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IV. Supplemental Jurisdiction

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IV. SUPPLEMENTAL JURISDICTION*

A. Introduction

"[F]ederal courts are courts of limited jurisdiction."[1] As such, a litigant who wants to be in the federal forum must take precautions and consider whether all her claims can be heard in the forum. In a perfect world, litigation would be simple, consisting of lawsuits containing one claim asserted by one plaintiff against one defendant. In reality, actions often consist of multiple claims and multiple parties, some of which arise during the course of litigation. Furthermore, in order for each of these claims to remain in the federal forum, each must have a basis of subject-matter jurisdiction. Generally, there are two ways that a federal court may exercise jurisdiction over claims: (1) original jurisdiction and (2) supplemental jurisdiction conferred by 28 U.S.C. section 1367. Original jurisdiction deals with claims that have independent bases of jurisdiction. Supplemental jurisdiction allows for additional claims lacking an independent basis of jurisdiction to be heard by the federal court as long as they are so related as to form part of the same case or controversy as a claim that has an independent basis of jurisdiction.[2] This concept of allowing supplemental claims into the federal forum "preserve[s] for litigants the attractiveness of the federal forum by allowing the entire case to be tried in federal court."[3] Thus, this Part examines developments in the area of supplemental jurisdiction that would be of interest both to a litigant

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1. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).
2. 28 U.S.C. § 1367(a) (2000).
3. Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 78 MARQ. L. REV. 973, 976 (1995).

who wants to be in federal court, and to a litigant who wants to avoid this forum.

Supplemental jurisdiction grew up as judge-made doctrine, but was later codified in section 1367 in 1990. Since the codification of this doctrine, there has been confusion as to the meaning and content of supplemental jurisdiction.[4] This confusion is still apparent fourteen years later.[5] It is important for a litigant who wants to attain or evade the federal forum to understand the different issues that may arise in choosing a forum as a result of supplemental jurisdiction. Supplemental jurisdiction can serve either as a bridge or a barrier to the federal forum; an understanding of this area can give a forum-shopping litigant an advantage by helping the litigant secure or avoid a forum.

B. Section 1367(a)—The Open Door

Section 1367 appears to be a broad grant of jurisdiction, allowing courts to exercise jurisdiction over 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."[6] This Part examines how broad this subsection is and looks at supplemental jurisdiction born out of section 1367 as compared to the doctrines it emerged from: ancillary, pendent and pendent party jurisdiction.

Supplemental jurisdiction as it exists today, under section 1367, is the descendant of the judge-made law of pendent and ancillary jurisdiction. On December 1, 1990, the Judicial Improvements Act of 1990, containing the supplemental jurisdiction statute, was signed into law.[7] Section 1367 introduced a new terminology to older

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4. *See generally* Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849 (1992) (criticizing § 1367's codification and expansion of "supplemental jurisdiction").

5. *See* Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdiction; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and the All Writs Act*, *in* 1 ALI-ABA COURSE STUDY MATERIALS: CIVIL PRACTICE AND TECHNIQUES IN FEDERAL AND STATE COURTS 221, 264 (2003), WL SH063 ALI-ABA 221, at *264.

6. 28 U.S.C. § 1367(a).

7. Pub. L. No. 101–650, 104 Stat. 5089 (1990). For a detailed discussion of the history of the statute's enactment, see McLaughlin, *supra* note 4, at 852–

principles; pendent, pendent party, and ancillary jurisdiction were now all a part of supplemental jurisdiction. As a result of the fact that supplemental jurisdiction was born of long-standing principles of judge-made law, a great deal of confusion and criticism ensued regarding the meaning of the statute.[8] Thus, an understanding of the law as it stands today requires an understanding of the origins of the doctrine and the ways in which it has changed.[9]

1. Pendent jurisdiction

Pendent jurisdiction dealt with whether the federal court could exercise jurisdiction over a non-federal claim in an action where the original jurisdiction of the court was based on federal question jurisdiction.[10] The doctrine of pendent jurisdiction derives from court-created doctrine,[11] which was ultimately clarified and set forth in the pivotal case of *United Mine Workers v. Gibbs*.[12] As the Supreme Court articulated in *Gibbs*, pendent jurisdiction "exists whenever there is a claim [with an independent basis of jurisdiction] 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.'"[13] In defining what this standard entailed, the Court found that "[t]he state and federal claims must derive from a common nucleus of operative fact . . . such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole."[14] Thus, the crux for the test of

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58 and John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 736–37 (1991).

8. *See generally* McLaughlin, *supra* note 4 (criticizing the supplemental jurisdiction statute).

9. For a detailed discussion of the judge-made doctrines of ancillary, pendent, and pendent party jurisdiction, see Murphy, *supra* note 3, at 975–91.

10. *See* David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 63 (1991).

11. *See* Aldinger v. Howard, 427 U.S. 1, 6–9 (1976).

12. 383 U.S. 715 (1966).

13. *Id.* at 725 (citation omitted).

14. *Id.*

pendent jurisdiction was whether the claims arose from a "common nucleus of operative fact."[15]

2. Ancillary jurisdiction

While pendent jurisdiction was usually utilized by plaintiffs, ancillary jurisdiction was mostly used by defendants and third parties.[16] These cases required that the claims "arise out of the same transaction or occurrence as the plaintiff's claims."[17] Typically, these were claims made by a defending party "haled into court against his will," or by someone whose "rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."[18]

3. Pendent-party jurisdiction

Pendent-party jurisdiction was more problematic for federal courts in the pre-section 1367 era of pendent and ancillary jurisdiction. As the Supreme Court noted in *Aldinger v. Howard*,[19] "[t]he situation with respect to the joining of a new party . . . strikes us as being both factually and legally different from the situation facing the Court in *Gibbs* and its predecessors."[20] Furthermore, the court stated, "[r]esolution of a claim of pendent-party jurisdiction, therefore, calls for careful attention to the relevant statutory language."[21] In 1989, in deciding *Finley v. United States*,[22] the Supreme Court, relying in part on *Aldinger*, determined "the *Gibbs* approach would not be extended to the pendent-party field . . . ."[23] The Court stated in *Finley* that "with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly."[24]

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15. *Id.*
16. Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798, 810 (2d Cir. 1979).
17. *See* Vairo, *supra* note 5, at *257-58.
18. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978).
19. 427 U.S. 1 (1976).
20. *Id.* at 14.
21. *Id.* at 17.
22. 490 U.S. 545 (1989).
23. *Id.* at 556.
24. *Id.* at 549.

4. "Supplemental" jurisdiction: a change in name and a new boss

Under section 1367, supplemental jurisdiction includes ancillary, pendent and pendent-party jurisdiction.[25] Under subsection (a), the court may exercise supplemental jurisdiction over a claim as long as there is a claim with an independent basis of jurisdiction, and the supplemental claim is so related to that claim as to form part of the same case or controversy under Article III of the Constitution.[26] There is general agreement that this Article III standard is equivalent to the "common nucleus of operative fact" standard of pendent jurisdiction.[27]

The largest change comes in cases of pendent party jurisdiction. In *Finley*, after determining the state of pendent-party jurisdiction, the Court sent a direct message to Congress, stating, "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress."[28] On December 1, 1990, Congress responded to this call, and explicitly stated in subsection (a) that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties," changing the effect of *Finley*.[29] Thus, section 1367(a) has expanded supplemental jurisdiction in this regard.

C. *Section 1367(b)—Explicit Exceptions in Diversity Jurisdiction Cases*

By drafting section 1367(a) so as to extend to the constitutional limits of the courts' ability to exercise supplemental jurisdiction, Congress created a large avenue through which a claimant can secure jurisdiction over supplemental claims in federal court.[30] Yet this

25. However, the Ninth Circuit stated that ancillary jurisdiction is a separate concept, not within the purview of supplemental jurisdiction. United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1012 n.5 (9th Cir. 1999).

26. 28 U.S.C. § 1367(a).

27. *See* Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1175 (1st Cir. 1995) ("In enacting section 1367, Congress essentially codified the rationale articulated in *United Mine Workers v. Gibbs*."); William A. Fletcher, *"Common Nucleus of Operative Fact" and Defensive Set-Off: Beyond the Gibbs Test*, 74 IND. L.J. 171, 174–78 (1998); Part IV.E.

28. 490 U.S. at 556.

29. 28 U.S.C. § 1367(a).

30. *See supra* Part IV.B.

broad grant is not without its limitations. One of these restrictions is found in subsection (b).[31] However, this mandatory limitation only applies when the court's original jurisdiction is based on diversity jurisdiction.[32]

Subsection (b) restricts the court from exercising supplemental jurisdiction over "claims by plaintiffs against persons made parties under Rule 14 [Impleader], 19 [Compulsory Joinder], 20 [Permissive Joinder], or 24 [Intervention]," and over "claims by persons proposed to be joined as plaintiffs under Rule 19 . . . or seeking to intervene as plaintiffs under Rule 24."[33] In addition, this subsection also states that supplemental jurisdiction shall not be exercised "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."[34]

Subsection (b) is the most problematic and criticized aspect of the supplemental jurisdiction statute.[35] Although subsection (b) appears to be a simple codification of the prior judge-made law in this area, as set forth in *Owen Equipment & Erection Co. v. Kroger*,[36] there is an argument that subsection (b) goes beyond *Kroger*.[37] Also, there is a are question as to whether the Federal Rules of Civil Procedure listed in subsection (b) are an exclusive list, or whether a plaintiff is also barred from asserting a claim against persons made parties by other means not listed. This Part explores some of the various issues of concern in cases based on diversity jurisdiction. Thus, a litigant dealing with such a claim should be cautious with respect to the various aspects contained in this Part.

1. Limiting diversity actions through subsection (b)—codification of *Kroger*?

In order for a litigant to understand the issues that arise in the current supplemental jurisdiction statute, it is first important for her to understand the foundation from which the statute arose. In

31. 28 U.S.C. § 1367(b).
32. *Id.*
33. *Id.*
34. *Id.*
35. *See* McLaughlin, *supra* note 4, at 855.
36. 437 U.S. 365 (1978).
37. *See* McLaughlin, *supra* note 4, at 936–40.

Kroger, before the enactment of section 1367, the Supreme Court examined the issue of whether, in an action based on diversity of citizenship, a plaintiff could assert a claim without an independent basis of jurisdiction against a third-party defendant.[38]

In *Kroger*, the plaintiff asserted a claim against the defendant based on diversity jurisdiction in the United States District Court for the District of Nebraska.[39] The defendant then impleaded a third party pursuant to Rule 14(a),[40] after which the plaintiff asserted a claim against the third-party defendant.[41] This third-party defendant was from the same state as the plaintiff, and there was no independent basis for jurisdiction over this claim.[42] Consequently, the Court examined whether or not the doctrine of ancillary jurisdiction extended over this claim.[43]

In reaching its determination in *Kroger*, the Court explained that courts have interpreted section 1332, the diversity jurisdiction statute, as requiring complete diversity, meaning each plaintiff must be diverse from each defendant.[44] The Court stated that "federal courts are courts of limited jurisdiction."[45] As such, it is of concern that "a plaintiff could defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."[46]

The Court explained that while ancillary jurisdiction could be used to confer jurisdiction over nonfederal claims involving impleader, cross-claims, and counterclaims, the context in which the claim that does not have its own basis of jurisdiction arises is "crucial."[47] In looking at the context of a claim that arises in a case based on supplemental jurisdiction against a third-party defendant, the Court made two important observations.[48] First, the Court

38. *Kroger*, 437 U.S. at 384.
39. *Id.* at 367.
40. *Id.*
41. *Id.* at 368.
42. *Id.* at 370.
43. *Id.* at 367.
44. *Id.* at 373. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
45. *Kroger*, 437 U.S. at 374.
46. *Id.*
47. *Id.* at 375–76.
48. *Id.* at 376.

explained that a third-party complaint is not always ancillary in the same sense as an impleader in that it depends partly on the resolution of the initial action.[49] Next, the Court explained that this case dealt with an action brought to the federal forum by the plaintiff herself.[50] As such, the plaintiff should not have complained about being prevented from asserting additional claims during the course of litigation, as she was the one "who [chose] the federal rather than the state forum and must thus accept its limitations."[51] The Court held that "ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."[52] This part of the analysis has set the tone for the policy behind limiting the plaintiff's ability to assert claims against parties joined during the course of the litigation.

While the legislative history of section 1367(b) states, "[t]he net effect of subsection (b) is to implement the principal rationale of [*Kroger*],"[53] there is a question as to whether the text of section 1367(b) purports to extend this doctrine.[54] The rest of this Part deals with issues that arise due to the ambiguity of section 1367(b).

