University of Baltimore Law Review

Volume 22
Issue 1 *Fall 1992*

Article 6

1992

Comments: Making a Federal Case out of It: Supplemental Jurisdiction under 28 U.S.C. § 1367

M. Ashley Harder
University of Baltimore School of Law

MAKING A FEDERAL CASE OUT OF IT: SUPPLEMENTAL JURISDICTION UNDER 28 U.S.C. § 1367.

I. INTRODUCTION

Section 1367 of the Judicial Improvement Act of 1990[1] ("Act") codifies the common law doctrines of pendent and ancillary jurisdiction under one concept of "supplemental jurisdiction." Applicable to actions commenced on or after December 1, 1990, section 1367 represents a significant expansion of the right to invoke federal court jurisdiction for the adjudication of state law claims that are transactionally related to litigation in federal court. Nevertheless, section 1367 remains largely misunderstood and overlooked. One commentator has suggested that because this section was enacted in the context of an act encompassing a host of other changes, including generally mundane items pertaining to federal judicial administration, the Act as a whole has served to obscure the importance of the new rules governing a civil litigant's choice of a federal forum.[2] As a result, the practicing bar may be largely unaware of these new rules. Even where an awareness exists, it is generally unaccompanied by informed understanding of the significance of the changes.[3]

This Comment first discusses the old system of pendent and ancillary jurisdiction. The Comment then reviews the new system implemented under section 1367 and explores Congress' motivations and intentions in enacting the Act. Finally, it discusses some of the ambiguities that exist under the Act and predicts, based upon an analysis of congressional intent, how these ambiguities should be resolved.

II. BACKGROUND

A. Ancillary Jurisdiction

The doctrine of ancillary jurisdiction permits the joinder of claims and parties over which a federal court would lack subject

---

1. 28 U.S.C. § 1367 (Supp. 1991).
2. John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 735-37 (1991).
3. *Id.* at 737; *see also* Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991) [hereinafter Arthur & Freer, *Burnt Straws*]; Richard D. Freer, *Compounding Confusion And Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991) [hereinafter Freer, *Compounding Confusion*].

matter jurisdiction if they were presented separately.[4] The rationale underlying this doctrine is that when a federal court has either diversity or federal question jurisdiction over an existing claim and one set of parties, other closely related claims and parties may be joined to the lawsuit.[5] "Ancillary jurisdiction exists because without it the federal court neither could dispose of the principal case effectively nor do complete justice in the dispute that is before the tribunal."[6] Additionally, ancillary jurisdiction is consistent with the procedural goals of liberal joinder outlined in the Federal Rules of Civil Procedure.[7] The ancillary jurisdiction doctrine makes multiparty litigation feasible by dispensing with the need for an independent basis of subject matter jurisdiction for all claims and parties in an individual lawsuit.[8]

Ancillary jurisdiction has been applied to the following claims and parties: Fed. R. Civ. P. 13(a) compulsory counterclaims;[9] Fed. R. Civ. P. 13(g) cross-claims;[10] Fed. R. Civ. P. 13(h) joinder of additional parties to compulsory counterclaims;[11] Fed. R. Civ. P. 14 impleader of third-party defendants for claims by and against third-party plaintiffs and claims by third-party defendants, but not for claims by the original plaintiff against third-party defendants;[12] Fed. R. Civ. P. 22 interpleader;[13] and Fed. R. Civ. P. 24(a) intervention as of right.[14] On the other hand, ancillary jurisdiction has been held

---

4. CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 28 (4th ed. 1983) [hereinafter WRIGHT, FEDERAL COURTS]. *See generally* David D. Siegel, 28 U.S.C.A. § 1367 practice commentary 219, 220 (Supp. 1991) (citing Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798 (2d Cir. 1979)).
5. *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE §§ 2.12, 2.14, at 66 (1985); 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523, at 82 (1984 & Supp. 1992) [hereinafter WRIGHT, FEDERAL PRACTICE].
6. 13 WRIGHT, FEDERAL PRACTICE, *supra* note 5, § 3523, at 85.
7. *See* Oakley, *supra* note 2, at 758-59.
8. *See generally* 13 WRIGHT, FEDERAL PRACTICE, *supra* note 5, § 3523, at 86.
9. FRIEDENTHAL ET AL., *supra* note 5, § 2.14, at 77 & n.12 (citing United States *ex rel.* D'Agostino Excavators, Inc. v. Heyward-Robinson Co., 430 F.2d 1077 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); Berger v. Reynolds Metals Co., 39 F.R.D. 313 (E.D. Pa. 1966)).
10. *See* Amco Constr. Co. v. Mississippi State Bldg. Comm'n, 602 F.2d 730 (5th Cir. 1979); City of Boston v. Boston Edison Co., 260 F.2d 872, 874-75 (1st Cir. 1958); Hoosier Casualty Co. v. Fox, 102 F. Supp. 214 (N.D. Iowa 1952).
11. *See, e.g.*, United Artists Corp. v. Masterpiece Prods., Inc., 221 F.2d 213 (2d Cir. 1955), *superseded by* 28 U.S.C. § 1367 (Supp. 1991).
12. *See* Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843, 845 (3d Cir. 1962); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959). *See also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (disallowing ancillary jurisdiction over a Rule 14(a) claim asserted by the plaintiff against a third-party defendant), *superseded by* 28 U.S.C. § 1367 (Supp. 1991).
13. *See, e.g.*, Walmac Co. v. Isaacs, 220 F.2d 108 (1st Cir. 1955).
14. *See, e.g.*, Lenz v. Wagner, 240 F.2d 666 (5th Cir. 1957).

inapplicable to the following claims and parties: Fed. R. Civ. P. 13(b) permissive counterclaims;[15] Fed. R. