Recognizing Party and Nonparty Interests in Written Civil Procedure Laws

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I. Introduction

Since their inception on September 16, 1938, the Federal Rules of Civil Procedure have largely directed civil litigation procedures in American trial courts, particularly in the federal district courts. The organization of the rules chiefly reflects the natural progression of a civil case from the filing of a claim to the enforcement of a judgment. The rules have been periodically updated to meet changing practices and expectations.[1] At the outset and through the years, however, the rules have ignored certain party and nonparty interests that are regularly considered during civil cases.

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1. The Federal Rules of Civil Procedure have undergone revisions in 1941, 1948, 1949, 1951, 1961, 1963, 1966, 1968, 1970, 1972, 1975, 1980, 1983, 1985, 1987, 1988, 1991, 1993, 1995, 1997, and 1999.

The Federal Rules of Civil Procedure have always been tailored chiefly to trials and more recently to settlements of claims between named parties. The rules focus on formal pleadings of alleged breaches of substantive rights involving named parties. Yet many civil cases also concern important party and nonparty interests beyond those in the presented claims. Consider, for example, personal injury cases wherein the true conflicts are often not over the pleaded claims, but over related interests including attorney's contingency fees; hospital, physician, worker's compensation or other liens; subrogation; insurance coverage; indemnification; and contribution. The absence of written rules governing party and nonparty interests has led to unfortunate misunderstandings. Given the continuing recognition and, in many instances, the expansion of party and nonparty interests in personal injury and other civil cases, it is time to rewrite the Federal Rules of Civil Procedure and other American civil procedure laws to better reflect the way the civil justice system truly operates.

This Article will demonstrate how American trial courts often deal with party and nonparty interests that are outside pleaded claims and are largely unrecognized in written civil procedure laws. The Article illustrates using *Kokkonen v. Guardian Life Insurance Company of America*,[2] a case in which the United States Supreme Court set out guidelines for ancillary jurisdiction.

Both federal and state civil trial courts often employ ancillary jurisdiction to address party and nonparty interests outside of presented claims.[3] Ancillary jurisdiction can cover two forms of interests: public interests such as citations for civil contempt and sanctions for litigation misconduct, and private interests such as liens and civil claim assignments. This Article will explore these private interests.

Ancillary jurisdiction is relevant to both private party and nonparty interests at many stages of civil litigation. This Article will explore four stages: (1) the early search for subject matter jurisdiction, (2) the presentation of claims for resolution, (3) the pretrial conference, and (4) the enforcement of judgments. We hope

2. 511 U.S. 375 (1994).

3. For example, trial courts recognize that under certain circumstances they may act to secure enforcement of a settlement between parties resolving all presented claims and resolving disputes between prevailing plaintiffs and their (non-party) lawyers over contingency fees due.

this Article will demonstrate the need for written civil procedure laws that better reflect the private interest resolutions occurring in American civil trial courts.

In *Kokkonen,* the named parties entered into a settlement agreement to resolve a pending federal district court diversity case.[4] Upon settlement, the case was voluntarily dismissed by stipulation under Federal Rule of Civil Procedure 41.[5] Kokkonen, an insurance agent, allegedly breached the settlement agreement with the defendant insurer by refusing to return certain documents. The district court enforced these settlement terms. However, in a unanimous decision, the United States Supreme Court denied enforcement because of a lack of federal court subject matter jurisdiction.[6] The Court said, "Neither the Rule nor any provision of law provides for jurisdiction of the court over disputes arising out of an agreement that produces the stipulation."[7] Finding that the settlement agreement required its own basis for subject matter jurisdiction, the Court found no independent basis for jurisdiction under any statute.[8] Further, the Court explained that ancillary jurisdiction was possibly available but extended only to "permit disposition . . . of claims that are . . . factually interdependent" or "to enable a court to function successfully."[9]

In *Kokkonen,* the district court did not reserve jurisdiction in order to act on any alleged future breaches of the settlement agreement.[10] Although the court was aware of the settlement terms, it did not even mention the agreement in its dismissal order. The Supreme Court held that any breaches of the agreement were not enforceable in the district court.[11] The Court found that the insurance company simply sought enforcement of the underlying

4. *See Kokkonen,* 511 U.S. at 376-77.

5. *See* FED. R. CIV. P. 41(a)(1) (providing in part that "an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action").

6. *Kokkonen,* 511 U.S. at 380-82 (refusing to extend ancillary jurisdiction to cover enforcement of the settlement agreement).

7. *Id.* at 378.

8. *See id.* at 382.

9. *Id.* at 380; *see also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978) (holding that ancillary jurisdiction is based on the practical need "to protect legal rights or effectively to resolve an entire, logically entwined lawsuit").

10. *Id.* at 380.