2. Implications for parties joined under Rule 13(h)

While section 1367(b) forbids a plaintiff from asserting a claim against persons made parties under Rules 14, 19, 20, or 24, the subsection remains silent as to parties joined under Rule 13(h).[55] Rule 13(h) allows the joinder of additional parties "to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20."[56] Suppose that *P*, from Michigan, sues *D*, from California, over a state law claim in federal court (assume that there is diversity jurisdiction). Then, *D* joins *T*, from Michigan, under 13(h). What happens if *P*, who is also from Michigan, wants to add a claim

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. H.R. REP. NO. 101-734, at 29 n.16.
54. *See* McLaughlin, *supra* note 4, at 936–39 (discussing the various ways in which *Kroger* has been extended by the enactment of § 1367(b)); Vairo, *supra* note 5, at 264.
55. 28 U.S.C. § 1367(b).
56. FED. R. CIV. P. 13(h).

against *T*? Does section 1367(b) prohibit *P* from asserting a claim against *T* joined under Rule 13(h)?

Technically, Rule 13(h) is not listed in subsection (b) as an exception to granting supplemental jurisdiction. Under a plain meaning reading of the statute, it would appear that a non-diverse plaintiff could file a claim against a party joined under Rule 13(h), and that her claim would have supplemental jurisdiction.[57] Should a court hold this to be permissible, a plaintiff who wanted to be in the federal forum could evade the complete diversity requirement set forth in *Strawbridge v. Curtiss*.[58]

However, there are several arguments that would lead to the opposite conclusion, that a non-diverse plaintiff could not file a claim against a third party joined under Rule 13(h). One such argument deals with the fact that "[e]xtending supplemental jurisdiction to claims asserted by plaintiffs against parties joined under Rule 13(h), while denying supplemental jurisdiction to claims by plaintiffs against parties joined, under the other enumerated Rules, would be inconsistent with th[e] statutory intent."[59] Another argument deals with the fact that Rule 13(h) itself depends on the requirements of Rules 19 and 20, which are among the Rules referred to by subsection (b). Therefore, a court "could find that because a party may be joined under Rule 13(h) only when the requirements of Rule 19 or 20 are met, their joinder is, in essence, one under those rules, and accordingly barred by § 1367(b)."[60] Clearly, a defendant in the federal forum would applaud these two arguments, as the result would allow her to assert additional claims while adding a barrier preventing the plaintiff from doing the same.

3. Who is the plaintiff?

Subsection (b) is clearly a limit on the plaintiff's ability to assert claims against non-diverse parties joined to the action.[61] However,

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57. *See infra* Part IV.C.4 (discussing Rule 23, which is also absent from the text of section 1367(b), and discussing how different courts have determined the effect of the absence of Rule 23).

58. 7 U.S. (3 Cranch) 267 (1806).

59. McLaughlin, *supra* note 4, at 940.

60. Vairo, *supra* note 5, at 266; *see* Mayatexti, S.A. v. Liztex U.S.A., Inc., No. 92 CIV. 4528, 1993 WL 180,371 (S.D.N.Y. May 19, 1993).

61. *See* Viacom Int'l, Inc. v. Kearney, 212 F.3d 721, 726–27 (2d Cir. 2000) ("Significantly, § 1367(b) reflects Congress' intent to prevent original

there is a question as to whether section 1367(b) takes into account the difference between the original role a party assumes and the posture a party may take on later. While a litigant who asserts a claim may technically be the plaintiff, there are situations where this party may act in a defensive posture. Likewise, there are situations where a party that is technically the defendant may act in the posture of a plaintiff.

One such situation arises when a party added by a defendant asserts a claim against the original plaintiff, and the original plaintiff files a compulsory counterclaim in response. There, the plaintiff is clearly acting in a defensive posture, but technically she may be asserting a claim against a non-diverse party joined under Rule 14, 19, 20, or 24. Assume a situation in which *P* from Michigan sues *D* from California in federal district court for damages over $75,000. Clearly, subject-matter jurisdiction is supported by diversity jurisdiction as set forth in section 1332.[62] However, life and litigation are never so simple. Thus, assume that *D* then impleads *T* from Michigan, via Rule 14. After being added to the suit, *T* decides to file a claim through Rule 14 against *P*, the original plaintiff. As a result, *P* has a compulsory counterclaim to *T*'s claim against her. Can she assert it? *T* is a person made a party under Rule 14, and section 1367(b) forbids a plaintiff from asserting a claim against persons made parties under Rule 14.[63] On the other hand, *P* is being put in the position of acting in a defensive posture, and not as a plaintiff. Should this matter?[64]

Consider, alternatively, that *P*, from Michigan, sues *D*, from California, for a state law claim in federal district court (assume that diversity jurisdiction exists). Then, *D* asserts a counterclaim against *P* and also wants to assert this claim as a cross-claim against *T*, a third-party claimant, by joining *T* via Rule 13(h). As a result, *T* is aligned as a plaintiff. Suppose further that *T* wants to assert a claim against *P*. For section 1367(b) purposes, will the court have

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plaintiffs—but not defendants or third parties—from circumventing the requirements of diversity.").

62. For a discussion on the requirements of diversity jurisdiction, see *infra* Part II.

63. 28 U.S.C. § 1367(b) (2000).

64. *See* McLaughlin, *supra* note 4, at 942–43 (addressing whether defensive claims by plaintiffs should fall under the command of § 1367(b)).

supplemental jurisdiction over this claim? *T* may not be the original plaintiff, but *T* is acting like one.

Alternatively, there may be times when a defendant acts like a plaintiff. If so, should the defendant be subject to the limitations of subsection (b) even though the statute clearly attempts to limit claims made by original plaintiffs? In *Mayatextil, S.A. v. Liztex U.S.A., Inc.*,[65] the district court had diversity jurisdiction over the claims initially pursued by the plaintiff. The defendants then asserted a counterclaim against the original plaintiff. They also asserted a cross-claim against non-diverse third parties, attempting to join them under Rule 13(h). They asserted a counterclaim against these parties as well.[66] After the court determined that Rule 13(h) was included in section 1367(b)—even though it was not expressly stated in the subsection—the court determined it lacked jurisdiction over the cross-claim.[67] However, it was the defendant, not the plaintiff, who tried to assert a claim against a party joined under Rule 13(h). Section 1367(b) does not bar defendants; it bars plaintiffs.[68]

However, other courts have held that section 1367(b) does not restrict defendants at all—no matter what their posture.[69] In a recent case, *Air Liquide America, L.P. v. Process Service Corp.*, a district court held that where a defendant attempted to join a non-diverse counterclaim defendant under Rule 13(h), the "significant procedural fact [was] that it [was] the defendant . . . seeking to join a non-diverse counterclaim."[70] The court explained that the plain language of section 1367(b) "applies only to claims by *plaintiffs* against new parties whose addition would destroy diversity."[71] The court further reasoned that "[t]he entire thrust of subsection (b) is to prevent the original plaintiff from manufacturing jurisdiction and later interjecting a non-federal claim."[72] Thus, as this claim was made by the original defendant, the court found it had the power to exercise

65. No. 92 CIV. 4528, 1993 WL 180,371 (S.D.N.Y. May 19, 1993).
66. *Id.* at *1–*2.
67. *Id.* at *3.
68. 28 U.S.C. § 1367(b).
69. *See* United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488 (4th Cir. 1998); Air Liquide Am., L.P. v. Process Serv. Corp., No. CIV.A. 02-3794, 2003 WL 22,272,190 (E.D. La. Oct. 1, 2003).
70. *Air Liquide Am.*, 2003 WL 22,272,190 at *3.
71. *Id.*
72. *Id.*

supplemental jurisdiction over this claim.[73] As a result, a defendant in a federal forum has broader latitude to assert additional claims, whereas a plaintiff may not have that same freedom. While it is understandable that the plaintiff chooses the forum in which she wants to assert her claims,[74] as she is the master of her complaint, this seems less justified when the defendant has removed the case to the federal forum.[75] However, perhaps justification lies in the fact that the plaintiff could have asserted claims against these additional parties in its original complaint.

4. The fate of *Zahn v. International Paper Co.*[76] after the enactment of section 1367

In addition to questions about when a plaintiff or defendant should be barred from exercising supplemental jurisdiction in a diversity case, there is also a question about how section 1367(b) affects class action lawsuits brought under Federal Rule of Civil Procedure 23(b)(3).[77] Rule 23 states, in pertinent part, that "[o]ne or

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73. *Id.*

74. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978) ("A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims . . . since it is he who has chosen the federal rather than the state forum and must thus accept its limitations.").

75. It is true that the result is the same even when the case is removed, but if the plaintiff asserts the additional claims that would destroy diversity jurisdiction when she first files the claim, the defendant would never have been in the position to remove the case in the first place.

76. 414 U.S. 291 (1973).

77. Provided that the requirements of the statute are met, Federal Rule of Civil Procedure 23(b)(3) allows for a class action to be maintained if:

> 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.

FED. R. CIV. P. 23(a).

Note that the language of Rule 23(b)(3)—"questions of law or fact common to the members of the class"—echoes the concept of "so related [as

more members of a class may sue or be sued as representative parties on behalf of [the entire class]," provided that certain conditions are met.[78] Suppose, for example, 310 property owners each own property around a lake that the defendant allegedly has been polluting.[79] Several of the owners want to assert a class action on their behalf and in representation of the other 300 owners with lakefront property via Rule 23(b)(3) in federal district court. None of the plaintiffs are from the same state as any of the defendants, so all potential members of the class are diverse from the defendant.[80] However, it is questionable as to whether all members of the class will seek damages exceeding $75,000.[81] In order for each member to have an independent basis of jurisdiction over her claim, she must show both diversity of citizenship and that the matter in controversy exceeds the jurisdictional amount required by section 1332.[82] What happens if, as here, despite the fact that all members of the class are diverse from the defendants, some of the members of the class do not meet the amount in controversy requirement of section 1332? Should the district court dismiss the claims of the members who do not meet the jurisdictional amount so that these members have to re-file their cases in state court even though their claims are so related as to form part of the same case or controversy? Or, alternatively, should the court allow these members to stay in court along with their fellow class members via supplemental jurisdiction?

Like the above example, the cases discussed in this section do not deal specifically with parties who spoil complete diversity jurisdiction per se; rather these cases deal with the amount in controversy requirement of section 1332.[83] The real question is

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to] form part of the same case or controversy under Article III." *See* 28 U.S.C. § 1367(a). This similarity is apparent given the common nucleus of operative fact test offered in *Gibbs*.

78. FED. R. CIV. P. 23(a).

79. These facts are a variation of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

80. For a discussion on diversity jurisdiction and what factors determine whether parties are diverse, see Part II.

81. The jurisdictional amount currently set by 28 U.S.C. § 1332 (2000).

82. For a discussion of the requirements for diversity jurisdiction, see generally *supra* Part II, which discusses developments in diversity jurisdiction including diversity and amount in controversy requirements.

83. Historically, the U.S. Supreme Court has interpreted § 1332 as solely requiring that the *named* class representatives in a class action be diverse from

whether the concept of supplemental jurisdiction, as codified in section 1367, allows additional parties in a class action to bootstrap their claims onto a member of the class who has an independent basis of jurisdiction, or whether each of the members must satisfy the amount in controversy requirement on her own in order to have her day in federal court.

Prior to the enactment of section 1367(b), the rule regarding who must satisfy the amount in controversy requirement of section 1332 was clear. The Court held in *Zahn v. International Paper Co.*[84] that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'"[85] Furthermore, if no plaintiff can meet the requisite amount in controversy, the federal district court must dismiss the case in its entirety.[86]

However, there is a question as to whether the enactment of section 1367 has altered this rule. This question arises because the text of section 1367(b) explicitly states exceptions to section 1367(a), but absent from these enumerated exceptions is Rule 23.[87] The effect of this silence in subsection (b) is the heart of the debate as to whether the rule of *Zahn* remains viable. Accordingly, the question is whether the silence of subsection (b) should be interpreted by the courts as extending supplemental jurisdiction over parties added by plaintiffs under Rule 23—the exact action forbidden by *Zahn*— or as keeping *Zahn* intact. Currently, the circuits are split on these

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the defendants. *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 365–67 (1921). Furthermore, currently the proposed Class Action Fairness Act of 1999, if passed, would provide for minimal diversity in class actions in order to prevent a class from avoiding federal court by including a non-diverse member in its class. S. 353, 106th Cong.; *see* Vairo, *supra* note 5, at 232–33. However, although individual class members need not all be diverse parties, *Cauble*, 255 U.S. at 365–67, there is still a question as to whether each individual class member must meet the amount in controversy requirement of § 1332. *See Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 297–98 (2d Cir. 2000).

84. 414 U.S. 291 (1973).

85. *Id.* at 301 (quoting *Zahn*, 469 F.2d at 1035).

