdiction in Diversity Cases: Some Doubts,* 11 SAN DIEGO L. REV. 296, 304-05 (1974).

59. 427 U.S. 1 (1976).

60. 42 U.S.C. § 1983 (1970).

61. Claims against political subdivisions of the state cannot be maintained under section 1983. *See* Monroe v. Pape, 365 U.S. 167 (1961). The state law claim in *Aldinger*

lyzing the inclusion of the county as a "pendent party,"[62] the Court ruled that before jurisdiction can be asserted over such parties, "a federal court must satisfy itself not only that Art. III permits [the exercise of jurisdiction], but that Congress in the statutes conferring jurisdiction has not expressly *or by implication* negated its existence."[63] Because Congress had not spoken on the general issue of federal jurisdiction over pendent state law claims, the *Gibbs* Court was free "to fashion its own rules under the general language of Art. III."[64] In *Aldinger*, however, the statute upon which federal question jurisdiction was based and without which plaintiff could not have sued in federal court, did not authorize actions against local governments. In fact, in *Monroe v. Pape*,[65] the Court had found in the legislative history of section 1983 a specific congressional intent to preclude such suits.[66] Given such an intent, the Court reasoned, the plaintiff in *Aldinger* could not be permitted to do indirectly what she was forbidden to do directly.[67]

Although *Aldinger* is clearly distinguishable on its facts from the situation in *Kroger*,[68] it is significant that, in finding an "implicit"

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was founded on a state statute making the county vicariously liable for the torts of its employees. *See* 427 U.S. at 4-5.

62. "Pendent party" jurisdiction is invoked by a plaintiff with a federal question claim against one party and a state law claim growing out of the same core of operative facts against another party. Jurisdiction over the latter party, often referred to as a "pendent party," has been held to be governed by the doctrine of *UMW v. Gibbs*. *See, e.g.*, Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809-11 (2d Cir. 1971); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971). *See generally* Note, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of* United Mine Workers v. Gibbs *Extended to Persons Not Party to the Jurisdiction-Conferring Claim*, 73 COLUM. L. REV. 153 (1973); *see also* notes 25-29 *supra* and accompanying text.

63. 427 U.S. at 18 (emphasis added).

64. *Id.* at 15.

65. 365 U.S. 167 (1961).

66. *See id.* at 187-91.

67. *See* 427 U.S. at 17.

68. The issue presented in *Aldinger* differs in a number of ways from the issue presented in *Kroger*. First, *Aldinger* involved a party specifically immune from liability under federal substantive law, not a party simply excluded from the reach of a jurisdictional statute. *See generally* Comment, *The Impact of* Aldinger v. Howard *on Pendent Party Jurisdiction*, 125 U. PA. L. REV. 1357 (1977). Second, the plaintiff in *Aldinger* attempted to employ a theory of pendent jurisdiction to bring under federal jurisdiction a party who could not otherwise be brought before a federal court, while in *Kroger* the court merely allowed the assertion of an additional claim against a party already before the court. *See generally* Comment, *Federal Jurisdiction—Independent Subject Matter Jurisdiction Required When Plaintiff in Diversity Action Brings Direct Action Against Nondiverse Third-Party Defendant*, 11 SUFFOLK U.L. REV. 1388, 1395-96 (1977). Third, *Aldinger* was concerned with a politically sensitive problem: the liability of county governments under section 1983. Thus, the Court may have been reluctant to address the merits of the claim absent a clear indication that Congress intended to confer jurisdiction on the federal courts. Given a less sensitive problem, such as the

negation of jurisdiction, the Court in *Aldinger* relied on legislative history that was far from compelling.[69] In fact, it appears that the evidence of a congressional intent to require complete diversity in cases arising under the general diversity jurisdiction statute is at least as strong as that underlying the conclusion that Congress had foreclosed suits against municipalities.[70]

Besides ignoring the statutory issues raised by a plaintiff's claim against a nondiverse third party, the *Kroger* court also failed to examine adequately the policy reasons for disallowing such claims. In addition to the danger of active collusion between plaintiffs and original defendants,[71] there is an equally serious danger that *Kroger* will encourage plaintiffs to engage in a more subtle form of forum shopping since plaintiffs who can predict when diverse defendants will implead nondiverse parties will be able to enjoy the benefits of collusion with-

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one in *Kroger*, the Court might have been more willing to involve itself in the dispute by asserting jurisdiction over a state law claim. Finally, the Court in *Aldinger* cautioned that "we decide here only the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result." 427 U.S. at 18. Nevertheless, *Aldinger* remains significant as the first Supreme Court decision to explicitly recognize statutory constraints on pendent jurisdiction. *See* Comment, Aldinger v. Howard *and Pendent Jurisdiction*, 77 COLUM. L. REV. 127 (1977). The recent history of the Court suggests that this sensitivity to congressional limits on federal jurisdiction will not be confined to section 1983 claims. *See* Tushnet, *The New Law on Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 665-80 (1977). *See also* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 315-22 (1976).