11. *Kokkonen,* 511 U.S. at 381.

settlement pact rather than the reopening of the dismissed civil action.[12]

The Supreme Court found this attempt at enforcement impermissible.[13] However, the Court's opinion did indicate that if the settlement agreement had been integrated into the dismissal order the district court could have enforced it because jurisdiction would have been necessary "to effectuate" the court decree.[14] In addition to effectuating court decrees, the Court noted that ancillary authority may also be employed "to enable a court to function successfully" in circumstances where the trial court needed to "manage its proceedings" or to "vindicate its authority."[15] While attempts at effectuation, management, and vindication were all missing in *Kokkonen*, the Supreme Court suggested that these elements might be present in other settings involving party and nonparty private interests.[16]

This Article addresses questions arising from *Kokkonen*: How might ancillary authority as defined in *Kokkonen* govern private party and nonparty interests in subject matter jurisdiction, claim presentation, pretrial conference, and judgment enforcement? When ancillary jurisdiction encompasses private party and nonparty interests beyond presented claims involving named parties, are the necessary procedures set forth in written civil procedure laws? If not, have difficulties resulted? How might any such difficulties be addressed by new written civil procedure laws?

II. Written Federal Civil Procedure Rules: Their Literal Terms and Broader Applications

A. Subject Matter Jurisdiction

Federal Rule of Civil Procedure 1 states that the federal rules govern procedures in the United States district courts "in all suits of a civil nature."[17] Most civil suits are "commenced by filing a com-

12. *Id.* at 378.

13. *Id.* at 381 (holding that an agreement dismissing a federal suit does not create federal jurisdiction over an action to enforce the agreement).

14. *Id.*

15. *Id.* at 380.

16. *See Kokkonen*, 511 U.S. at 380.

17. FED. R. CIV. P. 1.

plaint with the court."[18] Under Rule 8(a), a complaint usually contains, at a minimum, allegations involving (1) the basis for subject matter jurisdiction, (2) "a short and plain statement of the claim showing that the pleader is entitled to relief," and (3) "a demand for judgment."[19]

The jurisdiction referred to in Rule 8(a)(1) is subject matter jurisdiction.[20] Independent jurisdictional authority is chiefly set out in 28 U.S.C. §§ 1331-1364.[21] Also, § 1367(a) further extends jurisdiction by granting to the federal district courts "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."[22] This supplemental jurisdiction covers "claims that involve the joinder or intervention of additional parties."[23] In this setting, a claim is pleaded or otherwise presented as a cause of action. In limiting the scope to presented claims, the supplemental jurisdiction statute follows the *Kokkonen* Court's recognition of federal district court authority over "factually interdependent" claims but not its recognition of federal district court authority over matters necessary for the court to function successfully.[24] The statute thus ignores many party and nonparty interests that are subject to ancillary jurisdiction under *Kokkonen*.

In *Kalyawongsa v. Moffett*[25] a federal district court used nonstatutory ancillary jurisdiction to resolve a dispute about liens asserted by several lawyers on settlement proceeds arising from a housing discrimination claim.[26] The defendant allegedly refused to sell a tract of land to the plaintiffs because the plaintiffs were an interracial couple.[27] The case remained unsettled for several years and the plaintiffs replaced their counsel several times. When the case finally settled, two of the plaintiffs' former lawyers pursued

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18. FED. R. CIV. P. 3.

19. FED. R. CIV. P. 8(a).

20. *See* FED. R. CIV. P. App. Form 2.

21. *See generally* 28 U.S.C.A. §§ 1331-1364 (West 1993) (describing the variety of cases in which federal courts have independent federal jurisdiction).

22. 28 U.S.C.A. § 1367(a) (West 1993).

23. *Id.*

24. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379-80 (1994).

25. 105 F.3d 283 (6th Cir. 1997).

26. *Id.* at 287-88.

27. *Id.* at 285.

liens against the settlement proceeds. The district court awarded fees to the lawyers in accordance with the retainer agreements the plaintiffs had signed.

The plaintiffs argued on appeal that the trial court had improperly exercised jurisdiction, and, even if the trial court did have the power to declare a lien, the court must leave enforcement to an independent civil action.[28] The court of appeals disagreed, deeming it a well-established principle that attorney's fees fell within the trial court's ancillary jurisdiction, which permits "courts to adjudicate matters that arise during the course of an action and affect the court's ability either to render an efficacious judgment or to control the litigation before it."[29] Regarding the trial court's power to enforce liens, the appellate court held that the "same considerations that support supplemental jurisdiction also support some resolution, in the same court, of the attorneys' rights and the extent of their claim."[30]

The court also said that "[r]esolution of related fee disputes is often required to provide a full and fair resolution of the litigation," which enables the court "to render complete justice."[31] In so ruling, the appellate court remarked that lawyers were officers of the court and their "fees are part of the overall costs of the underlying litigation,"[32] making the fees "related to the main civil action."[33] Additionally, the court noted that "[c]onsiderations of judicial economy are at stake" since the trial judge "is already familiar with the relevant facts and legal issues."[34] The *Kalyawongsa* decision demonstrates that some courts have employed nonstatutory ancillary jurisdiction to resolve both party and nonparty interests.

B. Presenting Claims

Federal Rule of Civil Procedure 18(a) allows the party filing the original complaint to join additional claims.[35] It states that a

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28. *Id.* at 288.

29. *Id.* at 287 (citing Curry v. De Priore, 941 F.2d 730, 731 (9th Cir. 1991)).

30. *Id.* at 288.

31. *Kalyawongsa,* 105 F.3d at 287 (citing Jenkins v. Weinshienk, 670 F.2d 915, 918 (10th Cir. 1982)).

32. *Id.*

33. *Id.* at 288.

34. *Id.* at 287.

35. *See* FED. R. CIV. P. 18(a).

claimant "may join . . . as many claims . . . as the party has against an opposing party."[36] Rule 18 also permits a party to assert a claim that was "heretofore cognizable only after another claim has been prosecuted to a conclusion."[37] It further states that a court "shall grant relief . . . only in accordance with the relative substantive rights of the parties."[38]

In addition, under the federal civil procedure rules an original plaintiff may join with one or more other plaintiffs or may join two or more defendants in the suit.[39] Pursuant to Rule 20(a), "all persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative."[40] However, joinder is limited to those asserting rights to relief arising from "the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action."[41]

Further, an original defendant may act as a third-party plaintiff by adding a party to the civil action through Federal Rule of Civil Procedure 14(a).[42] This allows the defendant to implead a third-party defendant if the individual "is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."[43]

Similarly, a federal district court can *sua sponte* compel joinder of a person "as a party in the action" under Rule 19 if joinder will not deprive the court of subject matter jurisdiction.[44] The Rules permit this type of joinder as long as the person "claims an interest relating to" the case and the person's absence will either damage his ability to protect that interest or the failure to join will expose existing parties to substantial risk of "double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."[45] If such a person cannot feasibly be joined in the action as a party, the trial court must determine if the person is "indispensable" by considering

36. *Id.*
37. FED. R. CIV. P. 18(b).
38. *Id.*
39. *See* FED. R. CIV. P. 20.
40. FED. R. CIV. P. 20(a).
41. *Id.*
42. *See* FED. R. CIV. P. 14(a).
43. *Id.*
44. FED. R. CIV. P. 19(a).
45. *Id.*

a number of factors.[46] Those factors include the extent to which a judgment in the person's absence would be prejudicial to the person or the parties, whether that prejudice can be mitigated through a careful crafting of the judgment, whether any resulting judgment will be adequate, and whether any original plaintiff will have another adequate remedy if the action is dismissed for nonjoinder.[47]

Finally, Federal Rule of Civil Procedure 24(a) provides for intervention "when the applicant claims an interest relating to the property or transaction which is the subject of the action" and the applicant may not be able otherwise to fully protect that interest.[48] Rule 24(b) allows for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common."[49] Rule 24(c) outlines intervention procedures, which require any proposed intervenor to file a motion "accompanied by a pleading setting forth the claim or defense for which intervention is sought."[50]

These rules permit rather liberal joinder of both claims and parties through the use of written pleadings. Yet in the absence of written pleadings, certain claims may still be presented in the federal district courts. Federal Rule of Civil Procedure 54(c) declares that for other than defaults, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the *party* has not demanded such relief in the party's pleadings."[51] Claims may also be resolved, although not within any written pleadings, when "tried by express or implied consent of the parties" under Rule 15(b).[52] For example, an unpleaded claim is presented for resolution when it is included in a pretrial conference order which controls the subsequent course of the civil action.[53]

These rules governing the joinder of claims and parties fail to acknowledge the many occasions in which nonparty interests are

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46. *See* FED. R. CIV. P. 19(b).

47. *See id.*

48. FED. R. CIV. P. 24(a).

49. FED. R. CIV. P. 24(b).

50. FED. R. CIV. P. 24(c).

51. FED. R. CIV. P. 54(c) (emphasis added).

52. FED. R. CIV. P. 15(b) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

53. *See* FED. R. CIV. P. 16(e) (stating that the pretrial order "shall not control the subsequent course of the action unless modified by a subsequent order").

presented and resolved. For example, note the absence of any language covering the lawyer-lienholders in *Kalyawongsa*.[54] A very different occasion involving nonparty interests arose in *San Jose Mercury News v. U.S. District Court*.[55] A federal appeals court approved a newspaper's petition to intervene permissively in a sexual harassment suit so the newspaper could obtain access to an investigative report that had been sealed as a part of a settlement between the named parties.[56] The pleading that must have accompanied the newspaper's petition for intervention under Rule 24(c) could not have been one including named parties and pleaded claims. It did not contain a claim against either the defendant or the plaintiff; rather, it was a request for the release of civil litigation documents.[57] The newspaper had no interest in the outcome of the case on the merits and could complain of no injury as a result of any sexual harassment.[58] The newspaper's only interest was in obtaining documents in order to write a story.