86. *Id.*

87. 28 U.S.C. § 1367(b) (2000); *see In re* Abbott Labs., 51 F.3d 524, 527 (5th Cir. 1995), *aff'd per curiam by an equally divided Court, sub nom.* Free v. Abbott Labs., Inc., 529 U.S. 333 (2000).

questions.[88] This issue is important for class action plaintiffs who want to remain in the federal forum and for defendants who want to remove class action suits against them to the federal forum. This issue is of vital concern because the amount in controversy requirement set forth in section 1332 has increased from $10,000, in the days of *Zahn*,[89] to $75,000.[90] As a result, it is feasibly more difficult for each member of a class to meet the jurisdictional amount requirement, and the ability to aggregate claims may prove a crucial determinant for many class actions to remain in federal court. This Sub-Part examines the *Zahn* ruling and looks at the conflicting viewpoints of the different circuits as to whether or not the enactment of section 1367 overruled *Zahn*.

a. pre-section 1367 and the rule of Zahn v. International Paper Co.[91]

In order to understand the current debate about whether or not each claimant in a class action lawsuit must meet the jurisdictional amount in controversy, it is important to first understand the historical view taken by the courts. Before the enactment of section 1367, the U.S. Supreme Court decided *Zahn*.[92] In *Zahn*, four owners of a lakefront property brought a diversity action on behalf of a class that included over 200 other unnamed class members.[93] The district court refused to allow the action to proceed as a class action, finding that each member in the class did not suffer damages in excess of the amount in controversy requirement set forth in section 1332.[94]

The U.S. Supreme Court affirmed, holding that each of the members, including those in the unnamed class, had to meet the jurisdictional amount requirement on her own, or she would find her

88. *See infra* Part IV.C.4.b.
89. *Zahn*, 414 U.S. at 293 n.1.
90. 28 U.S.C. § 1332(a).
91. 414 U.S. 291 (1973).
92. *Id.*
93. *Id.* at 291–92.
94. *Id.* at 292. Note that at the time that the Court decided *Zahn*, § 1332 required that the matter in controversy exceed $10,000. *Id.* at 293 n.1. However, today the matter in controversy must exceed $75,000. 28 U.S.C. § 1332 (2000). For a discussion on the amount in controversy, see *supra* Part II.C.

claim dismissed.[95] The Court found that its prior decision in *Snyder v. Harris*[96] was controlling.[97] In *Snyder*, the Court held that plaintiffs in a class action could not aggregate their claims in order to meet the amount in controversy requirement of section 1332.[98] Thus, a federal district court could only retain jurisdiction over the plaintiffs in a class action suit whose individual claims exceeded this minimal amount.[99] Thus, according to *Zahn*, each plaintiff in a class action suit has to satisfy the jurisdictional amount requirement.[100] Those that do not meet this condition must be dismissed from the case, regardless of whether others allege sufficient claims.[101]

The majority opinion clearly held that there was no jurisdictional basis for the plaintiffs who did not meet the amount in controversy requirement.[102] Furthermore, the Court was not willing

95. *Zahn*, 414 U.S. at 292, 301.

96. 394 U.S. 332 (1969).

97. *Zahn*, 414 U.S. at 300.

98. *Id.* at 298–99. The only exception to this rule mentioned in *Zahn* was that plaintiffs who joined to assert a single claim in which they had "'a common and undivided interest'" could aggregate their claims. *Id.* at 294 (quoting Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40–41 (1911)).

99. *Id.* at 298–99.

100. *Id.* at 301–02.

101. *Id.* at 300.

102. *Id.* However, in his dissent Justice Brennan found that the federal district courts could have jurisdiction over members of the class that did not meet the amount in controversy requirement through the concept of ancillary jurisdiction. *Id.* at 306 (Brennan, J., dissenting). Brennan explained that just as the concept of ancillary jurisdiction had allowed jurisdiction over compulsory counterclaims and intervention, so too should it allow jurisdiction over class actions when one party's claim satisfied the amount in controversy requirements. *Id.* (Brennan, J., dissenting). Brennan found that denial of ancillary jurisdiction for class actions would impose a larger burden on the judiciary as a whole and would impede the ability of members of a class to assert their claims. *Id.* at 307 (Brennan, J., dissenting). Furthermore, Brennan stated that the majority's reasoning was inconsistent with a prior case, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), where the Court held that if the original plaintiffs and defendants satisfied diversity requirements, intervention by non-diverse members of a class would not destroy the courts' jurisdiction. *Zahn*, 414 U.S. at 309 (Brennan, J., dissenting). Brennan stated that he did not understand why the approach in *Ben-Hur* was not extended to the amount in controversy requirement of § 1332. *Id.* (Brennan, J., dissenting). Thus, Brennan concluded that as long as the original plaintiff met the jurisdictional requirements, the federal district courts might have jurisdiction over the rest of the members of the class through the concept of ancillary jurisdiction, whether or not the later members were non-diverse or simply

to overrule the amount in controversy requirement stated in *Snyder*, noting "[a]t this time, we have no good reason to disagree with [*Snyder*] or with the historic construction of the jurisdictional statutes, left undisturbed by Congress over these many years."[103] The Court added "[a]s the Court thought in [*Snyder*] the matter must rest there, absent further congressional action."[104]

In 1990, seventeen years after the *Zahn* decision, Congress acted. It did so not by changing section 1332, but by adding a new statute dealing with supplemental jurisdiction.[105] A question thus arose as to whether the passage of section 1367 overruled the Court's holding in *Zahn*, or whether the passage of the supplemental jurisdiction statute left the rule of *Zahn* standing.

b. post-section 1367 and the confusion of Zahn

Although section 1367(a) extends supplemental jurisdiction over claims involving "the joinder or intervention of additional parties," subsection (b) specifically prohibits the use of supplemental jurisdiction in diversity cases 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 . . . ."[106] However, this list of exceptions fails to mention Rule 23. Courts have disagreed as to whether the effect of this silence is to overrule *Zahn* or to leave the rule undisturbed.[107] The U.S. Supreme Court has yet to decisively

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failed the jurisdictional-amount requirement. *Id.* at 309–10 (Brennan, J., dissenting).

103. *Zahn*, 414 U.S. at 301.

104. *Id.* at 302.

105. *See* 28 U.S.C. § 1367.

106. *Id.*

107. Del Vecchio v. Conseco, Inc., 230 F.3d 974, 977 (7th Cir. 2000) ("Since the passage of the supplemental jurisdiction statute . . . there has been a conflict in the circuits on the question whether *Zahn*'s holding survives the enactment of § 1367."); *In re* Abbott Labs., 51 F.3d 524, 527 (5th Cir. 1995) ("Supplemental jurisdiction over the unnamed plaintiffs' claims has been an open question since Congress passed [§ 1367]."), *aff'd per curiam by an equally divided Court, sub nom.* Free v. Abbott Labs., Inc., 529 U.S. 333 (2000).

rule on the issue.[108] Therefore, the circuits have been left with little authority, and have remained split on the issue.[109] The courts finding that the enactment of section 1367 overruled *Zahn* tend to find so based on the plain meaning of the statute without placing much weight on legislative history.[110] On the other hand, the courts finding that the rule of *Zahn* retains its vitality seem heavily influenced by legislative history, whether they claim to base their holding on the plain text of the statute or the legislative history itself.[111]

i. the majority view: *Zahn* overruled

Though there is no consensus as to the effect of section 1367, the majority of circuit courts ruling on the issue, including the Fourth,[112] Fifth,[113] Seventh,[114] Ninth,[115] and Eleventh[116] Circuits, have found that section 1367 overrules *Zahn*.

All five of these circuit courts of appeals reached their conclusions based upon the plain meaning of the statute.[117] Mainly, these courts base their holdings on the absence of Rule 23 from the enumerated exceptions to section 1367(a) set forth in subsection

108. Although it appeared that the Court would resolve the issue in its decision in *Free v. Abbott Laboratories, Inc.*, 529 U.S. 333 (2000), it did not. Rather, the Court affirmed a judgment by an equally divided court in a per curiam opinion finding that § 1367(b) overrules *Zahn* leaving the issue open for debate. *Id.*

109. *See generally* Joseph J. Shannon, Comment, *Is* Zahn *Gone? The Effect of 28 U.S.C. § 1367 on the "No Aggregation Doctrine,"* 19 TOURO L. REV. 495, 505 (2002) (discussing the circuit split on the effect of section 1367 on the holding in *Zahn*).

110. *See Abbott Labs.*, 51 F.3d at 525.

111. *See* Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999); Leonhardt v. W. Sugar Co., 160 F.3d 631 (10th Cir. 1998).

112. *See* Rosmer v. Pfizer, Inc., 263 F.3d 110, 114–19 (4th Cir. 2001).

113. *Abbott Labs.*, 51 F.3d at 529.

114. *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997).

115. Gibson v. Chrysler Corp., 261 F.3d 927, 933–40 (9th Cir. 2001).

116. Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248 (11th Cir. 2003).

117. *See Allapattah Servs*, 333 F.3d at 1254; *Rosmer*, 263 F.3d at 115–19; *Gibson*, 261 F.3d at 934, 940; *Brand Name*, 123 F.3d at 607; *Abbott Labs.*, 51 F.3d at 527–28.

(b).[118] As the Eleventh Circuit Court of Appeals stated in the most recent of these cases to be decided, section 1367(a) is a broad grant of supplemental jurisdiction, and section 1367(b) serves to narrow that broad grant of jurisdiction in diversity cases; furthermore, "it is a well-accepted rule of statutory construction in this Circuit that 'where a statute explicitly enumerates certain exceptions to a general grant of power, courts should be reluctant to imply additional exceptions in the absence of a clear legislative intent to the contrary.'"[119] Thus, the court found that because Rule 23 is absent from the list of exceptions in section 1367(b) it is not an exception.[120]

Furthermore, after finding that the plain language of the statute was clear, these courts have refused to look into legislative intent, stating they cannot do so unless the statute is unclear or ambiguous.[121] Moreover, both the Fifth and Ninth Circuits stated that even if it was clerical error or oversight that Rule 23 was not inserted into the list of exceptions in subsection (b) that is of no concern because "the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result."[122] As the Ninth Circuit Court of Appeals explained, reading

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118. *See Abbott Labs.*, 51 F.3d at 527 (finding that while subsection (a) grants supplemental jurisdiction, subsection (b) "carves exceptions," and "[s]ignificantly, class actions are not among the exceptions").

119. *Allapattah Servs*, 333 F.3d at 1256 (quoting United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1502 (11th Cir. 1991)).

120. *Id.*

121. *See Allapattah Servs.*, 333 F.3d at 1253–56; *Rosmer*, 263 F.3d at 117; *Abbott Labs.*, 51 F.3d at 528. In *Rosmer*, although the plaintiff argued that the circuit split was evidence of the fact that the statute was ambiguous, the Fourth Circuit Court of Appeals found that just because other circuits have acted in a contrary manner, this did not "negate th[e] circuit's duty to interpret the text of the enactment." 263 F.3d at 118. The court held that it had a duty to interpret the statute, and that just because another circuit had done differently did not prevent the circuit from finding that this particular statute was clear and unambiguous. *Id. Compare with* Leonhardt v. W. Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998) (finding that the circuit split supports the idea that the statute is truly ambiguous).

122. *Gibson*, 261 F.3d at 939–40; *Abbott Labs.*, 51 F.3d at 529 (citing W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 99–100 (1991); United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)). The Ninth Circuit Court of Appeals stated its concern over following the clear meaning of the text of the statute, stating that if courts began to ignore the plain meaning of a statute because the legislative history demonstrated a contrary intent, then the plain

subsection (b) as overruling *Zahn* does not result in an "absurd or difficult-to-justify result."[123] As such, these circuits have held that the plain meaning of the statute controls, and the plain and unambiguous meaning of section 1367(b) is that the rule from *Zahn* no longer stands.[124] Thus, in these jurisdictions, as long as one named plaintiff satisfies the jurisdictional amount requirement, other named and unnamed class members can "piggyback on that plaintiff's claim" through the use of supplemental jurisdiction.[125]

ii. minority view: *Zahn* sustained

The minority opinion, consisting of the Third,[126] Eighth,[127] and Tenth[128] Circuits, is that section 1367 has not disturbed the U.S. Supreme Court's prior ruling in *Zahn*.[129] However, these circuits differ with respect to their reasoning as to why *Zahn* is still good law. While the Tenth and Eighth Circuits rely on the plain meaning of the statute,[130] the Third Circuit found the statute ambiguous and therefore relied on legislative history.[131]

In *Leonhardt v. Western Sugar Co.*,[132] the Tenth Circuit was the first of the Federal Courts of Appeals to decide that *Zahn* survived the enactment of section 1367.[133] The court first determined the statute was clear and unambiguous but held that the plain language

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meaning of statutes in general would be placed in jeopardy. *Gibson*, 261 F.3d at 940.

123. *Gibson*, 261 F.3d at 939.

124. *See Allapattah Servs.*, 333 F.3d at 1254; *Rosmer*, 263 F.3d at 115–19; ; *Gibson*, 261 F.3d at 934, 940; *Brand Name*, 123 F.3d at 607; *Abbott Labs.*, 51 F.3d at 527–28.

125. *Brand Name*, 123 F.3d at 607.

126. Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 218–22 (3d Cir. 1999).

127. Trimble v. Asarco, Inc., 232 F.3d 946, 960–62 (8th Cir. 2000).

128. Leonhardt v. W. Sugar Co., 160 F.3d 631, 637–41 (10th Cir. 1998).

129. The Second Circuit may be the next circuit to agree with this minority view. While the Second Circuit has yet to decide the issue, in a recent case the court noted that the majority of courts in that circuit have held that *Zahn* is still good law. Fox v. Cheminova, Inc., 213 F.R.D. 113 (E.D.N.Y. 2003).

130. *Trimble*, 232 F.3d at 961; *Leonhardt*, 160 F.3d at 638–39.

131. *Meritcare Inc.*, 166 F.3d at 222.

132. 160 F.3d 631 (10th Cir. 1998).

133. *Id.* at 638. Prior to this case, the Fifth and Seventh Circuits had both decided that the effect of the enactment of § 1367 was to overrule *Zahn*, but no other circuit courts of appeals had reached a conclusion. *Id.* at 639.

of the statute expressed that section 1367 did not overrule *Zahn*.[134] It stated that other circuits, in deciding that the statute displaced *Zahn*, relied solely on the fact that Rule 23 was absent from the exceptions enumerated in section 1367(b).[135] However, the court stated that "a literal and textually faithful reading of § 1367(a) leads to the opposite conclusion . . . ."[136] The court explained that subsection (b) only dealt with the plaintiff's claims added *after* the initial suit began, whereas class actions under Rule 23 dealt with the initial case itself.[137] Ironically, the court looked to legislative history to support its finding on the plain meaning of the statute, quoting the legislative record declaring that:

> "In diversity-only actions the district courts may not hear plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdictional requirement of 28 U.S.C. § 1332 by the simple expedient of *naming initially* only those defendants whose joinder satisfies section 1332's requirements *and later adding claims not within original federal jurisdiction* against other defendants who have intervened or been joined on a supplemental basis."[138]

Thus, the court read "original jurisdiction" as being different for diversity suits than for federal question suits.[139] Whereas in federal question cases, original jurisdiction seems to refer to the court having federal question jurisdiction over at least one claim, original jurisdiction in a suit based on diversity seems to imply something else.[140] The court explained that in a diversity suit, section 1332 confers original jurisdiction and requires plaintiffs to meet the requisite jurisdictional amount.[141] Thus, the court determined that

134. *Id.* at 638–39.
135. *Id.* at 639.
136. *Id.* at 640.
137. *Id.* at 639–40.
138. *Id.* at 639 n.7 (emphasis added) (quoting H.R. REP. No. 101-734, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 6875).
139. *See* James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109 (1999). *Cf.* Gibson v. Chrysler Corp., 261 F.3d 927, 934–40 (9th Cir. 2001) (analyzing and largely rejecting the Tenth Circuit's reasoning).
140. *See Gibson*, 261 F.3d at 936–37.
141. *Id.*

supplemental jurisdiction could apply only after the plaintiffs demonstrated in their initial complaint that all parties met the requirements of original jurisdiction.[142] Accordingly, the court concluded that the plain meaning of section 1367 did not overrule *Zahn*.[143] The Eighth Circuit, in *Trimble v. Asarco, Inc.*,[144] adopted the Tenth Circuit's holding in *Leonhardt* verbatim.[145]

However, after deciding the text of section 1367 clearly supported the rationale that the rule of *Zahn* remains viable, the Tenth Circuit assumed the statute was ambiguous, because two circuit courts of appeals reached the opposite conclusion and commentators were equally divided.[146] Therefore, the Tenth Circuit examined and found support for its interpretation of the statute in the legislative history of section 1367.[147] It stated the legislative history "expressly states that § 1367[b] 'is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to [*Finley*].'"[148] The court further stated that the House report cited to *Zahn* as an example of those requirements that were to remain intact after the passage of section 1332.[149] From this legislative report, the court concluded that "Congress did not intend to overrule the historical rules prohibiting aggregation of claims, including *Zahn*'s prohibition of such aggregation in diversity class actions."[150] The court further recognized that even the circuits that had reached the opposite result found that Congress did not intend for the statute to overrule *Zahn*.[151]

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142. *Id.*; *see* Pfander, *supra* note 139, at 109.

143. *Leonhardt*, 160 F.3d at 641.

144. 232 F.3d 946 (8th Cir. 2000).

145. *See id.* at 961. In fact, the Eighth Circuit Court of Appeals simply quoted an entire passage from *Leonhardt* dealing with the plain meaning of the statute, and adopted it as its own. *Id.* Moreover, the Eighth Circuit Court of Appeals seemed to rely more on the fact that the plain meaning of the statute supported its conclusion than it did on the legislative history; however, it did state that the legislative history supported its conclusion. *Id.* at 962.

146. *Id.* at 639 n.6, 640.

147. *Id.* at 640.

148. *Id.* (citing H.R. REP. NO. 101-734, at. 28, 29 & n.17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6974).

149. *Id.* (citing H.R. REP. NO. 101-734, at 28, 29 & n.17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6974).

150. *Id.* at 640–41.

151. *Id.* at 641 n.9.

While the Eighth and Tenth Circuits concluded that both the plain text of section 1367 and the legislative history of section 1367 left the ruling in *Zahn* intact,[152] in *Meritcare Inc. v. St. Paul Mercury Insurance Co.*[153] the Eighth Circuit determined that section 1367 was ambiguous, and therefore relied on the legislative history in making it decision.[154]

The court stated that section 1367(b) did not list Rule 23 as an exception, and that "[s]ubsection (b) notes a number of instances where 'exercising supplemental jurisdiction . . .would be inconsistent with the jurisdictional requirements of section 1332.'"[155] However, the court found that even though Rule 23 was absent from this list, exercising supplemental jurisdiction over claims through Rule 23 would be clearly inconsistent with the jurisdictional requirements of section 1332.[156] Furthermore, the court stated that even if it did not find the statute ambiguous, it would nonetheless turn to the legislative history because the literal application of the statute was at odds with Congressional intent.[157] As a result of the court's finding that the legislative history was in favor of retaining the viability of *Zahn*, the court held that section 1367 did not change the applicability of *Zahn*.

iii. undecided circuits: *Zahn* unclear

While a majority of the circuit courts have reached the issue as to the effect of section 1367 on the holding of *Zahn*, there are a few circuit courts that have yet to decide the issue. However, a review of other cases decided in their districts provides insight as to where these Circuits may be heading.

The Second Circuit Court of Appeals first heard the issue in *Mehlenbacher v. Akzo Nobel Salt, Inc.*,[158] where it declined to decide whether the enactment of section 1367 left *Zahn* undisturbed.[159] The

152. *Id.* at 641.
153. 166 F.3d 214 (3d Cir. 1999).
154. *Id.* at 222.
155. *Id.* at 221 (quoting 28 U.S.C. § 1367(b)).
156. *Id.*
157. *Id.* at 222 (citing United States v. Sherman, 150 F.3d 306, 313 (3d Cir. 1998); *Cf.* Gibson v. Chrysler Corp., 261 F.3d 927, 939 (2001) (holding that § 1367 did not produce absurd results that were hard to justify).
158. 216 F.3d 291 (2d Cir. 2000).
159. *Id.*

court briefly examined the circuit split and stated that "the Supreme Court itself has to date been unable definitively to resolve the question."[160] The court raised the issue of subject-matter jurisdiction *sua sponte* and stated it would not decide the issue because it would be "premature," as the parties did not have a chance to brief or argue the issue.[161] Specifically, the court was concerned with the fact that there was no assertion that even one of the plaintiffs met the amount in controversy requirement.[162] If none of the plaintiffs could meet the minimal jurisdictional amount, then the court could not have jurisdiction over the case, even if *Zahn* was no longer the law.[163] Thus, the court remanded the case to the district court, stating that if the district court were to find that one of the plaintiffs met the full requirements of section 1332, the district court could decide the issue of *Zahn*.[164] However, despite the fact that the Second Circuit Court of Appeals has not affirmatively decided the issue, the district court cases from that circuit appear to demonstrate that the circuit is overwhelmingly in favor of the proposition that *Zahn* survived section 1367.[165] In fact, in the recent case, *Fox v. Cheminova, Inc.*, the United States District Court for the Eastern District of New York actually surveyed views regarding the continuing viability of *Zahn* and found that although the Second Circuit has not yet ruled on the issue, the majority of courts in the circuit have held that *Zahn* is still good law.[166]

Like the court in *Mehlenbacher*, the First Circuit Court of Appeals has recognized the split in authority over the issue, but has not addressed the question. In *Speilman v. Genzyme Corp.*,[167] the court determined it did not need to decide the issue because there was a question as to whether even one plaintiff had satisfied the full requirements of section 1332.[168] However, unlike the district courts

160. *Id.* at 297 (citing Free v. Abbott Labs., Inc., 529 U.S. 333 (2000)).
161. *Id.* at 295, 297–98.
162. *Id.* at 298.
163. *Id.*
164. *See id.* at 298–99.
165. *See* Freeman v. Great Lakes Energy Partners, L.L.C., 144 F. Supp. 2d 201, 210 (W.D.N.Y. 2001) ("[E]very district court in this circuit that has addressed the issue has held that *Zahn* is still good law.").
166. 213 F.R.D. 113, 124 (E.D.N.Y. 2003).
167. 251 F.3d 1 (1st Cir. 2001).
168. *See id.*; *supra* notes 161–63 and accompanying text.

of the Second Circuit, the district courts of the First Circuit do not tend to overwhelmingly lean toward one side of this issue.[169] While all of the districts have not yet decided this issue, two district courts have decided the issue. The United States District Court of Massachusetts has decided this issue several times,[170] finally determining in *Payne v. Goodyear Tire & Rubber Co.* that "*Zahn* is dead."[171] The court in *Payne* disagreed with the Tenth Circuit and followed the Ninth Circuit view, finding that the text of section 1367 in no way hints that *Zahn* remains good law.[172] The court was also skeptical about the legislative history, but found that it did not need to "address the intricacies of Congressional intent" because it found that the text of section 1367 was clear and unambiguous.[173] Legislative intent was thus irrelevant.[174] However, the United States District Court of Puerto Rico, in *Arias v. American Airlines*, held, in the alternative, that the enactment of section 1367 did not overrule *Zahn*.[175]

While the First and Second Circuits' Courts of Appeal have considered the *Zahn* issue and refused to decide it, the Sixth Circuit Court of Appeals has yet to address the issue.[176]

D. The Discretion of the Court—Another Hurdle

A district court's exercise of supplemental jurisdiction can be analogized to a baseball game. If a litigant can show that her claim is so related as to form part of the same case or controversy, she has

169. *See* Payne v. Goodyear Tire & Rubber Co., 229 F. Supp. 2d 43, 48 (D. Mass. 2002).

170. The court in *Payne* stated that two courts in its own district reached opposite conclusions on this issue. *Id.* (citing Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. 54, 60 (D. Mass. 1997) (holding that § 1367 did overrule *Zahn*); Mayo v. Key Fin. Servs., Inc., 812 F. Supp. 277, 277 (D. Mass. 1993) (holding that § 1367 reaffirmed *Zahn*)).

171. 229 F. Supp. 2d at 48.

172. *Id.* at 50–52.

173. *Id.* at 51–52.

174. *See id.*

175. 163 F. Supp. 2d 111, 115 (D.P.R. 2001).

176. The most recent Sixth Circuit case dealing with the issue was an unpublished case decided in 1991 that did not even acknowledge the effect § 1367 might have had on *Zahn*. Dulin v. Trans Union Credit Information Co., No. 90-6209, 1991 U.S. App. LEXIS 12675 (6th Cir. June 11, 1991).

made it to first base.[177] Next, if there is no federal statute that bars supplemental jurisdiction over the claim, this litigant can easily make it to second base.[178] However, in order to reach third base, she has to make sure subsection (b) does not apply to her supplemental claim; otherwise, she is out.[179] Assuming she makes it to third base, she still has not reached home plate. In order to do so, she will still have to survive the exceptions listed in section 1367(c). Under subsection (c), it is the judge, as umpire, who gets to make the call as to whether she is out. Simply stated, although the litigant who wants to be in the federal forum may have met the broad requirements of subsection (a), and may have escaped the clutches of subsection (b), subsection (c) provides yet another hurdle. However, unlike subsection (b), section 1367(c) is permissive, not mandatory, and is within the court's discretion.

Section 1367(c) deals with when the court may, at its own discretion, refuse to exercise supplemental jurisdiction.[180] Yet, the question arises: How broad is this discretion given to the court? Must the court have a specific reason for dismissing the claim? Can a court refuse to extend jurisdiction over a claim that otherwise meets the requirements of section 1367 simply because it does not feel like it? Moreover, if the district court decides that the federal forum is not the proper place for a supplemental claim to be heard, can it, at its discretion, dismiss the entire case, including the claims over which the court has original jurisdiction?

While it may be safe to assert that the discretion doled to the court via section 1367(c) does not hinge on the personal feelings and mood swings of the district court, there is still some confusion as to exactly what this "discretion" entails. Once again, the enactment of section 1367 has caused some confusion as to the current meaning of the rule and as to whether or not the doctrine remains the same as it was before the enactment of section 1367.[181]

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177. For a discussion on this requirement, see *supra* Part IV.B.

178. 28 U.S.C. § 1367(a) (2000).

179. *See supra* Part IV.C.

180. 28 U.S.C. § 1367(c).

181. *See* Shirin Malkani, *Upside Down and Inside Out: Appellate Review of Discretion Under the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 1997 ANN. SURV. AM. L. 661, 672 (1997) ("While Section 1367(b) may have been a 'nightmare in draftsmanship' to critics, subsection (c) created equal uncertainty. The fundamental issue was whether subsection (c) was intended

Before Congress enacted section 1367, the judge-made law of pendent and ancillary jurisdiction regarding discretion of judges, as stated in *Gibbs*, was a flexible doctrine.[182] The question now is whether section 1367(c) has changed this flexible standard into one that is more rigid. The issue, more specifically, is whether the court's discretion is limited to the list of enumerated considerations contained in section 1367(c), or whether the court's discretion is still the flexible standard that it was in the days of *Gibbs*. This Part will explain the different views as to whether section 1367(c) has changed the doctrine of discretion. In addition, it will examine the question as to whether a district court may use its discretion to dismiss a case in its entirety through section 1367(c) by analogy to 28 U.S.C. § 1441(c).

1. Discretion of the court under section 1367(a)–(d)

Section 1367(c) states four instances where the court "may decline to exercise supplemental jurisdiction over a claim."[183] These include: (1) where a "claim raises a novel or complex issue of State law;"[184] (2) where the claim "substantially predominates" over those claims over which the court has original jurisdiction;[185] (3) where the court has "dismissed all claims over which it has original jurisdiction;"[186] and (4) where "in exceptional circumstances, there are other compelling reasons for declining jurisdiction."[187] The question that arises is whether this is an exclusive list, or simply an

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to codify prior case law or to modify the analysis of *Gibbs* and its progeny."); Joseph N. Akrotirianakis, Comment, *Learning to Follow Directions: When District Courts Should Decline to Exercise Supplemental Jurisdiction Under 28 U.S.C. § 1367(c)*, 31 LOY. L.A. L. REV. 995, 1009 (1998) ("In practice, courts have disagreed over whether § 1367 was merely intended to overrule the Supreme Court's decision in *Finley v. United States* and to codify the doctrines of pendent, ancillary and pendent party jurisdiction, while at the same time preserving the discretion to decline jurisdiction that district courts enjoyed under *Gibbs*.").

182. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726–27 (1966).

183. 28 U.S.C. § 1367(c).

184. *Id.* § 1367(c)(1).

185. *Id.* § 1367(c)(2).

186. *Id.* § 1367(c)(3).

187. *Id.* § 1367(c)(4). For a detailed discussion on issues arising in subsections (c)(1)–(4), see Jon D. Corey, Comment, *The Discretionary Exercise of Supplemental Jurisdiction Under the Supplemental Jurisdiction Statute*, 1995 BYU L. REV. 1263, 1271–97.

effort to codify the judge-made rule that the district court's discretion is one of flexibility. A litigant who wants to remain in the federal forum, or who conversely wants to evade it, should be aware of the different views regarding this issue. Litigants in circuits holding that the list in section 1367(c) is exclusive should understand that subsection (c) will provide them with a narrow exit, while litigants in circuits that have upheld the law as stated in *Gibbs* should understand that subsection (c) is a broad avenue that may suddenly call for their departure from the federal forum. Furthermore, this issue is especially important for a litigant who wants to evade the federal forum to understand, as some courts have held, that the court is not obliged to do a section 1367(c) analysis unless requested to do so.[188] Therefore, a litigant who wants to leave the federal forum should be aware of the different arguments she can raise under this subsection. If she fails to do so, she should not expect the court to address the issue on its own.[189] Conversely, this is good news for the litigant who wants to stay in federal court. If her opponent fails to address this argument, she "steals home."

a. pre-section 1367: discretion as set forth in Gibbs

Long before Congress enacted section 1367, the Supreme Court, in its decision in *Gibbs*, articulated the judge-made law regarding judicial discretion as to the dismissal of supplemental claims.[190] In that case, the Court held that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."[191] The Court explained that the policy behind allowing the court to dismiss claims that would otherwise be permissible consists of "judicial economy, convenience and fairness to litigants" as well as interests of promoting "comity

188. *See* Acri v. Varian Assocs., Inc., 114 F.3d 999, 1000–01 (9th Cir. 1997); Myers v. County of Lake, 30 F.3d 847, 850 (7th Cir. 1994), *cert. denied*, 513 U.S. 1058 (1994); Doe v. District of Columbia, 93 F.3d 861, 871 (D.C. Cir. 1996) (per curiam); *see also* Kan. Pub. Employees Ret. Sys. v. Reimer & Kroger Assocs., Inc., 77 F.3d 1063, 1067 (8th Cir. 1996) (distinguishing between the district court's power to exercise supplemental jurisdiction over claims and the advisability of doing so); Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1st Cir. 1995) (holding that the mere fact that the court has dismissed the supporting federal claim on the merits "does not, by itself, require that all pendent state-law claims be jettisoned").

189. *See* cases cited *supra* note 188.

190. United Mine Works v. Gibbs, 383 U.S. 715, 726–27 (1966).

191. *Id.* at 726 (citations omitted).

and . . . justice."[192] As a result, a consideration of these factors was a crucial part of a district court's determination as to whether to extend the jurisdiction of the court over a pendent claim.[193] As the Court later articulated in *Carnegie-Mellon University v. Cohill*, this standard is quite flexible.[194]

To guide the district courts in applying this flexible standard, the Court in *Gibbs* provided several scenarios under which it would appear that the court should dismiss a claim.[195] Under these scenarios, the court was to dismiss a claim where "the federal claims [were] dismissed before trial," when "it appeared that the state issues substantially predominate[d]," and when there were other "reasons independent of jurisdictional considerations, such as the likelihood of jury confusion."[196] Under judge-made law, the court's discretion was not limited to specific considerations. Rather, the *Gibbs* court simply listed some guidelines and stated that policy concerns were to play crucial factors in the courts' decisions.[197] A question arises as to whether Congress intended to codify these factors and scenarios in section 1367(c)(1)–(4), or whether the new list is more strict.

b. post-section 1367: the circuit split on discretion

With the enactment of section 1367, the question now is whether this flexible doctrine that relies on factors of judicial economy, convenience, fairness, and comity survives, or whether, section 1367(c) restricts the court's discretion to an enumerated list of considerations.[198] The circuits are split as to the effect of section 1367 on the ability of a court to use its discretion in exercising supplemental jurisdiction.[199]

192. *Id.*
193. *Id.*
194. 484 U.S. 343, 357 (1988).
195. *Gibbs*, 383 U.S. at 726–27.
196. *Id.*
197. *Id.*
198. *See* Akrotirianakis, *supra* note 181, at 1009.
199. *See id.*

i. the majority view: judicial discretion in exercising supplemental jurisdiction

The majority view, consisting of the First,[200] Third,[201] Fourth,[202] Sixth,[203] Seventh[204] and District of Columbia[205] Circuits, is that section 1367(c) is merely a codification of *Gibbs* and leaves broad discretion to the district courts to determine whether to exercise supplemental jurisdiction over a claim. These cases seem to focus on the fact that when Congress enacted section 1367 it did so with the intent of codifying the judge-made principles of pendent and pendent-party jurisdiction stated in *Gibbs*, including the principles concerning when a court may decline to hear a claim that it would otherwise be allowed to hear.[206] Therefore, these cases conclude that district courts have "broad discretion" and "wide latitude" in determining whether to exercise supplemental jurisdiction.[207] The key to determining how the court should exercise its broad discretion lies in looking at the totality of circumstances and considering such factors as "judicial economy, convenience, fairness, and comity."[208] These circuit courts have given great deference to district court discretion. A district court in these circuits does not need to articulate its reasons for dismissing a claim under subsection (c) in order for its decision to be upheld, as long as it does not appear to be

200. Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 37 (1st Cir. 2003); Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1st Cir. 1995).

201. De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 308 (3d Cir. 2003); Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995).

202. Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir. 1995).

203. Pinney Dock & Transp. Co. v. Penn Cent. Corp., 196 F.3d 617, 620 (6th Cir. 1999).

204. Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993); Kennedy v. Schoenberg, Fisher & Newman, Ltd., 140 F.3d 716, 727–28 (7th Cir. 1998).

205. Diven v. Amalgamated Transit Union Local 689, 38 F.3d 598, 600–01 (D.C. Cir. 1994).

206. *See Lancaster*, 45 F.3d at 788; *Brazinski*, 6 F.3d at 1182.

207. *See* Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 37 (1st Cir. 2003); *Penn Cent. Corp.*, 196 F.3d at 620; Van Harken v. City of Chicago, 103 F.3d 1346, 1354 (7th Cir. 1997); *Shanaghan*, 58 F.3d at 110; Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1st Cir. 1995);.

208. De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 308 (3d Cir. 2003); *Che*, 324 F.3d at 37; *Lancaster*, 196 F.3d at 620; *Kennedy*, 140 F.3d at 727; Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988); *Shanaghan*, 58 F.3d at 110; *see Rodriguez*, 57 F.3d at 1177.

a clear abuse of discretion.[209] As such, a litigant who prefers to leave the federal forum has broader latitude to argue the court should dismiss the claim under subsection (c).

ii. the minority view: judicial discretion in exercising supplemental jurisdiction is limited to the list contained in section 1367(c)

While the majority of Circuit Courts of Appeals view section 1367(c) as a codification of judge-made law, a minority, consisting of the Second,[210] Eighth,[211] Ninth,[212] and Eleventh[213] Circuits, have held that section 1367(c) has changed a district court's discretion to exercise supplemental jurisdiction from that of a flexible standard to that of a limited choice defined by the itemized list of subsection (c). The reasoning of these courts varies; however, most of these courts rely both on the text and structure of section 1367(c), as well as on the legislative history of the statute.[214]

Foremost, these courts have found that the text and structure of section 1367 reveal a change to the pre-section 1367 standard as stated in *Gibbs*.[215] The crux of this argument centers on the structural differences between subsections (a) and (c). Section

209. *See Rodriguez*, 57 F.3d at 1175–78 ("Here, choosing not to remand would effectively ignore the district court's special competence in the realm of discretionary decision making.").

210. Valencia *ex rel.* Franco v. Lee, 316 F.3d 299, 305 (2d Cir. 2003); Treglia v. Town of Manlius, 313 F.3d 713, 723 (3d Cir. 2002); Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442, 447 (2d Cir. 1998).

211. McLaurin v. F.C. Prater, 30 F.3d 982, 985 (8th Cir. 1994); Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills, 141 F.3d 1284, 1287 (8th Cir. 1998).

212. Acri v. Varian Assocs., Inc., 114 F.3d 999, 1001 (9th Cir. 1997); Executive Software N. Am., Inc. v. United States Dist. Court, 24 F.3d 1545, 1555–61 (9th Cir. 1994).

213. *In re* City of Mobile, 75 F.3d 605, 607 (11th Cir. 1996).

214. *See Itar-Tass*, 140 F.3d at 447; *Executive Software*, 24 F.3d at 1555–61. The Eleventh Circuit has come to the same conclusion as the other circuits discussed in this section. However, it did not state its reason for determining that the former principle of allowing a court to exercise discretion in the interest of judicial economy, convenience, and fairness was no longer the law and that, therefore, the district court must state a reason enumerated in § 1367(c)(1)–(4) as to why it dismissed the claim. *In re* City of Mobil, 75 F.3d at 607.

215. *See Executive Software*, 24 F.3d at 1555-61; *McLaurin*, 30 F.3d at 984.

1367(a) states "the district courts *shall* have supplemental jurisdiction;" while subsection (c) states that the district courts *may* exercise discretion in exercising supplemental jurisdiction.[216] Therefore, on the one hand, subsection (a) states that supplemental jurisdiction over a claim is mandatory, while, on the other hand subsection (c) is not a mandatory provision.[217] These cases suggest that "[b]y use of the word 'shall,' the statute makes clear that if power is conferred under section 1367(a), and its exercise is not prohibited by section 1367(b), a court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories specifically enumerated in section 1367(c) applies."[218]

In addition to looking at the relation between subsection (a) and subsection (c), the Ninth Circuit Court of Appeals identified another aspect of the statute that demonstrates that section 1367 has modified prior judge-made law in this area. The Ninth Circuit Court of Appeals stated that the catch-all provision, section 1367(c)(4), is constructed in a narrower fashion than the law as stated in *Gibbs*.[219] The court explained that section 1367(c)(4) allows a court to use discretion in exercising supplemental jurisdiction over a claim "only if the circumstances are quite unusual."[220] Accordingly, the court stated that section 1367(c)(4) is more narrow than the *Gibbs* catch all, which broadly serves to be consistent with the values of economy, convenience, fairness, and comity.[221]

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216. 28 U.S.C. § 1367(a), & (c) (2000).

217. *McLaurin*, 30 F.3d at 984–85 ("the word 'shall'... is a mandatory command.... '[S]hall' does not mean 'may' or 'is permitted to'; 'shall' has been consistently understood to mean that something is required.").

218. *Executive Software*, 24 F.3d at 1555–56 ; *see Itar-Tass*, 140 F.3d at 447; *McLaurin*, 30 F.3d at 984–85. *Compare* Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993) ("[Section 1367] surely did not change [the judge-made principles of pendent jurisdiction as stated in *Gibbs*] merely by providing that the district judge 'may' relinquish supplemental jurisdiction...."), *with* John B. Oakley, *supra* note 7, at 766–67 ("By the juxtaposition of sections 1367(a) and 1367(c) Congress appears to have created a strong presumption in favor of the exercise of supplemental jurisdiction.").

219. *Executive Software*, 24 F.3d at 1557–60.

220. *Id.* at 1558 ("[D]eclining jurisdiction outside of subsection (c)(1)—(3) should be the exception, rather than the rule.").

221. *See id.*

Furthermore, the Ninth Circuit and Second Circuit Courts of Appeals have also looked at legislative history for support.[222] The Ninth Circuit Court of Appeals looked at the circumstances surrounding the enactment of section 1367 and found that while one purpose of drafting section 1367 was to resurrect pendent-party jurisdiction after the Supreme Court rejected it in *Finley*, another purpose was to provide a firm statutory basis for supplemental jurisdiction generally.[223] However, the court rejected the contention that the statute was meant to simply codify, rather than alter, the judge-made principles of pendent jurisdiction.[224] The court found that the interpretation that "section 1364(c)(4) more carefully channels courts' discretion . . . comports with the text and structure of the statute . . . but also is entirely consistent with the legislative history."[225]

As a result of the fact that these circuits have held that section 1367(c) grants only limited discretion to district courts, a district court in one of these circuits must articulate why it refuses to exercise jurisdiction over a claim if the reason is not enumerated in section 1367(c)(1)–(4); otherwise, it will be questioned or possibly overturned.[226]

2. Making Sense of Section 1441(c) and Section 1367(c)

Another issue concerning the court's discretion to dismiss claims from the federal forum deals solely with cases in which the court's original jurisdiction is based on federal question jurisdiction under 28 U.S.C. section 1331.[227] This issue arises partly from

222. *Itar-Tass*, 140 F.3d at 447–48 (stating that "[t]his interpretation not only comports with the text and structure of the statute, but is also consistent with the legislative history," and then explaining congressional discussions and considerations related to the enactment of § 1367); *Executive Software*, 24 F.3d at 1559–60.

223. *Executive Software*, 24 F.3d at 1552–55.

224. *Id.* at 1559 n.12.

225. *Id.* at 1558–59.

226. *See id.* at 1560–61 ("[A]ny *further* extension of *Gibbs* through subsection (c)(4) should be undertaken only when the district court both articulates 'compelling reasons' for declining jurisdiction and identifies how the situation that it confronts is 'exceptional.'").

227. As such, this Sub-Part only refers to claims where original jurisdiction is based on section 1331. For a discussion on section 1441(c), see *infra* Part V.E.

confusion over section 1441(c), relating to the court's discretion with respect to removal. Section 1441(c) states:

> [w]henever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.[228]

This statute seems to be the polar opposite of supplemental jurisdiction, as section 1441(c) deals with a claim that is "separate and independent,"[229] while section 1367 deals with a claim that is "so related."[230] However, the interaction and apparent overlap between these two statutes has caused both confusion and criticism.[231] The main question at issue is whether section 1441(c) suggests or allows the district court to dismiss federal law claims once it has dismissed state law claims under section 1367(c). This Sub-Part attempts to clarify some of these issues.

The first thing to understand is that section 1367(c) deals with the discretion of the court when it already has the power to hear a supplemental claim. Concededly, in a section 1367(c) analysis the court is deciding whether to retain a claim that it has already determined is "so related" to the federal claim. Thus, "where the state claims are pendent, or supplemental, they necessarily arise from a single wrong and cannot be construed as 'separate and independent' for the purposes of Section 1441(c)."[232] However, courts disagree as to whether it is ever appropriate to remand a federal law claim under section 1367(c).[233] While some courts have

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228. 28 U.S.C. § 1441(c) (2000).

229. *Id.*

230. *Id.* § 1367(a).

231. *See* Moore v. DeBiase, 766 F. Supp. 1311, 1319 n.13 (D.N.J. 1991); Edward Hartnett, *A New Trick From an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1100–01 & nn.7–9 (1995).

232. City of New Rochelle v. Town of Mamaroneck, 111 F. Supp. 2d 353, 372 (2000) (citing Hickerson v. City of New York, 932 F. Supp. 550, 558 (S.D.N.Y. 1996)).

233. *See* Bodenner v. Graves, 828 F. Supp. 516 (W.D. Mich. 1993); Administaff, Inc. v. Kaster, 799 F. Supp. 685 (W.D. Tex. 1992).

argued that the discretionary power to remand federal law claims under section 1441(c) cannot possibly extend to section 1367(c) because they necessarily are not separate and independent, other courts have found that it can.[234]

While there may not be support from the legislative history or case law of section 1367(c) for the court to have the discretion to remand the entire case,[235] cases that have found that the court has the discretion to do so have found support in section 1441(c).[236] In one such case, *Bodenner v. Graves*,[237] a district court explained that while it could only find one case in support of complete dismissal under section 1367, it found support from the fact that other courts had stated that sections 1367 and 1441(c) were "analogous with respect to the complete dismissal issue."[238] Therefore, in deciding to dismiss both state and federal claims under section 1367(c), the court relied on cases where the courts found that section 1441(c) allows the court to remand an entire action.[239]

This issue is of particular concern to litigants who want to enjoy the federal forum. If a court follows this idea that section 1441(c) provides support for the fact that once supplemental claims are dismissed, the court may use its discretion to remand the entire case, then all claims may be out the door. However, realize that this issue brings up an interesting problem with forum shopping. Suppose that a plaintiff files both federal and state claims in federal court, and that the court uses its discretion to dismiss the supplemental claims because they contain a novel issue of state law, or because state law

234. *Compare In re* City of Mobile, 75 F.3d 605, 607 (11th Cir. 1996) (stating that there is no support for the assertion that the court can exercise the discretion to remand an entire case under § 1367(c)), *with* Bodenner v. Graves, 828 F. Supp. 516 (W.D. Mich. 1993) (finding that the court could find support for remanding an entire case through § 1367(c) in cases that address section 1441(c)).

235. *See In re City of Mobile*, 75 F.3d at 607.

236. *See Bodenner*, 828 F. Supp. at 518–19.

237. *Id.*

238. *Id.* at 519.

239. *Id.* It is important to note that courts are split as to whether or not § 1441(c) allows a court to dismiss an entire action. *See, e.g.*, City of New Rochelle v. Town of Marmaroneck, 111 F. Supp. 2d 353, 372–73 (S.D.N.Y. 2000) (discussing the differing viewpoints as to whether § 1441(c) grants the district court the discretion to remand federal claims, or whether it only grants discretion to remand state claims).

predominates. The plaintiff may then decide whether she would like to keep her federal claim in federal court, and litigate her state claims in state court, or whether she wants to forgo litigating in both forums and continue to pursue all claims in state court.[240] On the other hand, imagine a scenario where the plaintiff files her federal and state claims in state court, and the defendant has the claims removed to federal court. Imagine that the district court then determines that under section 1367(c) it will dismiss the state claims. Here, the plaintiff no longer has a choice of whether to forgo litigating in two forums; rather she is forced to litigate in two separate forums, or to dismiss one of the claims.[241] Furthermore, "as a general matter, plaintiffs and defendants differ in their litigation resources and therefore in their need for a single forum . . . . This disparity in litigation resources between plaintiffs and defendants is especially dramatic in removed cases. The majority of cases that get removed are those filed by individuals against corporations."[242] Thus, it could be argued that "there is good reason to treat direct-filed and removed cases differently, particularly where state law predominates in the case as a whole."[243] As a result, where a court determines that it can use the support of section 1441(c) to remand a whole case under section 1367(c), this may be better for the plaintiff who would rather litigate in only one court; however, the defendant who may benefit from this forced split, would prefer the court to state that it cannot dismiss the whole claim.

E. Tolling State Statutes of Limitations Under Section 1367(d)

When a plaintiff pursues an action in the federal forum, and the complaint contains a state law claim that does not have an independent basis of subject-matter jurisdiction, the plaintiff runs the risk that the court will dismiss the state law claim.[244] If the federal court dismisses the state claim, the plaintiff may decide to pursue the

240. *See* Hartnett, *supra* note 231, at 1171; *supra* Part IV.E.2.b.
241. *Id.* at 1172.
242. *Id.* at 1174–75.
243. *Id.* at 1171.
244. *See supra* Part IV.D for a discussion of the court's discretion in dismissing a state law claim.

state claim in state court.[245] What happens, however, if the state statute of limitations is tolled before the plaintiff has the opportunity to do so? Should a plaintiff who has filed an action in federal court in a timely manner be penalized now because the court dismissed her claim after the statute of limitations has expired? Or, for that matter, should a plaintiff be able to take advantage of a rule that would allow her to file in state court after the set statute of limitations has expired? If she is the one who voluntarily dismisses the claim, should the state statute of limitations still be tolled? These are just some of the concerns inherent in the construction of section 1367(d).[246]

At its root, section 1367(d) serves as a means of insurance for the plaintiff who files a state law claim in federal court: If the plaintiff filed the action in federal court in a timely manner, the state law claim will not be lost simply because the federal court dismisses the state claim after the state's statute of limitations has expired. This is a built in protective mechanism, which stops the state clock from ticking while an action is pending in federal court and for thirty days thereafter, provided that the state statute of limitations does not allow for a longer tolling period.[247] Therefore, a plaintiff need not worry that a choice to file her claim in federal court will lead to no court hearing her claim.

However, there are limitations on section 1367(d), and questions as to its constitutionality.[248] While case law and commentary

245. *See, e.g.*, Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002) (The plaintiff re-filed in state court in Minnesota after the federal district court dismissed plaintiff's state law claims.).

246. Section 1367(d) (2000) states:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State-law provides for a longer tolling period.

247. *Id.*

248. *See generally Raygor*, 534 U.S. at 548 (holding that § 1367(d) does not apply to a suit against a non-consenting state defendant that is subsequently dismissed on Eleventh Amendment grounds, but leaving open whether it would be constitutional as applied to other defendants); Jinks v. Richland County, 123 S. Ct. 1667, 1673 (2003) (addressing the question left open by *Raygor* and upholding the constitutionality of § 1367(d) as applied to a municipality).

regarding this tolling provision is scarce,[249] there are a few important developments regarding this subsection that a plaintiff contemplating filing a state law claim in federal court should consider. For that matter, there are also issues a defendant contemplating removal should consider. This Part discusses the constitutionality of the tolling provision of section 1367 and inquires into whether section 1367(d) only applies when the court dismisses a state law claim for lack of subject-matter jurisdiction or whether section 1367(d) also applies when the court or the plaintiff dismisses the claim on other grounds. Finally this Part discusses subsection (d)'s implications on forum shopping.

1. The constitutionality of section 1367(d)

The question concerning the constitutionality of section 1367(d) is twofold, though both inquiries relate to whether section 1367(d) is a violation of the principles of state sovereignty.[250] The first issue addresses whether Congress has the power to create a law that regulates state procedure.[251] The second issue addresses whether the tolling provision can apply to claims brought against a state's actors[252] or against political subdivisions.[253] The answer appears to be that Congress has the power to enact this subsection,[254] but that the provision may not apply to non-consenting state defendants after a federal court has dismissed a state claim on Eleventh Amendment grounds.[255]

a. congressional power to enact section 1367(d)

The first Supreme Court decision that examined the constitutionality of section 1367(d) was *Raygor v. Regents of the*

249. While § 1367 has been substantially criticized, subsection (d) has gone unnoticed for quite some time. *See* Ruth Vanstory Horger, Comment, *For Whom the Bell Tolls: Tolling State Statutes of Limitations and the Constitutionality of 28 U.S.C. § 1367(d)*, 54 S.C. L. REV. 1047, 1051, 1057 & n.85 (2003).

250. *See Jinks*, 123 S. Ct. at 1667.

251. *See id.* at 1670–72.

252. *See Raygor*, 534 U.S. at 539–48.

253. *See Jinks*, 123 S. Ct. at 1672–73.

254. *Id.* at 1671–72.

255. *Raygor*, 534 U.S. at 548.

University of Minnesota.[256] However, the Court was not preoccupied with Congress's power to enact the provision. Rather, the Court focused on whether the provision applied to a non-consenting state defendant.[257] It was not until its decision in *Jinks v. Richland County*[258] that the Court explicitly held that Congress had the power to enact section 1367(d).[259]

Although the defendant in *Jinks* argued that the provision was facially invalid as it exceeded the powers of Congress, the Court rejected this argument.[260] In a unanimous decision, the Supreme Court determined that Congress had the power to enact the provision under the Necessary and Proper Clause.[261] Under that clause, Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof."[262] The Court found that subsection (d) was a necessary and proper execution of Congress's Article III power "'to constitute Tribunals inferior to the supreme court.'"[263] The Court reiterated that "necessity" does not necessarily mean "absolutely necessary"; rather, it is sufficient that the act be "'[1] conducive to the due administration of justice' in federal court, and [2] is 'plainly adapted' to that end."[264] The Court concluded that the tolling provision of section 1367 met the first requirement, as the provision provides for a "fair and efficient operation of the federal courts and is therefore conducive to the administration of justice."[265] The Court highlighted the efficiency promoted by section 1367(d) by looking at the inefficiency of the pre-section 1367 options that the subsection replaced.[266] The Court explained that subsection (d) assures "that

256. *Id.*
257. *Id.* at 541–47.
258. 123 S. Ct. 1667.
259. *Id.*
260. *Id.* at 1670.
261. *Id.* at 1670–72.
262. U.S. CONST. art. I, § 8, cl. 18.
263. *Jinks*, 123 S. Ct. at 1671 (quoting U.S. CONST. art. I, § 8, cl. 9).
264. *Id.* at 1671 (footnote omitted) (quoting McColloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–15, 417, 421 (1819)).
265. *Id.*.
266. *Id.* The court explained that before Congress enacted § 1367(d), there were three options from which a court could choose in anticipation that the

state-law claims asserted under § 1367(a) will not become time barred while pending in federal court."[267] As a result, the subsection eliminates a barrier to accessing the federal court system for a plaintiff with an action that contains both federal and state claims that are so related as to form part of the same case or controversy.[268] Therefore, the Court found that section 1367(d) satisfies the second requirement in that it is "plainly adapted" to Congress's power to establish the lower federal courts and to provide for fair and efficient exercise of their Article III powers.[269]

After determining that Congress had the power to enact section 1367(d) under the Necessary and Proper Clause, the Court addressed whether the provision violated the principles of state sovereignty.[270] The argument was that Congress lacks the power to regulate procedure in state courts, and that the tolling provision is arguably a regulation of state court procedure, therefore it is unconstitutional.[271] However, the issue is resolved by skilled labeling. The Court explained in *Jinks* that the categories of "substance" and "procedure" do not have firm boundaries nor immutable shapes; rather "the meaning[s] of 'substance' and 'procedure' . . . [are] 'largely determined by the purposes for which the dichotomy is drawn.'"[272] While in some situations the court may label statutes of limitations as procedure, in other cases it may label them as substance.[273] In the

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defendant would assert a statute of limitations defense in state court: (1) the court could make the dismissal of the state law claim conditional upon the defendant's waiver of that defense in state court; (2) the court could retain jurisdiction over the state law claim, even though the federal court was not the appropriate forum for the claim; or (3) the court could dismiss the plaintiff's claim for the time being, but allow the plaintiff to re-file the claim in federal court if the state court dismissed the action due to the defendant's assertion that the claim was time-barred. Id. (citing Newman v. Burgin, 930 F.2d 955, 963–64 (1st Cir. 1991); Duckworth v. Franzen, 780 F.2d 645, 657 (7th Cir. 1985); Fin. Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 778 (D.C. Cir. 1982); ; and Rheaume v. Tex. Dep't of Pub. Safety, 666 F.2d 925, 932 (5th Cir. 1982)).

267. *Id.* at 1672.

268. *Id.* at 1671.

269. *Id.* at 1672.

270. *Id.*; *see also* Prinz v. United States, 521 U.S. 898, 923–24 (1997).

271. *Jinks*, 123 S. Ct. at 1672.

272. *Id.* (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988)).

273. *Compare Sun Oil*, 486 U.S. at 726 (holding that statutes of limitation are procedural for purposes of the Full Faith and Credit Clause), *with* Erie R.R.

context of *Jinks*, the Court found that statutes of limitations fall within the category of "substance";[274] therefore, subsection (d) does not regulate state procedure and does not violate the principle of state sovereignty in that regard.[275] As such, the tolling provision is a constitutional exercise of Congressional power.[276]

The Supreme Court held that section 1367(d) is a valid exercise of Congress's powers, both in that it is necessary and proper to its power to create lower federal courts,[277] and because it is not a regulation of state court procedure.[278] Although this may appear to be the end of the discussion, there is still an issue as to whether the statute is constitutional as applied to certain defendants, specifically those defendants who are arms of the state or a political subdivision.

b. constitutionality of the tolling provision as applied to non-consenting state defendants

The Supreme Court took its first look into the constitutionality of section 1367(d) when it examined *Raygor*.[279] There, the plaintiffs asserted both federal law and state law claims in federal district court against a public university.[280] However, because the defendant was an arm of the state, the district court dismissed the plaintiffs' claims on Eleventh Amendment grounds.[281] After the district court dismissed both claims, the plaintiffs filed their state claims in state court.[282] The defendant moved for summary judgment, claiming that the action was time-barred and that section 1367(d) did not apply in this situation.[283] The state court granted the defendant's motion for summary judgment, agreeing with the defendant, and both claims were subsequently dismissed.[284]

Co. v. Tompkins, 304 U.S. 64 (1938) (finding that statutes of limitation are substantive for purposes of the *Erie* Doctrine).

274. *Jinks*, 123 S. Ct. at 1672.
275. *Id.*
276. *Id.*
277. *Id.* at 1671–72.
278. *Id.* at 1672.
279. Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002).
280. *Id.* at 537.
281. *Id.* at 536–38.
282. *Id.* at 538.
283. *Id.*
284. *Id.*

After granting certiorari, the Supreme Court agreed that subsection (d) could not toll the state statute of limitations in that situation because the tolling provision did not apply where the defendant was a non-consenting state or state actor.[285] While the Court in *Raygor* held that the provision did not apply to non-consenting state defendants, the Court based its decision on the idea that subsection (d) itself was not a clear expression of Congressional intent to change the balance of federal and state power.[286]

The Court noted that if it were to read the statute as applicable to non-consenting state defendants there would be "serious doubts" as to the constitutionality of section 1367(d).[287] However, the Court did not confront this constitutional issue head on.[288] Instead, the Court looked at the fact that control over state statutes of limitations is typically a role reserved for a state's government.[289] As such, when Congress acts to toll a state's statute of limitations, Congress shifts the balance between federal and state power.[290] The Court explained that if Congress intends to shift this balance of power, it must make this intent "'unmistakably clear in the language of the statute.'"[291] The Court concluded that Congress was unclear as to its intent to include state law claims dismissed under the Eleventh Amendment in the tolling provision.[292] Additionally, the Court refused to read anything into the subsection that was not clearly already written therein.[293]

Although the Court refused to focus its discussion on whether a federal toll on a state statute constituted an abrogation of state sovereign immunity with respect to claims brought against state defendants, the Court's discussion appears broad enough to encompass this likelihood as well.[294] While the Eleventh Amendment ensures state sovereign immunity from suit, Congress

285. *Id.* at 548.
286. *See id.* at 544–47.
287. *Id.* at 542.
288. *Id.* at 544.
289. *Id.*
290. *Id.*
291. *Id.* at 543 (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989)).
292. *Id.* at 545–46.
293. *Id.* at 546.
294. *See id.* at 543–47.

may abrogate this immunity through certain powers.[295] The plaintiffs argued that the tolling provision applied to their claims as Congress enacted it to prevent a due process violation, and that therefore Congress enacted the subsection under its section 5 powers under the Fourteenth Amendment.[296] The Court found this argument unpersuasive and irrelevant because the statute was still unclear as to Congressional intent.[297] In order for Congress to abrogate such immunity, Congress must make its intent clear in the words of the statute.[298] This was the downfall for the plaintiffs in *Raygor*, for the Court concluded that subsection (d) did not state a clear intention to toll the limitations period for claims against non-consenting states after a state claim is dismissed based on Eleventh Amendment grounds.[299]

Thus, the Court decided that even though Congress might be able to use its section 5 power to abrogate state immunity in this situation, there was no clear showing that it had.[300] Congress had not

295. CONST. amend. XIV, § 5; *Raygor*, 534 U.S. at 547. For a discussion on Congressional power to abrogate sovereign immunity, see Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that the Eleventh Amendment barred congressional authorization of suits against non-consenting states, but the Court explained that two provisions provide Congress with the power to abrogate sovereign immunity from suit; one of those provisions is section 5 of the Fourteenth Amendment. *Id.*

296. *See Raygor*, 534 U.S. at 546.

297. *Id.*

298. *Id.*

299. *Id.* at 543–46.

300. However, the Court did note that Congress could abrogate state immunity if Congress makes its intent "unmistakably clear in the language of the statute" through its section 5 powers under the Fourteenth Amendment. *Id.* at 543. Yet the Court generally seems reluctant to allow Congress to exercise this section 5 power, even though it has held elsewhere that section 5 may allow for congressional power to abrogate immunity in certain situations. The Court may be reluctant to find such power if it finds that the Fourteenth Amendment does not justify the enactment. *See generally* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (finding that section 5 of the Fourteenth Amendment did not authorize congressional abrogation of state immunity through the ADEA, which prohibits employment discrimination on the basis of age, since "states may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification is rationally related to a legitimate state interest"). For other cases that reject the claim that abrogation of state sovereign immunity to suit is justified by section 5, see Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) and Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S.

provided for a clear intent to shift the balance between state and federal power.[301] Therefore, the Court held that section 1367(d) did not apply to non-consenting state defendants.[302]

The crux of the decision centered on whether or not the State consented.[303] Although the plaintiffs argued that the defendant consented to suit by waiting almost ten months to dismiss the suit on Eleventh Amendment grounds, the Court in *Raygor* disagreed, finding that the defendant did not consent to suit.[304] Rather, the Court viewed the defendant's timing in filing the motion consistent with the pre-trial schedule.[305] The Court found that the defendant acted reasonably by raising its Eleventh Amendment defense in its answer.[306] In short, the Court felt that the defendant moved to dismiss the case in a timely and efficient manner.[307] As the Court found that the defendant was a non-consenting state, the tolling provision did not apply to the state statute of limitations.

Furthermore, the Court explained that a limitations period may be viewed as "'a central condition'" to a sovereign's waiver of immunity to suit.[308] The Court explained that when a plaintiff files a suit against the United States, there is a rebuttable presumption that equitable tolling under federal law applies to waivers of the United States' immunity; however, the Court has never held that when a plaintiff files suit against a state actor, the same rebuttable

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627 (1999). For further discussion on issues that arise when the defendant is a non-consenting state, see *infra* Part IV.E.2.a.

301. *Raygor*, 534 U.S. at 544.

302. *Id.* at 548.

303. *See id.* at 546–47.

304. *See id.*

305. *Id.* at 547. Plaintiffs filed suit in the district court on or about August 29, 1996. In September 1996 the defendant filed answers to the complaints and asserted the Eleventh Amendment as one of its eight affirmative defenses. The court set a pre-trial schedule, according to which discovery would end by late May 1997, and dispositive motions would be filed by mid-July 1997. In early July 1997, the defendant filed a motion to dismiss based on the fact that the claims were barred by the Eleventh Amendment. The court granted the defendant's motion to dismiss on July 11, 1997. *Id.* at 537–38.

306. *Id.* at 547.

307. *Id.*

308. *Id.* at 542–43 (quoting United States v. Mottaz, 476 U.S. 834, 843 (1986).

presumption applies.[309] The Court held that a state may provide for conditions upon consenting to suit in its own courts.[310] By providing a statute of limitations for certain claims, a state consents to suit upon the condition that a plaintiff files that suit within the limited time period. Once the period lapses, the plaintiff can no longer meet the condition and the state's invitation to suit is withdrawn.

c. constitutionality of section 1367(d) as applied to consenting state defendants

A different issue arises if a court finds that the state has consented.[311] This has important implications for a state or state actor who attempts to remove a case from state court to federal court, from which a state claim is later dismissed.[312] The Court has commented that there are limited situations where a state would be viewed as consenting to suit.[313] The Court has given examples of two situations where a state might be viewed as having consented to suit: [1] "when a State voluntarily invoked federal court jurisdiction," or [2] "otherwise 'ma[de] a "clear declaration" that it intends to submit itself to our jurisdiction.'"[314] This is an important notion for a state defendant, who should realize that removing a case from state court to federal court is an act of consent,[315] as removal is a voluntary invocation of federal court jurisdiction.

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309. *Id.* at 543 (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)). Although Justice Stevens agreed in his dissent with the majority opinion that § 1367(d) could not apply to a non-consenting state, Justice Stevens stated that Minnesota had given its consent by agreeing to be treated as a private employer and by allowing plaintiffs to sue the state for a period of forty-five days. *Id.* at 552 (Stevens, J., dissenting). Justice Stevens explained that tolling the period of limitations is very different from Congress's power to entirely abrogate a state's sovereign immunity defense. *Id.* (Stevens, J., dissenting).

310. *Id.* at 543.

311. *Id.* at 547.

312. *Id.* at 533, 547.

313. *Id.* at 547.

314. *Id.* (quoting Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999)).

