Florida Law Review

Volume 31 | Issue 2 Article 8

January 1979

Federal Civil Procedure: Limiting Ancillary Jurisdiction

J. Renee Kastanakis

As government strives to apply its extended powers to resolve today's complex problems, legislators should remember Justice Holmes' statement in *Pennsylvania Coal*:[96] "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." The instant case indicates that by augmenting regulation with conciliation designed to ensure the protection of private property, government is provided with a new means by which to pay the constitutional price of promoting the common good.

IRA PAULL

FEDERAL CIVIL PROCEDURE: LIMITING ANCILLARY JURISDICTION

Owen Equipment & Erection Co. v. Kroger, 98 S. Ct. 2396 (1978)

Respondent, a citizen of Iowa,[1] brought a wrongful death action[2] against a Nebraska corporation, Omaha Public Power District (OPPD),[3] in federal district court basing jurisdiction on diversity of citizenship.[4] OPPD filed a third-party complaint[5] against petitioner.[6] The court permitted respondent to amend

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is an unreasonable exercise of the state's police power constituting a taking without just compensation, the court shall remand the matter to the agency which shall, within a reasonable time: (1) Agree to issue the permit; or (2) Agree to pay appropriate monetary damages, provided however, in determining the amount of compensation to be paid, consideration shall be given by the court to any enhancement to the value of the land attributable to governmental action; or (3) *Agree to modify its decision to avoid an unreasonable exercise of police power.*" 1978 Fla. Laws ch. 78-85, §3 (emphasis supplied).

96. 260 U.S. 393, 416 (1922).

1. 98 S. Ct. 2396, 2399 (1978).

2. *Id.* at 2399. Respondent's husband was electrocuted in the course of his employment when the boom of a steel crane came in contact with high-tension electric power lines operated by OPPD. The crane was owned by petitioner, Owen Equipment and Erection Company.

3. OPPD, a public corporation established under the laws of Nebraska, has its principal place of business in Omaha. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 428-29 (8th Cir. 1977). For diversity suit purposes, this makes OPPD a citizen of Nebraska. See note 4 *infra*.

4. 28 U.S.C. §1332 (1970), *as amended by* Act of Oct. 21, 1976. Pub. L. No. 94-583, §3, 90 Stat. 2891 (1976), which governs federal court jurisdiction in diversity suits, provides that: "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between — (1) citizens of different states; . . . (c) For the purpose of this section . . . a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . ."

5. The third-party complaint was filed pursuant to FED. R. CIV. P. 14(a). In part, that rule states: "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." See text accompanying notes 31-35 *infra*, concerning the purpose behind rule 14.

her complaint under Rule 14 of the Federal Rules of Civil Procedure[7] to make petitioner an additional defendant. Before trial OPPD moved for and was granted summary judgment,[8] leaving petitioner and respondent the only parties to the suit. On the third day of trial, testimony[9] established that Iowa was petitioner's principal place of business.[10] Petitioner moved for dismissal, challenging the court's jurisdiction over the action on the basis of non-diversity.[11] The district court denied the motion, ruling that an independent basis of jurisdiction was not necessary for a plaintiff to bring a claim against a Rule 14 third-party defendant.[12] The court of appeals affirmed.[13] The Su-

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This rule 14(a) impleader action should be distinguished from the interpleader action, rule 22(1), which provides in part: "Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability," and from 28 U.S.C. §1335 (1976) (statutory interpleader).

6. OPPD's third-party complaint alleged that petitioner's negligence proximately caused the death of respondent's husband. After a 1948 amendment to rule 14(a), defendants could no longer implead parties who might be liable to the plaintiff unless they were also derivatively liable to the original defendant. Advisory Committee Report, 5 F.R.D. 433, 446 (1946). The complaint failed to allege petitioner's liability to OPPD, but petitioner never challenged the complaint's validity. 98 S. Ct. at 2400 n.3.

7. FED. R. CIV. P. 14(a) further provides that a "plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. . . ."

8. 98 S. Ct. at 2400 n.4, *see* Kroger v. Omaha Pub. Power Dist., 523 F.2d 161, 164 (8th Cir. 1975). As a matter of law the district court found that OPPD owed no duty to respondent's deceased husband because it did not own or maintain the electric lines.

9. Kroger v. Owen Equip. & Erection Co., 558 F.2d at 419.

10. 98 S. Ct. at 2400 n.5. The Missouri River, which marks the boundary between Iowa and Nebraska, had shifted so that petitioner's main office, once located within Nebraska, was currently situated in Carter Lake, Iowa. For purposes of diversity actions, petitioner was thus a citizen of Iowa.

11. 98 S. Ct. at 2400. See note 4 *supra.*

12. Kroger v. Owen Equip. & Erection Co., 558 F.2d at 419, citing Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486 (D. Neb. 1965) (ancillary jurisdiction exercised over a third-party defendant's claim asserted against a non-diverse plaintiff); Olson v. United States, 38 F.R.D. 489 (D. Neb. 1965) (following the minority view, independent jurisdiction not needed for a plaintiff to assert a nonfederal claim against a non-diverse third-party defendant pursuant to rule 14). See text accompanying notes 31-35 and notes 43-45 *infra.*

13. Kroger v. Owen Equip. & Erection Co., 558 F. 2d at 428. The Eighth Circuit agreed that the trial court had the discretionary power to exercise jurisdiction over the claim due to the doctrine of ancillary jurisdiction and the Supreme Court's decision in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). 558 F.2d at 424-27. For a discussion of the *Gibbs* decision, see text accompanying notes 46-52 *infra.* The court also held that petitioner, by not properly denying its Nebraska citizenship, was estopped from asserting abuse of discretion by the trial court. 558 F.2d at 427.