Similar issues are present in civil actions involving lienholders other than attorneys. Thus, hospitals, doctors, and others are allowed to insert themselves into civil cases even though they have presented no claims involving the two named parties and have no "factually interdependent" claims. In fact, lienholders may have no "claims" at all under the federal rules, since no breach of duty may yet have occurred at the time certain liens attach. Lienholders may have only financial interests in the outcomes of pending civil cases. In sum, lienholders can utilize ancillary jurisdiction to secure resolution of their private interests though they have presented no claims.[59]

C. *Pretrial Conferences*

Pretrial conferences may be held under Federal Rule of Civil Procedure 16 for various purposes, including "facilitating the settlement of the case"[60] and "improving the quality of the trial

54. *See generally* Kalawongsa v. Moffett, 105 F.3d 283 (6th Cir. 1997).

55. 187 F.3d 1096 (9th Cir. 1999).

56. *See id.* at 1098.

57. *See id.*

58. *See id.* at 1099.

59. *See, e.g.*, Temesvary v. Houdek, 703 N.E.2d 613 (Ill. App. Ct. 1998) (holding that a trial court may determine reasonableness of a physician's charges before adjudication of a lien under the Physicians Lien Act).

60. FED. R. CIV. P. 16(a)(5).

through more thorough preparation."[61] While both settlement and trial-preparation conferences can involve significant party and nonparty interests outside of any claims already presented, this federal rule suggests otherwise.[62]

1. Settlement Conferences

Federal Rule of Civil Procedure 16(a)(5) grants federal district judges the power to direct the parties' attorneys to appear for the purpose of "facilitating the settlement of the case."[63] Such a settlement conference expressly encompasses only presented claims. Rule 16(c)(9) states that subjects for consideration at a pretrial conference can include "settlement and the use of special procedures to assist in resolving the dispute."[64] In addition, Rule 16(c) currently allows judges to "require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute."[65]

The case of *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*,[66] decided under an earlier version of Rule 16, demonstrates the limitations inherent in the wording of that rule.[67] The trial court ordered the defendant corporation to produce a corporate representative with settlement authority at a settlement conference.[68] Although the company sent two attorneys to the conference, it sent no corporate representative. The trial court sanctioned the corporate defendant for noncompliance. The defendant appealed, arguing that Rule 16 at the time only expressly allowed trial courts to order attorneys to attend conferences.

The court of appeals, while acknowledging that the existing rule did not specifically permit a court to compel the attendance of parties, found that the federal civil procedure rules did not

61. FED. R. CIV. P. 16(a)(4).

62. *See* FED. R. CIV. P. 16(a) (recognizing that only "attorneys for the parties and any unrepresented parties" may be directed to appear at pretrial conferences).

63. FED. R. CIV. P. 16(a)(5).

64. FED. R. CIV. P. 16(c)(9).

65. FED. R. CIV. P. 16(c).

66. 871 F.2d 648 (7th Cir. 1989) (en banc).

67. *See* FED. R. CIV. P. 16(c) (effective in 1993) ("If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.").

68. *Heileman Brewing*, 871 F.2d at 650.

"completely describe and limit the power of the federal courts."[69] Thus, absence of language in the rules expressly authorizing certain trial court conduct did not mean that the conduct could not be undertaken.[70] In fact, the appeals court held that the "inherent power" of the trial court could be used to ensure the "orderly and expeditious disposition of cases" by compelling party attendance.[71] Seemingly, this power was also recognized in *Kokkonen* when the Supreme Court explained that trial court ancillary jurisdiction could be exercised "to enable a court to function successfully."[72]

2. Trial Preparation Conferences

Federal Rule of Civil Procedure 16(c)(1) grants federal district judges the power to direct attendance at pretrial conferences for "the formulation and simplification of the issues, including the elimination of frivolous claims or defenses."[73] This rule suggests that issues germane to trial preparation conferences relate to presented claims or defenses. Rule 16(c)(2) lends support by adding that "the necessity or desirability of amendments to the pleadings" may be considered at these conferences.[74] Additional matters for consideration under Rule 16(c)(13) include "an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case."[75] Rule 42(b) allows the trial court to "order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or any separate issue" when separation will prevent prejudice or will prove expedient.[76] Thus, trial preparation conferences seem geared toward upcoming trials involving pleaded claims between named parties.

It is common practice, however, for federal district courts to determine at trial party and nonparty interests beyond any presented

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69. *Id.* at 651.

70. *See id.* at 651 (indicating that a district court's exercise of procedural authority outside the language of the rules was valid though "not frequently documented").

71. *Id.* The court noted that this "inherent power" is grounded in the control vested in a court to manage its cases in an organized and expeditious manner. *Id.*

72. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994).