69. The conclusion that Congress intended to exclude state governments from the reach, even indirectly, of the Civil Rights Act was based largely on Congress' rejection of an amendment that would have made municipal corporations liable under the Act. *See* Aldinger v. Howard, 427 U.S. 1, 16 (1976) (citing Monroe v. Pape, 365 U.S. 167, 187-91 (1961), and City of Kenosha v. Bruno, 412 U.S. 507, 511-13 (1973)). The accuracy of the Court's construction of congressional intent has been seriously questioned both generally and as applied to the facts in *Aldinger*. *See* Comment, Aldinger v. Howard *and Pendent Jurisdiction*, *supra* note 68. *See also* Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1203-07 (1971). Indeed, three Justices in *Aldinger*, while not disputing the assertion that Congress may impose jurisdictional limitations beyond those found in the Constitution, disagreed with the Court's statutory analysis. They reasoned that Congress excluded local governments from the purview of the post-Civil War Civil Rights Act because it questioned the constitutionality of imposing federal liability on local governments. There was nothing in the legislative history of the Act to suggest, however, that Congress intended to preclude the exercise of federal jurisdiction over claims against local governmental units where such claims had been specifically authorized by state statute. *See* 427 U.S. at 23-24 (Brennan, J., joined by Blackmun & Marshall, JJ., dissenting).

70. *Compare* notes 48-58 *supra* and accompanying text, *with* text accompanying notes 65-67 *supra*, *and* note 69 *supra*. *But cf.* note 68 *supra* (noting policy distinctions between *Aldinger* and *Kroger*).

71. *See* sources cited at note 24 *supra*.

out actually conspiring with the original defendants. This type of forum shopping both increases the burdens on federal courts and third party defendants[72] and runs counter to a strong judicial policy against circumvention of statutory limits on jurisdiction through the use of artful devices.[73] Given these concerns, it would be better to avoid adjudication of plaintiff claims against third party defendants in the absence of independent jurisdictional support, particularly where, as in *Kroger,* an alternative state forum is readily available.[74]

For the reasons suggested above, the majority position requiring an independent jurisdictional basis for claims by plaintiffs against third party defendants represents the sounder policy. In cases such as *Kroger,* where a third party's misconduct creates a situation in which strict application of the statutory limits on jurisdiction may produce undesirable or unjust results, the appropriate remedy is, as the dissent in *Kroger* recognized, the imposition of sanctions against the responsible parties, not the exercise of jurisdiction the court does not possess.[75]

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72. *See generally* Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972); Note, *Federal Pendent Party Jurisdiction and* United Mine Workers v. Gibbs*—Federal Question and Diversity Cases,* 62 VA. L. REV. 194 (1976).

Supporters of the *Kroger* position respecting plaintiff claims against third party defendants have emphasized the ability of federal courts to use their discretionary power to eliminate claims that might cause an undue burden to be placed on either the court or the litigants. *See, e.g.,* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction,* 33 U. PITT. L. REV. 759 (1972); Note, *Rule 14 Claims and Ancillary Jurisdiction,* 57 VA. L. REV. 265 (1971); Note, *supra* note 24. This view, however, ignores the time and energy expended by courts and litigants in determining which claims should, as a matter of discretion, be dismissed.

73. *See, e.g.,* 28 U.S.C. § 1359 (1970) ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.").

74. *See* 558 F.2d at 432 (Bright, J., dissenting); note 34 *supra.*

75. As Judge Bright noted, there already exists authority for such sanctions. *See* 558 F.2d at 432. In Basso v. Utah Power & Light Co., 495 F.2d 906, 911 (10th Cir. 1974), the Tenth Circuit assessed "all reasonable costs and expenses . . . including a reasonable attorney's fee for work on this appeal" against a defendant who waited for an advantageous time to disclose a jurisdictional defect.