Ancillary jurisdiction of the federal courts "generally involves either proceedings which are concerned with pleadings, processes, records or judgments of court in principal case or proceedings which affect property already in court's custody. The ancillary process must be to aid, enjoin, or regulate original suit and prevent relitigation in other courts of issues heard and adjudged in such suit." BLACK'S LAW DICTIONARY 112 (rev. 4th ed. 1968). Use of ancillary jurisdiction has expanded beyond this definition. "Ancillary jurisdiction is a broader concept [than pendent jurisdiction] allowing a court to acquire control of an

preme Court granted certiorari,[14] reversed, and HELD, in a diversity suit, a federal court lacks the power to hear a plaintiff's claim against a third-party defendant without an independent basis of jurisdiction over that claim.[15]

Article III of the Constitution[16] and federal statutes[17] delineate the extent of original jurisdiction of the federal courts. During the nineteenth century the courts developed ancillary jurisdiction in equity[18] in order to expand their power to cover supplementary claims, typically involving additional parties over which the court lacked an independent basis of jurisdiction. The first cases developing this jurisdictional doctrine allowed nondiverse claimants to intervene in federal actions when necessary to protect their interests in assets disputed in the principal action which were within the court's court.[19]

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entire controversy, both the claims and additional parties, where it has no independent jurisdiction of one or more parties." Jacobs v. United States, 367 F. Supp. 1275, 1277 (D. Ariz. 1973). See text accompanying note 25 *infra*, for further explanation of the expansion of the doctrine; see note 46 *infra*, for a discussion of pendent jurisdiction.

14. 98 S. Ct. at 2399. The Court granted certiorari because of a conflict among the circuits. The Eighth Circuit in the instant case allowed plaintiff's claim against the third-party to stand without an independent basis of jurisdiction. Kroger v. Owen Equip. & Erection Co., 558 F.2d at 424-26. The Supreme Court noted contrary opinions, 98 S. Ct. at 2399 n.1: Fawvor v. Texico, Inc., 546 F.2d 636 (5th Cir. 1977) (strictly construing rule 14 in conjunction with the diversity statute, 28 U.S.C. §1332, and dismissing plaintiff's complaint against a nondiverse third-party defendant); Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976) (holding that the district court had abused its discretion in hearing plaintiff's claim against a nondiverse third-party defendant after plaintiff and the original defendant had settled before trial).

15. 98 S. Ct. at 2405 n.21. After the Supreme Court reached this result there was no need to consider the Eighth Circuit's holding as to the issue of estoppel. See note 13 *supra*.

16. U.S. CONST. art. III, §2, cl. 1 provides federal courts with original jurisdiction over "all cases, in law and equity, arising under this Constitution, the Laws of the United States, and treaties. . . ." It also extends judicial power to "controversies between two or more States, between a State and citizens of another State, between citizens of different States . . . ." For an interpretation of this constitutional limitation on diversity jurisdiction see note 33 *infra*.

17. 28 U.S.C. §1331 grants federal courts original jurisdiction over federal question claims, and 28 U.S.C. §1332 grants jurisdiction over diversity actions. See note 4 *supra*.

18. Freeman v. Howe, 65 U.S. (24 How.) 450 (1861). This ancillary suit was a replevin action by the defendants against the marshall who had custody over their attached property. Defendants and the marshall had common citizenship and no federal question was raised. *Accord*, Stewart v. Dunham, 115 U.S. 61 (1885), where the court did not need independent jurisdiction over additional creditors of defendant when the creditors joined the suit as co-claimants.

19. Thus, in Fulton Nat'l Bank v. Hozier, 267 U.S. 276, 280 (1925), the Court was confronted with a controversy concerning property; because the property claimed had not been impounded there was no power of ancillary jurisdiction over the additional creditors' claims. See cases cited in note 18 *supra* and Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921) in which the Court allowed co-citizens of defendant to be joined in a class action questioning the disposition of a trust fund. Because the decree would bind all members, regardless of citizenship, the Court granted ancillary jurisdiction. *See also* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §1444 (1971) (ancillary jurisdiction originally employed as matter of necessity, such as with ownership of property). *But see* Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329 (1887) (ancillary jurisdiction exercised with no property before the court, although assets were the subject of litigation);

The Supreme Court decision in *Moore v. New York Cotton Exchange*[20] enabled lower federal courts to adjudicate a defendant's compulsory counterclaim without independent jurisdiction although the original federal question claim was dismissed on its merits.[21] The basis of the Court's jurisdictional decision in *Moore* was a Federal Equity Rule;[22] however, the holding provided the underlying precedent for future expansions of the doctrine of ancillary jurisdiction.[23]

In 1938, the Federal Rules of Civil Procedure were adopted with provisions encouraging joinder of parties and claims.[24] To further extend their jurisdictional powers, the courts began applying ancillary jurisdiction in connection with the Federal Rules and multiparty actions.[25] Rule 14 of the Federal Rules provides that defendants, as third-party plaintiffs, can implead third-party defendants,[26] but the rule does not grant original jurisdiction over

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Partridge v. Phoenix Mutual Life Ins. Co., 82 U.S. (15 Wall.) 573 (1872) (ancillary jurisdiction exercised over set-off claim, with no property before the court).

20. 270 U.S. 593 (1926). Plaintiff's federal question claim against the Cotton Exchange alleged violation of the Sherman Antitrust Act. The Exchange, with the same citizenship as the plaintiff, asserted a nonfederal compulsory counterclaim against the plaintiff.

21. *Id.* at 608. The Court disputed the plaintiff's claim that the original bill was dismissed for lack of jurisdictional facts. The argument that the original claim was dismissed on its merits is similar to the "substantial" federal claim requirement discussed in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). See note 49 *infra* and accompanying text.

22. Under Federal Equity Rule 30 there were two types of counterclaims: those "arising out of the transaction which is the subject matter of the suit" (*compare* with FED. R. CIV. P. 13(a) compulsory counterclaims) and those "which might be the subject of an independent suit in equity." It was clear to the courts that under the rule the first type of counterclaim did not require an independent basis of federal jurisdiction. *See generally* 4 WIS. L. REV. 43 (1926).

23. *See* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 762 n.23 (1972) (ancillary jurisdiction assumed its present importance with the *Moore* decision); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265, 268 (1971) (*Moore* was the foundation of the expansion of ancillary jurisdiction).

24. *See* FED. R. CIV. P. 18 (which provides for joinder of claims against an opposing party and joinder of remedies); FED. R. CIV. P. 13 (counterclaim and cross-claim); FED. R. CIV. P. 14 (third-party practice; see note 5 *supra*); FED. R. CIV. P. 19 (joinder of persons needed for just adjudication); FED. R. CIV. P. 20 (permissive joinder of parties); FED. R. CIV. P. 22 (interpleader; see note 5 *supra*); FED. R. CIV. P. 23 (class actions); FED. R. CIV. P. 24 (intervention); FED. R. CIV. P. 42 (consolidation of separate trials and severance of joined actions). *See also* United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."). Comment, *Federal Jurisdiction—Ancillary Jurisdiction—Although Both Original Diverse Defendants Are Dismissed Prior to Trial, Trial Court Has Discretion to Retain Ancillary Jurisdiction Over Plaintiff's Claim Against Third-Party Defendant Asserted Under Rule 14 of the Federal Rules of Civil Procedure*, 46 GEO. WASH. L. REV. 416, 425 (1978) (where the author makes note of the rules' liberal provisions for joinder of parties and claims).

25. *E.g.*, Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960) (intervention by right); Glens Falls Indem. Co. v. United States, 229 F.2d 370 (9th Cir. 1956) (cross-claim); Lankford v. Ryder Truck Sys., Inc., 41 F.R.D. 430 (D. S.C. 1967) (impleader); Heintz & Co. v. Provident Tradesman Bank & Trust Co., 30 F.R.D. 171 (E.D. Pa. 1962) (third-party defendant's claim against original plaintiff).

26. See note 5 *supra* for provisions of rule 14.

the impleader actions.[27] Courts have consistently claimed ancillary jurisdiction over third-party complaints without an independent basis of jurisdiction between the third-party plaintiff and third-party defendant.[28] Rule 14 also provides for original plaintiffs to assert complaints against third-party defendants,[29] but courts have been divided in their application of ancillary jurisdiction to these actions.[30]

Prior to March, 1948, Rule 14 allowed a defendant to join third parties who were allegedly liable to the plaintiff for the claim asserted against the defendant.[31] The Second Circuit Court of Appeals in *Friend v. Middle Atlantic Transportation Co.*[32] held that although such joinders were convenient, the boundaries placed on federal jurisdiction[33] precluded joinder when the third-

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27. FED. R. CIV. P. 82 states that the Rules should not be read to extend or limit jurisdiction of federal courts. *See* Snyder v. Harris, 394 U.S. 332, 337-38 (1969) (interpretation of jurisdictional statute cannot be changed by the Rules).

28. *E.g.*, Stemler v. Burke, 344 F.2d 393 (6th Cir. 1965); Dery v. Wyler, 265 F.2d 804, 808 (2d Cir. 1959) (ancillary jurisdiction over third-party complaint survived settlement of original claim because subsequent events should not change jurisdictional prerequisites satisfied at the beginning of the suit); Sheppard v. Atl. States Gas Co. of Pa., 167 F.2d 841 (3d Cir. 1948). *See* 1A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §424 (1960) (third-party claim by defendant against third person liable to him for all or part of the original claim in the suit clearly is involved closely in the subject matter of the original action).

29. See note 7 *supra.*

30. See the majority and minority cases and their respective rationales in notes 39-45 *infra* and accompanying text.

31. Advisory Committee Report, 5 F.R.D. 433, 446 (1946) (original language and 1948 amendment, see text accompanying note 36 *infra*). For amended language of rule 14 see note 5 *supra.*

32. 153 F.2d 778 (2d Cir. 1946). A citizen of Connecticut sued a New York corporation and an Ohio citizen for damages in an auto accident. Defendants removed the suit from the Connecticut state court to federal court and joined another Connecticut citizen to answer to plaintiff's claim. Plaintiff's complaint was subsequently amended to assert a negligence claim against the third-party defendant. The court recognized that ancillary jurisdiction may have been used if contribution between joint tortfeasors had been involved. Contribution, however, was not allowed in Connecticut; therefore, the court viewed the plaintiff's claim against the third-party defendant as a joint claim with the others and held that ancillary jurisdiction could not be applied. *Id.* at 780.

33. The boundaries placed on federal jurisdiction by Congress which are relevant in this case are 28 U.S.C. §1332 and FED. R. CIV. P. 82. See note 4 *supra* concerning 28 U.S.C. §1332, which has consistently been interpreted as requiring complete diversity between all plaintiffs and all defendants. Complete diversity is not constitutionally mandated. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (case which laid down the "complete diversity" rule subsequently incorporated in 28 U.S.C. §1332). *Accord*, American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951) (plaintiff's claim against several defendants, one of which was nondiverse, remanded to state court because federal court jurisdiction is carefully guarded against expansion); Seyler v. Steuben Motors, Inc., 462 F.2d 181 (3d Cir. 1972) (doctrines of ancillary and pendent jurisdiction did not apply when plaintiff brought diversity action against several defendants, one of whom was a co-citizen of plaintiff); 3A MOORE'S FEDERAL PRACTICE §22.04 at 22-24 (2d ed. 1948). *Cf.* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) (because complete diversity is not a constitutional requirement minimum diversity required for interpleader actions is adequate). See notes 5 & 16 *supra.*

See rule 82, note 27 *supra. But see* Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.,

party defendant and the plaintiff were co-citizens. A number of federal district courts[34] felt that the *Friend* holding would impair Rule 14's practical effect,[35] which was to avoid circuitous action and multiple lawsuits. Therefore, they allowed joinder of third-party defendants under the doctrine of ancillary jurisdiction.

Rule 14 was amended in 1948 so that a defendant could no longer implead third parties who may be liable only to the plaintiff.[36] The drafters of the amendment felt that in any case in which the plaintiff could not have originally joined the third party due to lack of jurisdiction, the plaintiff should not be allowed to add a claim against a third party by amending the complaint.[37] The majority of courts[38] have followed this view, denying ancillary jurisdiction over plaintiff-third-party defendant claims for several reasons: first, plaintiffs should not be allowed to do indirectly what they could not do directly;[39] second, there is a possibility of collusion between plaintiffs and cooperative original defendants;[40] third, federal dockets are so

426 F.2d 709, 717 (5th Cir. 1970) (ancillary jurisdiction over rule 14 type claims existed before codification of the Federal Rules, and rule 82 took this fact into consideration); Note, *supra* note 23 at 277 (mere broadening in scope of a single action properly before court does not expand jurisdiction and therefore does not exceed rule 82).

34. *E.g.*, Kelly v. Oklahoma Nat. Gas Co., 11 Fed. R. Serv. 14a 62, Case 8, 215 (W.D. Okla. 1948); Myer v. Lyford, 2 F.R.D. 507 (M.D. Pa. 1942) (joinder allowed to dispose of entire case on its merits at one trial); Malkin v. Arundel Corp., 36 F. Supp. 948 (D. Md. 1941) (ancillary jurisdiction recognized over third-party complaint and then plaintiff required to amend complaint against nondiverse third-party defendant as joint tortfeasor with original defendant); Skylar v. Hayes, 1 F.R.D. 594 (E.D. Pa. 1941).

35. *See* Fraser, *Ancillary Jurisdiction and Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 27 (1963) (Federal Rules of Civil Procedure were invoked to prevent piecemeal litigation); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 32 (1968) (critical collision occurs between *Strawbridge* complete diversity requirement and liberal joinder philosophy of Federal Rules of Civil Procedure encouraging judicial economy); Note, *supra* note 23, at 265 (effectiveness of rule 14 device would be undermined if the traditional diversity requirement is strictly applied).

36. Advisory Committee Report, 5 F.R.D. 433, 446 (1946).

37. *Id.* at 447.

38. *E.g.*, Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398 (W.D. Pa. 1969) (majority view, but even if the matter had been within the discretion of the court, the claim would have been denied due to confusion caused to the jury); Corbi v. United States, 298 F. Supp. 521 (W.D. Pa. 1969) (following majority view; see text accompanying notes 39-42 *infra*).

39. McPherson v. Hoffman, 275 F.2d 466, 470 (6th Cir. 1960) (plaintiff could not have sued nondiverse third-party defendant in federal court). *Accord*, Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir.), *cert. denied sub. nom.*, Rosario v. United States, 429 U.S. 857 (1976); Palumbo v. Western Md. Ry., 271 F. Supp. 361 (D. Md. 1967). *But see* 3 MOORE'S FEDERAL PRACTICE §14.27(1) at 570-71 (2d ed. 1974); Fraser, *supra* note 35, at 38.

40. The fear is that plaintiff could find a diverse "friendly" defendant who would agree to implead a nondiverse third-party defendant whom the plaintiff could not otherwise sue in federal court. *See, e.g.*, Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., 512 F.2d 890, 893-94 (4th Cir. 1972), *citing* Heintz & Co. v. Provident Tradesman Bank & Trust Co., 30 F.R.D. 171 (E.D. Pa. 1962) (although no collusion would exist when third-party defendant brings a claim against the original plaintiff, court foresees possibility of collusion if plaintiff is allowed to amend complaint to bring claim against resident third-party de-

overburdened that they should not contend with litigation that belongs in state court;[41] and finally, Rule 82 forbids expansion of federal court jurisdiction through the use of the Federal Rules of Civil Procedure.[42]

A minority of courts,[43] however, used ancillary jurisdiction to entertain such claims without an independent basis of jurisdiction. These courts found no express provisions in Rule 14 requiring an independent basis for jurisdiction[44] and felt that the possibility of collusion in some cases should not prevent the use of ancillary jurisdiction in all cases.[45]

Distinguishable from ancillary jurisdiction is the concept of pendent jurisdiction,[46] which grants a federal court power to hear the plaintiff's state claim along with a federal claim already before the court. The Supreme

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fendant). *But see* 3 MOORE'S, *supra* note 39, at §14.27(1) (because of 1948 amendment to rule 14, defendant can no longer implead on theory of liability to plaintiff, diminishing chances of collusion); Note, *supra* note 23, at 275 (number of actions where collusion would actually occur would be small and 28 U.S.C. §1359 (1964) was enacted to provide courts with authority to dismiss these cases).

41. Ayoub v. Helm's Express, Inc., 300 F. Supp. 473 (W.D. Pa. 1969) ("convenience and saving of time" could be accomplished as a matter of right in one suit in state courts). *See* Frank, *Let's Keep Diversity Jurisdiction*, 9 FORUM 157 (1973) (only reason for the American Law Institute proposal to limit diversity jurisdiction in federal courts is to lighten case load). See note 89 *infra* for a discussion of the ALI proposal.

42. See notes 27 and 33 *supra*. *But see* 3 MOORE'S, *supra* note 39, at §14.27(1) (rule 14 does not expand jurisdiction but merely provides opportunity for full exercise of ancillary jurisdiction in additional situations).

43. *E.g.*, Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972) (state claim of plaintiff against third-party defendant was so intertwined with a claim under the Federal Tort Claims Act that the court exercised its power of pendent jurisdiction, although this appropriately was an ancillary claim). For other minority view cases see notes 44-45 *infra*. *See also* Holtzoff, *Entry of Additional Parties in a Civil Action*, 31 F.R.D. 101, 110 (1963) (majority view may frustrate some beneficial aspects of third-party practice).

44. *E.g.*, Buresch v. American La France, 290 F. Supp. 265 (W.D. Pa. 1968) (discretionary power of court to exercise ancillary jurisdiction extends to a plaintiff/third-party defendant claim). *Accord*, CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975). The plaintiff in *CCF Indus. Park* sued a heating system manufacturer in a products liability action to recover damages from fire. The manufacturer filed a third-party complaint against the installer of the heating system. The court subsequently allowed the plaintiff to file the same complaint against the third-party defendant.

45. *E.g.*, Olson v. United States, 38 F.R.D. 489 (D. Neb. 1965) (each case should be viewed individually and the plaintiff/third-party defendant claim barred only if collusion actually exists). *Accord*, Morgan v. Serro Travel Trailer Co., Inc., 69 F.R.D. 697 (D. Kan. 1975) (no hint of collusion in this case and ancillary claim allowed to serve the "ends of justice"). See note 40 *supra*.

46. Pendent jurisdiction occurs when "[o]riginal jurisdiction resting under federal claim extends to any nonfederal claim against same defendant if the federal question is substantial and the federal and nonfederal claims constitute a single cause of action." BLACK'S LAW DICTIONARY 1290 (rev. 4th ed. 1968). For further explanation of pendent jurisdiction *see* United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (see text accompanying notes 47-52 *infra*); Hurn v. Oursler, 289 U.S. 238 (1933) (federal claim based on copyright laws was dismissed and pendent jurisdiction was invoked to hear state claim for unfair business practices and competition); Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824) (the act of incorporation of the Bank gave federal courts jurisdiction over suits by and against the Bank, and the pendent state claims were against the bank officers as individuals).

Court in *United Mine Workers v. Gibbs*[47] upheld an expanded concept of pendent jurisdiction by deciding a state law claim against the defendant although the main federal claim against the same party had been dismissed after trial. The Court set forth a flexible test[48] for determining when a court could hear state claims asserted in conjunction with a "substantial"[49] federal claim: if both the federal and state claims against a party before the court derive from a common nucleus of operative facts, and if they would ordinarily be tried in a single proceeding, the court has power to hear the state claim.[50] According to *Gibbs*, pendent jurisdiction over the state claim is a matter left to the court's discretion in light of considerations of judicial economy, convenience, and fairness to the litigants.[51] The Court suggested that if the federal claim were dismissed before trial, an abuse of discretion would occur if the state claim were not also dismissed.[52]

Several district courts read the *Gibbs* decision broadly as indicative of a trend,[53] the intent of which would permit federal courts to hear both pendent

47. 383 U.S. 715 (1966). Plaintiff's federal claims against the union for the secondary boycott and for interference with his contracts of employment and haulage were brought under §303 of the Labor Management Relations Act, 29 U.S.C. §187 (1947). His state law claim asserted unlawful conspiracy and an unlawful boycott, based on the common law of Tennessee. 383 U.S. at 717-20. The trial court sustained defendant's motion for judgment notwithstanding verdict on the federal claim and ordered a remitted award on the state law claim. Gibbs v. United Mine Workers, 220 F. Supp. 871, 880-81 (E.D. Tenn. 1963), *aff'd*, 343 F.2d 609 (6th Cir. 1965).

48. *Compare Gibbs with* Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 191-92 (1909) (if based on a federal question which is raised in good faith and not merely colorable, the court has the right to hear all questions in the case) and Hurn v. Oursler, 289 U.S. 238, 245 (1933) (if two grounds are presented in support of a single cause of action, only one of which presents a federal question, the court may retain the nonfederal ground as long as the federal question is not wanting in substance).

49. See note 47 *supra*. See Note, UMW v. Gibbs *and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 659 (1968) (substantialness of federal claim means a federal court would ordinarily assume jurisdiction over it).

50. United Mine Workers v. Gibbs, 383 U.S. at 725. See 3 MOORE'S, *supra* note 39, at §14.27(1) (*Gibbs* reemphasizes a fundamental principle that the federal courts have jurisdictional power to adjudicate the whole case).

51. 383 U.S. at 726.

52. *Id. Accord*, Iding v. Anaston, 266 F. Supp. 1015 (N.D. Ill. 1967) (declined to exercise pendent jurisdiction over an unfair competition claim based on state law after dismissal of main claim, relying on *Gibbs*); Stone v. Local 29, Int'l Bd. of Boilermakers, 262 F. Supp. 961 (D. Mass. 1967) (court dismissed first count of action and therefore dismissed pendent count, citing *Gibbs*). *But see* Rosado v. Wyman, 397 U.S. 397 (1970) (mootness of the federal claim should only be a factor affecting the court's discretion, not its power, to retain a pendent claim); Arizona v. Cook Paint & Varnish Co., 541 F.2d 226, 227 (9th Cir.), *cert. denied*, 430 U.S. 915 (1976) (whether court should entertain pendent claims after dismissal of federal claim is question of discretion, not power); 3 MOORE'S, *supra* note 39, at §14.27(1) (according to most subsequent cases this statement in *Gibbs* was mere dictum; dismissal of original claim before trial is only one factor for the court to consider in using its discretion).

53. Davis v. United States, 350 F. Supp. at 208 ("[t]o read *Gibbs* to apply only to situations wherein there is one plaintiff and one defendant having two claims between them . . . is to destroy the spirit of the case"); Buresch v. American La France, 290 F. Supp. at 266 (court found no express provision in rule 14 requiring diverse citizenship between a plaintiff and a third-party defendant against whom the plaintiff asserts a claim).

and ancillary claims falling within the limits of the "nucleus of operative facts" test.[54] Due to the doctrinal similarities between pendent and ancillary jurisdiction, and judicial confusion of the two concepts,[55] the expansion of pendent jurisdiction thus spurred an additional expansion of ancillary jurisdiction.[56]

Adding to the confusion between ancillary jurisdiction and pendent jurisdiction, the Supreme Court applied the hybrid concept of "pendent-party" jurisdiction[57] in *Aldinger v. Howard*.[58] In *Aldinger*, the plaintiff wished to join an additional nondiverse party as a defendant for the purpose of asserting a state law claim arising from a nucleus of operative facts common to the federal and state claims.[59] The nonfederal complaint requiring new

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54. Davis v. United States, 350 F. Supp. at 208. See text accompanying note 50 *supra*.

55. *See, e.g., id.* at 207 (proper to apply doctrine of pendent jurisdiction to a plaintiff's ancillary claim against a third-party defendant); Buresch v. American La France, 290 F. Supp. at 266 ("to deny pendent jurisdiction would defeat the raison d'etre of ancillary jurisdiction"); Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486, 489 (D. Neb. 1965) ("it is the feeling of this court that the concept of ancillary or pendent jurisdiction is soundly and justifiably applied in an instance such as this"). *See also* Note, *Jurisdictional Requirements for Plaintiff's Claim Against Impleaded Third Party Defendant*, 26 U. KAN. L. REV. 493, 495 (1978) (*Gibbs* decision could be applied to ancillary or pendent jurisdiction due to doctrinal similarities).

56. *E.g.*, CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259, 1260-61 (E.D. Pa. 1975) (in allowing plaintiff's negligence claim against a nondiverse third-party defendant, the court joined other jurisdictions in holding that the exercise of ancillary jurisdiction was permissible under the discretionary powers of federal courts). For further examples, see note 52 *supra*. *See also* Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968) (ancillary jurisdiction expanded to cover claim which lacked requisite jurisdictional amount or value); Baker, *supra* note 23 at 763 (*Gibbs* expansion equally applicable to ancillary jurisdiction). *But see* Comment, *Federal Courts—Jurisdiction—Eighth Circuit Court of Appeals Holds Ancillary Jurisdiction Supports Plaintiff's Claim Against Impleaded Non-Diverse Third Party Defendant*, 11 CREIGHTON L. REV. 631, 641 (1977) (*Gibbs* holding arguably limited to exercise of pendent jurisdiction over federal question claims).

57. "Pendent-party" jurisdiction was developed by superimposing the doctrine of pendent jurisdiction (involving additional claims) upon the doctrine of ancillary jurisdiction (involving additional parties) in order to assert a pendent state law claim against one not already a party to the jurisdiction-conferring claim. *See* Comment, Aldinger v. Howard *and Pendent Jurisdiction*, 77 COLUM. L. REV. 127, 136 (1977); *Recent Developments: Pendent Jurisdiction Against Additional Parties*, 41 ALB. L. REV. 389, 395 (1977). "Pendent-party" jurisdiction was introduced by lower federal courts following the *Gibbs* expansion of the pendent jurisdiction doctrine. *E.g.*, Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); Hartridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Conn. Gen. Life Ins. Co. v. Craton, 405 F.2d 41 (5th Cir. 1968). The Supreme Court had recognized "pendent-party" jurisdiction in Moor v. County of Alameda, 411 U.S. 693 (1973), but was not required to decide the issue of judicial power over such claims because it decided that the lower court had properly exercised its discretion by dismissing the case. *See also* Jacobs v. United States, 367 F. Supp. 1275, 1277 (D. Ariz. 1973) (hybrid "pendent-party" may confuse the semantic distinctions of earlier cases).

58. 427 U.S. 1 (1976).

59. *Id.* at 13. For an explanation of the *Gibbs* test see text accompanying note 50 *supra*. Petitioner had been discharged from her job with respondent county treasurer because of her alleged cohabitation with her boyfriend. She claimed her discharge violated her constitutional rights and filed a complaint under the Civil Rights Act of 1871, 42 U.S.C. §1983. Her state claim requested both an injunction restraining her dismissal and damages

parties to be called into court was viewed in *Aldinger* as a "more serious obstacle" to a justifiable application of pendent jurisdiction[60] than the state claim in *Gibbs*, which was litigated by parties already properly before the federal court.

The *Aldinger* court added a statutory criterion to the *Gibbs* threshold:[61] the posture in which the pendent claim is asserted[62] must be studied along with the statutory language to assure that Congress did not intend to deny the courts power to hear such a claim.[63] The original claim in *Aldinger* arose under a federal civil rights statute.[64] The Court found that Congress, by the language of that statute, intended to exclude the specific pendent party in question[65] from the Court's jurisdiction.

Conflicting decisions continued among the circuits[66] involving ancillary jurisdiction over plaintiffs' claims against nondiverse third-party defendants. The Sixth Circuit Court of Appeals[67] refused to adopt a rule precluding ancillary jurisdiction over the plaintiff's claim until the Supreme Court ruled on the issue, and merely held that the lower court had abused its discretion in retaining an ancillary claim. In 1977, the Eighth Circuit[68] held that the expansion of pendent jurisdiction in *Gibbs* should be extended to ancillary jurisdiction and that the trial court had the discretion to hear the plaintiff's

for loss of salary. The state claim was brought against the county on the basis of vicarious liability for the tortious conduct of its officials.

60. 427 U.S. at 18. See text accompanying notes 97-99 *infra*, discussing the instant Court's failure to consider this obstacle.

61. See text accompanying note 50 *supra*.

62. 98 S. Ct. at 2404, *citing* Aldinger v. Howard, 427 U.S. at 14. The *Aldinger* court discussed the factual and legal differences from the *Gibbs* situation and noted, in particular, the addition of a party not already properly before the court.

63. Aldinger v. Howard, 427 U.S. at 17. See also Zahn v. International Paper Co., 414 U.S. 291, 294 (1973) (study of congressional intent behind 28 U.S.C. §1332(a) indicates that each separate claim within a class action must meet the jurisdictional amount requirement); Comment, *Federal Jurisdiction: Federal Court Has Power to Hear Rule 14 Claim by Plaintiff Against Nondiverse Third Party Defendant*, 62 MINN. L. REV. 251, 261 (1978) (Congress had not spoken on federal jurisdiction over pendent state law claims; hence, the *Gibbs* Court was free to look only to constitutional limitations).

64. 42 U.S.C. §1983.

65. 42 U.S.C. §1983 provides that: "Every person who, under color of any statute, . . . subjects or causes to be subjected . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." The Court, looking to the intent of Congress, found counties to be excluded from the "persons" subject to the statute. The Court further held that the statute conferring jurisdiction, 28 U.S.C. §1343(3), should be construed using the same restrictions as the substantive cause of action. 427 U.S. at 16-17.

66. Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977) (expressing majority view of courts and dismissing ancillary claim for lack of diversity jurisdiction); Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir. 1976) (majority view applied where principal claim was federal question brought under Federal Tort Claims Act). *But see* Arizona v. Cook Paint & Varnish Co., 541 F.2d 226 (9th Cir.), *cert. denied*, 430 U.S. 915 (1976) (expressing minority view that although federal claim was dismissed before trial, court's decision to retain state claim was within its discretionary power).

67. Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976).

68. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417 (8th Cir. 1977), *rev'd*, 98 S. Ct. 2396 (1978).

claim against a co-citizen third-party defendant even though the main claim had been dismissed prior to trial.[69]

In the instant case, the Supreme Court, although differentiating between pendent jurisdiction in *Gibbs* and ancillary jurisdiction in the case at hand,[70] viewed these doctrines as being generally related to the single problem of determining under what circumstances federal courts may entertain state law claims litigated between nondiverse parties.[71] Because the Court perceived this relationship between the doctrines, it assumed[72] the *Gibbs* test for pendent jurisdiction to be the constitutional minimum required to exercise federal judicial power under both pendent and ancillary jurisdiction. In addition, the majority required application of the *Aldinger* statutory test[73] before conferring jurisdiction upon the court. Applying this test, the Court noted that the federal statute[74] granting jurisdiction over the main claim in the instant case has consistently been interpreted to require complete diversity,[75] and that to allow jurisdiction over respondent's claim against petitioner would destroy complete diversity. The Court refused to allow circumvention of complete diversity, reasoning that to hold otherwise would only serve to encourage plaintiffs to sue any diverse defendants in federal courts and wait for the defendants to implead the nondiverse opponents.[76]

Justice White, dissenting,[77] criticized the majority's expansion of both the complete diversity requirement[78] and the expressly limited holding in *Aldinger*.[79] In his view, the majority overlooked the distinction made in *Aldinger* between circumstances involving an addition of new parties to the lawsuit and a situation, as in the instant case, where new parties are not joined. Justice White believed that the majority also failed to consider the

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69. See note 52 *supra* and accompanying text for other courts' decisions as to relevancy of dismissal of main claim before trial.

70. 98 S. Ct. at 2401. The Supreme Court, as in *Aldinger*, did not see any need to determine the principal distinctions between pendent and ancillary jurisdiction or the effect these distinctions may have on decisions. *See* Note, *supra* note 23, at 271 (distinction between ancillary and pendent jurisdiction only complicates the question central to both as to when federal judicial power exists over state law claims between nondiverse parties).

71. 98 S. Ct. at 2401.

72. *Id.* at 2401-02. The Eighth Circuit in the instant case applied the *Gibbs* "constitutional minimum" test to the diversity action. However, *Gibbs* involved a federal question claim. The Supreme Court failed to confront this distinction. *Id.* at 2402 n.10.

73. *Id.* at 2402. For a discussion of the *Adlinger* test see text accompanying notes 62-63 *supra*.

74. 28 U.S.C. §1332(a)(1) (1976). See note 4 *supra*.

75. See note 33 *supra*.

76. 98 S. Ct. at 2403. For a discussion of majority view's fear of collusion, see note 40 *supra* and accompanying text.

77. 98 S. Ct. at 2405-08 (White, J., dissenting). Justice Brennan joined in the dissent.

78. *Id.* at 2406. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 n.6 (1967), indicating that *Strawbridge* is not to be given an expansive reading by the Court.

79. 98 S. Ct. at 2406 n.3, *citing* Aldinger v. Howard, 427 U.S. at 18: "[W]e decide here only the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under §§1343(3) and 1983." *See* Note, *supra* note 24, at 422 (recognizing that the Supreme Court checked the expansion of pendent-party jurisdiction in *Aldinger*, but in a limited context).

purposes served by ancillary jurisdiction: convenience, judicial economy, and fairness.[80] The dissent would demand complete diversity only between the plaintiff and the parties that the plaintiff brings to the suit,[81] leaving ancillary jurisdiction to the court's discretion.[82]

The Supreme Court expressed its desire to preserve federal jurisdictional limitations mandated by Congress in the federal diversity statute.[83] Ancillary jurisdiction, however, was judicially created[84] as an expanded interpretation of those congressional jurisdictional limitations in order to allow a greater number of claims and persons into federal courts within a single proceeding. A broad view of the instant holding finds the Supreme Court reversing directions, moving toward a possible expansion[85] of the complete diversity requirement[86] and thereby closing its doors to many state claims. The Court's decision indicates a policy against a diversity jurisdiction framework which allows otherwise nonfederal[87] claims to be brought in federal court through strategic defendant selection. This policy could be used to invalidate other ancillary Rule 14 claims which are joined with principal diversity actions but lack original jurisdictional basis.[88] A trend towards restricting these state claims to the state courts is not unexpected in light of a previous proposal[89]

80. These considerations were recognized in *Gibbs*. See text accompanying note 51 *supra*.

81. 98 S. Ct. at 2408. See text accompanying note 75 *supra* for limitation placed by this Court on *Strawbridge* requirement of complete diversity.

82. *Id.* at 2408 n.7, following *Gibbs*. See text accompanying note 51 *supra*.

83. 28 U.S.C. §1332 (1976). *See* 98 S. Ct. at 2403; C. WRIGHT & A. MILLER, §1444, *supra* note 19, at 221: "The decision [whether or not a court has ancillary jurisdiction] ultimately will be based on a weighing of the court's desire to preserve the integrity of constitutionally based jurisdictional limitations against the desire to dispose of all disputes arising from one set of facts in one action."

84. See notes 18-19 *supra* and accompanying text for a discussion of the development of ancillary jurisdiction. *See* C. WRIGHT & A. MILLER §1444, *supra* note 19, at 218-19 (describing ancillary jurisdiction as ill defined judicially developed concept).

85. 98 S. Ct. at 2406 (White, J., dissenting).

86. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). See note 33 *supra*.

87. The Court defines "nonfederal" claims as those over which there is no independent basis for federal jurisdiction. 98 S. Ct. at 2402 n.11.

88. The other possible rule 14 claims consist of: (1) the original impleader claim, see note 5 *supra*; (2) the third-party defendant's counterclaims against the third-party plaintiff; (3) the third-party defendant's cross-claims against other third-party defendants; and (4) the third-party defendant's claim against the plaintiff, arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. Justice White, dissenting, had difficulty reconciling the majority's strict reading of §1332 which seems to approve of the exercise of ancillary jurisdiction over impleader, cross-claims, and counterclaims. 98 S. Ct. at 2406. The majority opinion, however, could be read as acknowledgment but not approval of past applications of ancillary jurisdiction over these other rule 14 claims. *Id.* at 2404.