73. FED. R. CIV. P. 16(c)(1).

74. *See* FED. R. CIV. P. 16(c)(2).

75. FED. R. CIV. P. 16(c)(13).

76. FED. R. CIV. P. 42(b).

claims. In *Cluett, Peabody & Co. v. CPC Acquisition Co., Inc.*,[77] for example, CPC employed a law firm to assist in its contemplated takeover of Cluett.[78] Cluett thereafter filed an action in a federal district court to enjoin CPC from certain takeover acts. During the litigation, Cluett was voluntarily acquired by another company and the civil action was mooted. Shortly thereafter, CPC disagreed with its lawyers about legal fees related to the attempted takeover and filed a declaratory judgment action in a state court. Since the Cluett federal court action was still awaiting final disposition, the law firm asked the trial judge in that case to exercise ancillary jurisdiction over the fee dispute. The district court assented and held a jury trial.

After a jury finding for the law firm, CPC appealed. It argued that the federal district court did not have ancillary jurisdiction over the fee dispute. The court of appeals, however, noted that it is "well settled that '[a] federal court may, in its discretion, exercise ancillary jurisdiction to hear fee disputes . . . between litigants and their attorneys when the disputes relate to the main action.'"[79] The district court's holding was affirmed even though a portion of the disputed fees involved work on the attempted takeover that was unconnected to the federal litigation.[80]

Given that trials, as in *Cluett,* can extend beyond matters encompassing pleaded claims between parties, trial preparation conference rules such as Federal Rule of Civil Procedure 16 should reflect that additional matters are suitable for conferencing.

D. Judgments

Under the Federal Rules of Civil Procedure, the entry of a judgment signifies the resolution of at least one claim involving at least two named parties.[81] In multi-claim and multi-party settings, the Rules favor a single judgment covering all pending claims. Rule

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77. 863 F.2d 251 (2d Cir. 1988).

78. *Id.* at 252.

79. *Id.* at 256 (quoting Marrero v. Christiano, 575 F. Supp. 837, 839 (S.D.N.Y. 1983)).

80. *See id.* at 257 ("It would have been wasteful and duplicative, under the circumstances, to require a bifurcated procedure in which part of the fee dispute would be resolved by a federal court in Manhattan and another part by a state court in Sacramento, California.").

81. *See generally* FED. R. CIV. P. 54-63 (explaining the federal procedural requirements pertaining to judgments).

54(b) states that in the absence of an express determination and direction

> any order or other form of decision, however designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form or decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.[82]

These provisions fail to acknowledge expressly that attorneys, hospitals, insurers, and other interested nonparties often have as much to gain or lose through final judgments as do the named parties. However, Federal Rule of Civil Procedure 71 does state that when "an order is made in favor of a person who is not a party . . . that person may enforce obedience . . . by the same process as if a party."[83] Further, in saying that "when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party."[84] Seemingly, this rule encompasses the type of injunctive relief ordered against nonparties that is expressly permitted under Federal Rule of Civil Procedure 65.[85] Rule 71 may also contemplate monetary awards to lienholders or court-imposed financial obligations on defendant's nonparty insurers.[86] At best, the recognition of nonparty interests in final judgements is oblique so that a clear understanding of the reach of the federal civil procedure rules is not facilitated.

Matsushita Electric Industrial Co., Ltd. v. Epstein[87] is an example of a trial court judgment involving party interests other than pleaded claims. Matsushita had made a successful tender offer for the common stock of MCA, Inc.[88] MCA's shareholders filed a class

82. FED. R. CIV. P. 54(b).
83. FED. R. CIV. P. 71.
84. *Id.*
85. FED. R. CIV. P. 65(d) (stating that injunctions and restraining orders may be binding not only upon the parties, but also "upon those persons in active concert or participation with them who receive actual notice").
86. *See* FED. R. CIV. P. 71.
87. 516 U.S. 367 (1996).
88. *Id.* at 367.

action lawsuit against MCA, its directors, and Matsushita in a Delaware state court for breach of their fiduciary duty to maximize shareholder value. Subsequently, some shareholders filed another suit against Matsushita in a federal district court for violation of federal Securities and Exchange Commission rules. This federal suit was dismissed and while it was on appeal the parties to the state lawsuit settled.[89] The shareholders in the state suit agreed to a release with prejudice of all claims, including the claims presented in the federal action.[90] The terms of agreement were incorporated into the state court's final judgment which barred further litigation of the federal lawsuit.[91]

However, several stockholders later urged that the settlement agreement encompassed claims within the exclusive subject matter jurisdiction of the federal judiciary and that these claims were not barred but should continue in the federal courts. The Supreme Court held that although some of the claims settled in the state suit were within the exclusive jurisdiction of the federal courts, the state courts could enforce settlements of those claims as long as the state courts rendered no decisions on the merits of the claims.[92] While the parties could not press certain federal law claims in the state court, the state court could hold a hearing to determine that the settlements of those very same claims were in the best interests of the class members and could agree to enforce any resulting settlements.[93] *Matsushita* demonstrates how trial courts are able to enforce judgments involving party interests that were not—and could not have been—pleaded as claims for resolution on the merits.[94]

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89. *See id* at 369-70.