315. *See* Oleski v. Dep't of Pub. Welfare, 822 A.2d 120, 126–27 & n.5 (Pa. Commw. Ct. 2003) (holding that a state actor who removed the case against it to federal court consented by virtue of the act of removing the case).

d. the constitutionality of section 1367(d) as applied to political subdivisions and other non-state defendants

In *Raygor*, the Court reserved the question as to the constitutionality of section 1367(d) as applied to non-state defendants.[316] However, recently, in *Jinks*[317] the Supreme Court determined, in a unanimous decision, the constitutionality of section 1367(d) as applied to political subdivisions. There, plaintiff Susan Jinks asserted an action against Richland County in the United States District Court for the District of South Carolina.[318] Jinks asserted both a federal claim and two state claims, and she asserted all claims in a timely manner.[319] In November 1997, the district court granted summary judgment on the federal claim in favor of the defendant.[320] Subsequently, the district court dismissed the state law claims without prejudice.[321] Thereafter, the plaintiff filed her state law claims in state court, and judgment was granted in her favor.[322] The defendant then appealed to the South Carolina Supreme Court, claiming that the state law claims were time-barred because section 1367(d) was unconstitutional as applied to the defendant, a state political subdivision.[323] The state supreme court reversed on the grounds that the provision "interfere[d] with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit."[324] The Supreme Court granted certiorari and reversed.[325]

After the Court found that Congress had the authority to enact section 1367(d),[326] the Court examined whether, though constitutional, section 1367(d) applies to state political subdivisions.[327] The Court found that it did.[328] The Court explained

316. 534 U.S. at 547.
317. 123 S. Ct. 1667.
318. *Id.* at 1670.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. Jinks v. Richard County, 563 S.E.2d. 104, 107 (S.C. 2002), *rev;d*, Jinks v. Richard County, 123 S.Ct. 1667 (2003).
325. *Jinks*, 123 S. Ct. at 1673.
326. *Id.* at 1670–72.
327. *Id.* at 1672–73.
328. *Id.*

that a municipality does not enjoy the same constitutionally protected immunity from suit as a state does.[329] Therefore, the principle determined in *Raygor*[330] did not extend to municipalities or other non-state defendants; section 1367(d) is constitutional and applies to all non-state defendants.[331]

2. The claims affected by section 1367(d)

The plain language of section 1367(d) states in pertinent part that the statute applies to "any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a)."[332] While case law is scarce as to whether or not this includes claims that the plaintiff voluntarily dismisses, or whether this includes claims that are dismissed for reasons other than lack of subject matter jurisdiction,[333] this Part discusses the prevailing views.

One thing is clear: the statute clearly provides that section 1367(d) applies when a federal court dismisses a claim asserted under section 1367(a) for lack of supplemental jurisdiction for any reason under section 1367(a)–(c).[334] However, it is less clear whether subsection (d) applies to claims dismissed for reasons other than lack of supplemental jurisdiction, or to claims voluntarily dismissed by the plaintiff. Clearly, a valid argument could be made that subsection (d) applies without regard to the federal court's reason for dismissal, unless of course the court dismisses the case on the merits.[335]

329. *Id.*
330. Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002).
331. *Jinks*, 123 S. Ct. at 1673.
332. 28 U.S.C. § 1367(d) (2000).
333. *See* Blinn v. Fla. Dep't of Transp., 781 So. 2d 1103, 1107 (Fla. Dist. Ct. App. 2002) (stating that the court could not find a published opinion that discussed the issue of whether the tolling provision was triggered by a plaintiff voluntarily dismissing a state claim with the intention of re-filing in state court).
334. *See* Murphy, *supra* note 3, at 1032.
335. *Id.* at 1033–35; *see Raygor*, 534 U.S. at 545.

a. claims dismissed on Eleventh Amendment grounds

However, there are situations that may limit the scope of section 1367(d). A primary situation is when a plaintiff files a suit in federal court and asserts a state law claim against a non-consenting state defendant that is later dismissed on Eleventh Amendment grounds.[336] The Supreme Court touched on this issue in its decision in *Raygor*.[337] In *Raygor*, the Court said that on its face the tolling provision appears to broadly apply "to any claim technically 'asserted' under subsection (a) as long as it [is] later dismissed, regardless of the reason for dismissal."[338] However, the Court determined that there would be serious issues if this provision were to apply to non-consenting state defendants after a supplemental claim was dismissed based on Eleventh Amendment grounds.[339]

The Court first explained that "the Eleventh Amendment bars the adjudication of pendent state law claims against nonconsenting state defendants in federal court."[340] Therefore, although section 1367(a) is broad, it cannot cover claims against non-consenting states because the Eleventh Amendment is an "'explicit limitation on federal jurisdiction.'"[341] As such, a non-consenting state cannot be forced to adjudicate in federal or state court.[342] Even though the Court clearly stated that a federal court cannot retain jurisdiction under subsection (a) over a state law claim that violates the principles of state sovereign immunity, there was still a question as to whether subsection (d) applied against a non-consenting state defendant, where the state law claim was first asserted under subsection (a) and later dismissed on Eleventh Amendment grounds.[343]

The Court explained how one could read subsection (d) broadly as applying to any claim asserted under subsection (a) regardless of

336. *See* Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002).
337. *Id.* at 544–47.
338. *Id.* at 542.
339. *Id.*
340. *Id.* at 540–41 (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 120 (1984)).
341. *Id.* at 541 (quoting *Pennhurst*, 465 U.S. at 118).
342. *Id.* at 543.
343. *Id.* at 542.

the reason for dismissal.[344] However, the Court stated that if it were to read the tolling provision as having that broad effect, there would be "serious doubts" as to its constitutionality.[345]

The Court went on to explain that to read the provision's application as inclusive of all claims asserted under subsection (a) and later dismissed for any reason at all would be to read the subsection in isolation of "a statute that specifically contemplates only a few grounds for dismissal."[346] Yet the Court concluded that it was unclear whether or not the statute included grounds for dismissal beyond subject matter jurisdiction.[347] The Court further explained that it did not matter for the purpose of its decision in *Raygor* what subsection (d) excluded; rather, what was of importance was whether there was a clear statement of what the subsection included.[348] Notwithstanding the Court's discussion, its conclusion clearly stated that subsection (d) does not apply to claims filed in federal court against non-consenting State defendants that are subsequently dismissed on sovereign immunity grounds.[349] Thus, while the Court would not explicitly conclude that the subsection does not apply to claims dismissed on Eleventh Amendment grounds, the effect of the *Raygor* decision is the same as if it had done so.

b. claims voluntarily dismissed by the plaintiff

The next question deals with the scope of the language "any other claim in the same action that is voluntarily dismissed."[350] The suggestion is that if a claim is dismissed, a party may decide to voluntarily dismiss all other claims asserted and pursue them in one action in state court.[351] However, what if a plaintiff simply voluntarily dismisses a state law claim in *anticipation* of the fact that the court is about to do so on its own?

344. *Id.* For a more detailed discussion of what types of dismissals are included in subsection (d), see *infra* Part IV.E.2.b.
345. *Raygor*, 534 U.S. at 542.
346. *Id.* at 545.
347. *Id.*
348. *Id.* (citing Gregory v. Ashcroft, 501 U.S. 452, 467 (1991)).
349. *Id.* at 548.
350. 28 U.S.C. § 1367(d) (2000); *see* Murphy, *supra* note 3, at 1032–35.
351. *See* Murphy, *supra* note 3, at 1033.

Although few courts have dealt with this issue, in *Blinn v. Florida Department of Transportation*[352] a Florida court looked at whether the statute would apply if the plaintiff voluntarily dismissed the claim.[353] The court held that it did.[354] This finding has enormous implications on the forum shopping market.

In *Blinn*, a plaintiff filed state and federal claims in federal district court. Two years later, while under the impression that the court would dismiss her claims on Eleventh Amendment grounds, she voluntarily dismissed the action pursuant to Federal Rule of Civil Procedure 4; nine days later she filed her complaint in state court.[355] The defendants argued that the statute of limitations period had run out.[356] The state district court found that it indeed had as section 1367(d) only applied to claims dismissed by the federal court in which the federal court declined to exercise supplemental jurisdiction.[357] The district court found that the plain language of the statute was ambiguous, and came to its conclusion by looking at the legislative history of section 1367(d).[358] The state court of appeals reversed, looking at the plain meaning of the statute and concluding that section 1367(d) applied to claims dismissed for reasons other than those found in subsection (c).[359] While the state court of appeals admitted that the legislative history of subsection (d) pointed to the conclusion that the tolling period only applied to cases dismissed by the federal court pursuant to section 1367(a)–(c),[360] the court explained that its state follows the policy that "where the language of a statute is clear, the language must be given effect, rather than the purpose or intent indicated by legislative history."[361]

However, as the discussion in the *Blinn* opinion dictates, different courts may find different answers to whether or not subsection (d) is limited in its application to claims dismissed by a

352. 781 So. 2d 1103 (Fla. Dist. Ct. App. 2000).
353. *Id.* at 1104.
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.* at 1107.
361. *Id.* (citing Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997)).

federal court pursuant to section 1367(a)-(c).[362] A court that determines that the language of section 1367(d) is unambiguous and does not look at legislative intent, may find as the court in *Blinn* did; however, a court that finds that the language is ambiguous may examine legislative intent and reach the opposite result.

If a court decides to examine legislative history and intent, it will likely find that section 1367(d) applies solely to claims dismissed for lack of subject matter jurisdiction.[363] In fact, the tolling provision appears to exist to ensure that if the court decides to use its discretion to decline exercising supplemental jurisdiction over a claim, the plaintiff can still pursue the claim elsewhere.[364] Therefore, it would make sense that Congress intended to limit the tolling provision to claims dismissed under section 1367(a)–(c). However, in a situation where the plaintiff is the one voluntarily dismissing the claim, the policy concern driving subsection (d) no longer applies, as the plaintiff is not in the vulnerable position of being at the mercy of the court's discretion. On the other hand, this limitation is not express in the statute, which leads one to question whether or not Congress intended this restriction. While the tolling provision does not state on its face that it is only applicable where the federal courts decline to exercise supplemental jurisdiction of a claim under section 1367(a) for reasons stated in section 1367(c), this is the view generally adopted by commentators.[365]

3. The effect of section 1367(d) on forum selection

Subsection (d) has important implications for forum selection. As a result, there are important factors that each party should consider when selecting its forum. The Court in *Jinks* explained that prior to subsection (d), a plaintiff with an action that contained both a federal and state law claim that formed part of the same case or controversy had three options: (1) she could file a single federal court action and run the risk that the district court would dismiss her state law claim after it would be too late for her to re-file in state court; (2) the plaintiff could file the entire action in state court, giving up on her right to the federal forum; or (3) the plaintiff could

362. *Id.* at 1105–10.
363. *Id.*
364. *See* Jinks v. Richard County, 123 S. Ct. 1667, 1671–72 (2003
365. *See* Murphy, *supra* note 3.

file the state law claim in state court and the federal claim in federal court, and request that the state action be stayed pending the results of the federal claim.[366] The Court explains that the tolling provision allows the plaintiff to file a state law claim in federal court without having to worry that her state law claim will later be time-barred.[367] This factor should provide comfort to the plaintiff seeking to file in federal court. If her claim is later dismissed by the federal court, she can then re-file her claim in state court. However, there are some important considerations that both plaintiffs and defendants should note before making any choices.

a. implications on forum shopping and the constitutionality of section 1367(d)

In *Jinks*, the Court found that subsection (d) is constitutional as applied to political subdivisions and non-state defendants.[368] Therefore, post-*Jinks*, a plaintiff who decides to file a supplemental claim in federal court against a non-state defendant can feel more secure that her claim will not be lost if the court decides to dismiss it. Stated more accurately, a plaintiff no longer has to worry whether the subsection will apply if her state claim is later dismissed for lack of supplemental jurisdiction.

However, if a plaintiff is filing a suit against a state actor in federal court, she must be careful as her claim may expire while pending, and she may not be able to seek recourse in subsection (d).[369] If the court dismisses her supplemental claim on Eleventh Amendment grounds, she is without recourse.[370] However, if she can show that the defendant consented to suit, she will be able to assert her claim in state court and the tolling provision will apply.[371] Therefore, it is important for a state actor defendant who is sued in state court to think twice before removing the case to federal court, as this action may be interpreted as consenting to suit.[372]

366. *Jinks*, 123 S. Ct. at 1671–72.
367. *Id.* at 1672.
368. *Id.*
369. *See* Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002).
370. *Id.*
371. *Id.*
372. Oleski v. Dep't of Pub. Welfare, 822 A.2d 120, 126–27 & n.5 (Pa. Commw. Ct. 2003).

b. the implications of the scope of section 1367(d) on forum selection

In determining whether to bring an action in the federal forum, the plaintiff should consider what may happen to her claim if it is dismissed from the federal court for a reason other than lack of jurisdiction. However, the plaintiff should also consider her choices such as voluntarily dismissing her suit and re-filing in state court. If a court reads the provision as applying to the voluntary dismissals, this may afford a plaintiff ammunition as she may voluntarily dismiss the state law claim in fear of losing it; this might be especially helpful if the defendant is the one to remove the case as she may dismiss a part of her claim that she knows would have an unfavorable result in federal court, but a favorable one in state court. However, few courts have decided this issue, so the only plaintiff who might be secure with this gamble is the plaintiff in Florida, where *Blinn* was decided.