89. S. 1876, 92d Cong., 1st Sess. §§1301-1307 (1971); *cf.* 28 U.S.C. §§1332, 1359, 1391, 1401, 1441 (1971) (the Senate bill, a result of the American Law Institute study proposed by the late Chief Justice Earl Warren, would change all of the current statutes in order to limit federal diversity competence). *See* Burdick, *Diversity Jurisdiction Under the American Law Institute Proposals: Its Purpose and its Effects on State and Federal Courts*, 48 N.D. L. REV. 1 (1971) (purpose of proposal was to gain a proper jurisdictional balance between federal and state court systems, assigning to each judicial system those cases most appropriate in light of basic principles of federalism). *Cf.* Frank, *supra* note 41, at 157 (the only reason

by the Court and Congress to limit federal diversity actions. Reasons for these limitations include overcrowded federal dockets[90] and federal-state comity considerations.[91]

Although the Court seems to set an absolute rule governing federal court recognition of ancillary plaintiff-third-party defendant claims, its recognition of the need to consider the context in which the nonfederal claim is asserted[92] may restrict the instant case's precedential value. Although the Court failed to comment on the lower court's dismissal of the original claim before trial,[93] this dismissal may have been the decisive factor in the Court's denying this particular ancillary claim.[94] In his dissent, Justice White noted the possibility of such a narrow holding[95] in expressing his desire to retain the discretionary power of the courts upheld in *Gibbs*.[96]

If the Court had not wanted to limit access to federal courts, it could have reached the opposite result by distinguishing the instant case from *Aldinger*. The *Aldinger* court's emphasis on the great burden raised by bringing a new party into the court[97] would not be applicable to the instant case where the third-party defendant previously had been properly impleaded by the original defendant.[98] Although ignored by the majority, judicial convenience and ex-

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for the proposal was to lighten the federal courts' load, which will necessarily increase the states' load, an undesirable result); Meador, *A New Approach to Limiting Diversity Jurisdiction*, 46 A.B.A.J. 383 (1960) (contending that the answer was to eliminate certain kinds of cases from federal jurisdiction, rather than eliminating diversity jurisdiction); Currie, *supra* note 35, at 7-8 (viewing the purpose of diversity jurisdiction as protecting an outsider from local prejudice, and suggesting that if diversity jurisdiction is retained, it should be used to meet this purpose). *See also* Comment, *supra* note 63, at 259 (offering other evidence of congressional intent to limit federal diversity jurisdiction, such as increasing the jurisdictional amount requirement to $10,000 and imposing dual citizenship on corporations [codified at 28 U.S.C. §§1332(a), (c) (1978)]).

90. *See* 3 MOORE'S, *supra* note 39, at §14.27(1) (although federal dockets are overcrowded, federal courts have the duty to use their conceptual tools to end congestion and dispose of all related claims with the greatest economy and convenience; otherwise, they add to diseconomy and inconvenience of litigants in state courts); Frank, *supra* note 41, at 158 (sole reason for the proposal is overloaded federal dockets).

91. *See* Burdick, *supra* note 89, at 1 (focusing on basic principles of federalism). *Cf.* Frank, *supra* note 41, at 158 (comity should not be a problem because federal interaction with state laws is desirable).

92. See note 62 *supra* and accompanying text for discussion of the Court's recognition of this consideration.

93. For discussion of the effect dismissal may have on ancillary jurisdiction, see note 52 *supra* and accompanying text.

94. The claim being questioned in the instant case was ancillary, rather than pendent, because it was: (1) not asserted along with a federal claim; and (2) not asserted against the original defendant. See definitions of ancillary and pendent jurisdiction, notes 13 and 46 *supra*, respectively.

95. 98 S. Ct. at 2408 n.7: "[T]he majority's concerns . . . could be met on a case-by-case basis, rather than by the absolute rule it adopts."

96. See text accompanying note 51 *supra*.

97. Aldinger v. Howard, 427 U.S. at 18. The new party presents "a more serious obstacle to the exercise of pendent jurisdiction." *Id.* See text accompanying note 60 *supra*.

98. See note 5 *supra* for proper impleader action. In the instant case, the Supreme Court noted that "the petitioner has never challenged the propriety of the third party

penditures of substantial time and money by the parties and the court[99] should have been important considerations in this case. In *Aldinger* these factors were irrelevant because neither the new party nor the new claim had ever been present before the court. In light of these considerations, this case presents an example in which retention of the ancillary claim would appear to be the only appropriate alternative.[100]

The instant case suggests that future questions of federal jurisdiction should be subject to the two-tier analysis used by the Court: first, the parties must meet constitutional minimum requirements; second, statutory jurisdictional requirements must be fulfilled. In taking this approach, the Court failed to differentiate between questions of constitutional and statutory compliance when deciding what factors were proper in determining the existence of jurisdiction. In the case where constitutional minimums are met[101] and the question of jurisdiction depends on statutory interpretation, considerations of judicial economy and fairness to the litigants are legitimate factors to consider in effectuating congressional intent with respect to the courts' jurisdictional powers.[102] Recognition that these are proper considerations in the process of statutory interpretation will result in equitable application of the Court's holding.[103]

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complaint as such," which suggested that the impleader action was actually improper. 98 S. Ct. at 2400 n.3. See note 6 *supra.*

99. The lack of diversity of citizenship was not realized until the third day of trial. See note 9 *supra* and accompanying text. Substantial commitment of the court's and litigants' resources was a consideration of the lower court in retaining the ancillary claim. Kroger v. Owen Equip. & Erection Co., 558 F.2d at 425-26.

100. *See* C. WRIGHT & A. MILLER §1444, *supra* note 19, at 237 (instances will occur where retention would only seem appropriate, such as substantial commitment of resources by the court or litigants); Note, *supra* note 49, at 664 (retention seems warranted due to substantial federal judicial resources being committed, along with litigants' efforts). Irreparable harm to the litigants may also occur due to: (1) a delay in re-entering the state judicial system; and (2) a running of the statute of limitations before the complaint is refiled in state court. *Id.* at 665.

101. *See* note 72 *supra* and accompanying text. In making the assumption that the *Gibbs* test was the applicable constitutional minimum, the Supreme Court has left the question to be decided at a later time.

102. Consideration of such factors within the process of statutory interpretation is to be distinguished from their consideration, as in *Gibbs*, as a matter of discretion once jurisdictional power exists. See text accompanying note 51 *supra.*

103. The instant case, in particular, involved several inequities which the Court failed to consider once the lack of jurisdictional "power" was determined. 98 S. Ct. at 2405 n.21. Respondent's alleged concealment of its citizenship and the possible running of the state's statute of limitations are factors which may have resulted in petitioner's loss of a cause of action.