90. *See id.* at 370-71.

91. *See id.* at 369-70.

92. *Matsushita,* 516 U.S. at 386-87.

93. *Id.* 381-82 (finding that the state court's approval of the settlement "does not amount to judgment on the merits of the [federal] claims").

94. Federal appellate courts have also recognized that federal district courts have supplemental jurisdiction in disputes between a party and a nonparty which involve the nonparty's indemnification of the party for a money judgment against the party. These courts have recognized such jurisdiction when the dispute arises during post-judgment asset discovery proceedings initiated by the judgment creditor under Federal Rule of Civil Procedure 69(a). *See* Carver v. Condie, 169 F.3d 469 (7th Cir. 1999) (holding that it is within ancillary court authority to enforce the judgment in a dispute involving an Illinois county's duty to satisfy a sheriff-signed consent); *see also* Peacock v. Thomas, 516 U.S. 349, 356-57 (1996) (recognizing ancillary jurisdiction over a broad range of supplementary

III. Misunderstandings of Ancillary Jurisdiction Due to the Limitations of Written Civil Procedure Laws

Ancillary jurisdiction appears to extend beyond factually interdependent claims, embodies power over more than pleaded claims, and prompts pretrial conferences directed at private party and nonparty interests beyond claims pleaded for resolution on the merits. It also appears to cover judgment enforcement involving settlements of claims which could not have been presented for resolution. Yet, because the broad parameters of ancillary jurisdiction over private party and nonparty interests are unrecognized in written civil procedure laws, courts and litigants are often prone to misunderstandings. At times these written laws have also been curiously stretched to reach a desired result, resulting in decisions like *In re Novak*.[95]

In *Novak*, a legal malpractice case, a federal district judge ordered an employee of the defendant's insurer to attend "a pretrial conference to facilitate settlement discussions."[96] The appellate court found that the trial judge lacked the authority to issue the order under the existing civil procedure rule but suggested an alternate way to secure the appearance.[97] In doing so the court not only strained to apply the relevant civil procedure rule but also appeared to misunderstand the full breadth of trial court ancillary jurisdiction.

The relevant rule governing pretrial conferences stated that a district court "may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference . . . for such purposes as . . . facilitating the settlement of the case."[98] The appellate court held that this rule, as written, did not cover directives to the insurer's employee since he was neither an attorney

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proceedings involving nonparties, including attachment, mandamus, and garnishment); Macklanburg-Duncan Co. v. Aetna Casualty and Surety Co., 71 F.3d 1526, 1535 (10th Cir. 1995) (allowing ancillary trial court authority during post-judgment proceedings to resolve insurance dispute between a judgment debtor and nonparty insurer when the relevant facts and theories are very similar to those germane to the claim leading to the judgment).

95. 932 F.2d 1397 (11th Cir. 1991).

96. *Id.* at 1398.

97. *See id.* at 1406-07.

98. *Id.* at 1404 (citing FED. R. CIV. P. 16(a) (1983)).

nor an unrepresented party.[99] The court also found that the directive was not authorized by either a statute or inherent court power.[100]

Notwithstanding the rule's explicit provisions that cover only attorneys and unrepresented parties, the appellate court found that trial-court directives requiring appearances of represented parties at pretrial settlement conferences were permitted under the inherent powers doctrine, at least when the parties' attorneys had not been delegated full settlement authority.[101] Such a directive could be an alternate way of seeking the presence of an insurer's employee. The appellate court suggested that the district court could have secured the attendance of the nonparty insurance agent by directing the insured defendant, a named party, to produce an individual with full settlement authority at the pretrial conference.[102] The appellate court also hinted that such an order directed at the defendant (rather than at the defendant's insurer) may even have been expressly authorized by the pretrial conference rule, reasoning "there is a colorable argument that Rule 16 empowers the court to order such a party to attend a pretrial conference; the party is an unrepresented party with respect to settlement, and, thus his attendance is crucial."[103] This constitutes a strained reading of Rule 16 since it requires courts to consider whether a party with an attorney is "unrepresented" based on the degree of authority delegated to the attorney by the party, which requires courts to delve into attorney-client communications.[104]

The appellate court's general interpretation of inherent trial court power in *Novak* was comparable to the vision of ancillary jurisdiction in *Kokkonen*. In *Novak*, inherent power was appropriate when the court deemed the exercise of power "necessary to protect its ability to function [or] . . . to facilitate activity authorized by

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99. *Id.* at 1408.

100. *Novak*, 932 F.2d at 1409.

101. *See id.* at 1406-07 (rejecting the argument that, by explicitly mentioning only unrepresented parties and parties' attorneys, Rule 16 prohibits district courts from issuing pretrial orders directed at represented parties).

102. *See id.* at 1408 (stating that the defendant's nonparty insurer who possesses settlement authority could be coerced into attending if, for example, the trial judge issued an order directing attendance of someone with full settlement authority and threatened to strike the defendant's pleadings as a sanction for noncompliance).

103. *Id.* at 1407 n.19.

104. *See id.* (holding that an otherwise-represented party who retains full settlement authority may be "an unrepresented party with respect to settlement").

statute or rule"[105] In *Kokkonen*, ancillary jurisdiction was held to be appropriate when the trial court deemed it necessary "to function successfully, that is, to manage its proceedings."[106] Yet, in *Novak* the court limited the scope of inherent power to include only trial court orders directed at attorneys or parties.[107] The court's holding in *Novak* excluded orders directed at nonparties even when they were nonparties only in a formal sense because they controlled the litigation for the named parties and had real interests at stake.[108] The *Novak* court acknowledged that this limitation at times "may impede . . . a district court's ability to conduct a fruitful settlement conference" when a nonparty, not itself subject to inherent power directives, is also not subject to coercion through the named parties or their attorneys.[109] The court acknowledged that this limit would surface when a nonparty insurer and an insured party have "conflicting interests."[110]

Can a trial court resolve conflicting interests between a nonparty insurer and an insured defendant in a civil action? If so, can the two be directed to attend a pretrial conference? The answer appears to be yes, notwithstanding the *Novak* court's analysis. In *Cluett*, a fee dispute between the nonparty attorney and a named party was resolved.[111] How different is a coverage dispute between a nonparty insurer and an insured defendant? In *Kokkonen*, the court suggested that ancillary jurisdiction is proper over unpresented claims that involve many of the same facts as the pleaded claims when the exercise of ancillary jurisdiction is essential to enable a court to function successfully.[112] The *Novak* court did not fully extend the inherent power doctrine to the limits of ancillary

105. *Novak*, 932 F.2d at 1406.

106. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379-80 (1994).

107. *See Novak*, 932 F.2d at 1408.

108. *See id.* (stating that, although an insurer controls the litigation for its insured and is effectively a party to the action, Rule 16 does not allow courts to order insurers that are not formally parties to the case to provide an individual with full settlement authority at the pretrial conference).

109. *Id.*

110. *Id.* at 1408 n.20 ("[W]hen the insurer's and the insured's interests are not aligned, they generally hire their own attorneys to protect their conflicting interests.").

111. *See* Cluett, Peabody & Co. v. CPC Acquisition Co., Inc., 863 F.2d 251 (2d Cir. 1988).

112. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380-81 (1994).

jurisdiction later defined in *Kokkonen* but instead was deterred by the formality of the pretrial conference rule's explicit embrace of only attorneys and parties, even though the conduct of fruitful settlement conferences would be impeded.[113]

IV. Written Civil Procedure Laws That Better Recognize Party and Nonparty Interests in Civil Litigation

Misunderstandings of the ancillary jurisdiction doctrine and its relevance to such civil procedure arenas as subject matter jurisdiction, interest presentations, pretrial conferences and judgment enforcement should be diminished. In order to accomplish this, more comprehensive written civil procedure laws are needed. This section of the Article outlines how new written civil procedure laws might look.

Better recognition of trial court subject matter jurisdiction over party and nonparty interests beyond presented claims could be accomplished through amendments to the federal civil procedure rules. A new rule should be adopted that requires allegations as to ancillary subject matter jurisdiction over any party or nonparty interests presented for resolution on the merits and over judicial enforcement of settlements. Amendments could be modeled on Federal Rule of Civil Procedure 8(a)(1).

Similarly, greater clarity would be promoted by amendments to the supplementary jurisdiction statute, 28 U.S.C. § 1367.[114] Successful functioning of a federal court necessitates judicial power to "manage its proceedings, vindicate its authority, and effectuate its decrees."[115] The statute should address judicial authority over not only factually interdependent claims but also orders intended to enable courts "to function successfully."[116] Statutory amendments could facilitate these orders by explicitly granting ancillary court authority to sanction civil litigation misconduct, to maintain decorum, and to resolve the interests of certain nonparty lienholders,

113. *See Novak*, 932 F.2d at 1408.

114. *See* 28 U.S.C. § 1367 (setting forth the rules for supplementary jurisdiction).

115. *See Kokkonen*, 511 U.S. at 380.

116. *Id.*

insurers, and others.[117] These orders enabling courts to function successfully should also be recognized as subject to trial court discretion, with the relevant factors to be considered by judges enumerated.[118]

Party and nonparty interests subject to this ancillary jurisdiction would also be better recognized early in civil litigation if greater notice responsibilities were added to written civil procedure laws. Consider the local civil procedure rules of a Texas federal district court, which require disclosure of all interested parties.[119] These rules make both the plaintiff and defendant responsible for presenting, outside of the pleadings, "a separately signed certificate of interested persons that contains a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities who are or which are financially interested in the outcome of the case."[120] A parallel federal rule providing early notice and the

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117. *See id.* The *Kokkoken* court supported its holding that ancillary jurisdiction can be used to enable a court to function successfully by citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), *U.S. v. Hudson*, 11 U.S. 32 (1812), and WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523 (1984). *Chambers* authorizes courts to compel payment of an opposing party's attorney's fees and to sanction for misconduct. 501 U.S. at 43-44. *Hudson* authorizes courts to maintain order through the use of contempt. 11 U.S. at 34. Wright, Miller & Cooper states that ancillary jurisdiction covers matters involving attorneys' fees. WRIGHT, MILLER & COOPER § 3523.

118. *See, e.g.*, Ryther v. Kare, 976 F. Supp. 853 (D. Minn. 1997) (citing Wing v. E. River Chinese Rest., 884 F. Supp. 663 (E.D.N.Y. 1995)). The *Ryther* court advocated that the following factors should be weighed by a trial court in deciding whether to exercise jurisdiction over fee disputes: (1) the court's familiarity with the subject matter of the suit, (2) the court's responsibility to protect its officers, and (3) whether the convenience of the parties would be served. *Id.* at 858. The court also cited 28 U.S.C. § 1367(c) for the proposition that if a trial court believes that a claim grounded in state law substantially dominates the federal question in the claim there is a compelling reason for the federal court to decline jurisdiction. *Id.* at 857.

119. D. TEX., N.D. TEX R 3.1(f) [hereinafter Texas Local Rule 3.1(f)] (requiring that when a complaint is filed the plaintiff must also provide the court clerk with a separately signed certificate of interested persons, including all legal entities that are financially interested in the outcome of the case); *see also* D. TEX., N.D. TEX. R 7.4 (requiring a defendant in a civil action to file a separately signed certificate of interested persons or legal entities along with the initial responsive pleading).

120. *See* Texas Local Rule 3.1(f), *supra* note 119 If a large group of persons or firms can be specified by a generic description, individual listing is not necessary.

opportunity for interested persons and entities to participate would diminish the need for concurrent or subsequent independent civil actions.

The opportunity for pretrial conference agendas to include settlement discussions related to party and nonparty interests within ancillary court authority would be facilitated if the written laws about these conferences included broader recognition of all potential necessary participants. For example, the Massachusetts Court of Appeals has extended its law beyond the scope of Federal Civil Procedure Rule 16. Civil trial conferences in the Massachusetts Court of Appeals must be attended by attorneys, parties, or "any other person necessary to act on behalf of [the] respective parties" when the attendance of the person is "the responsibility" of the attorney.[121] Similarly, written civil procedure laws should expressly recognize an opportunity for pretrial conference agendas to include trial preparation discussions involving party and nonparty interests that may be resolved under ancillary jurisdiction.

Finally, better recognition is needed of trial court ancillary jurisdiction over enforcement of civil judgments involving resolution of party and nonparty interests beyond the claims pleaded. Under the Federal Rules of Civil Procedure, a final decision allowing the recovery of a sum certain only prompts the clerk to enter a judgment without waiting for court direction when the recovery is obtained by a party.[122] Better recognition of ancillary jurisdiction would be promoted by a written civil procedure rule that explicitly recognizes that both a final judicial decision on the merits and a settlement agreement can encompass the resolution of nonparty interests. This would fit within the judicial powers noted in *Kalyawongsa*.

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121. Standing Order of the Appeals Court of Massachusetts Concerning Conferences in Civil Appeals, §(c)(2) (as amended Dec. 2, 1999) (requiring that all attorneys and parties attend the civil trial conference unless excused by the conference counsel and that the attorneys arrange the attendance of any other person necessary to act on behalf of their respective parties).

122. *See* FED. R. CIV. P. 58 (explaining that "upon a general verdict of a jury, or upon a decision by the court," a party shall receive only a sum certain, and the clerk has the authority to prepare, sign, and enter a judgment without any direction from the court); *see also* FED. R. CIV. P. 70 (explicitly stating that a judgment for a specific act embodies only a directive to a party or an order on behalf of a "party entitled to performance").

V. Conclusion

Written civil procedure laws should better recognize the significant ancillary authority of civil trial courts over party and nonparty interests that extend beyond pleaded claims. This authority enables trial judges to resolve disputes involving these interests and to enforce settlements of judgments encompassing these interests. This authority is frequently misunderstood. Misunderstandings involving this ancillary authority would likely be reduced through amendments to written civil procedure laws on supplementary jurisdiction, claim and interest presentation, pretrial conferences, and entry of judgments. These amendments need not alter existing practices but only recognize them expressly so that ancillary authority can be more easily understood and more fully and openly exercised.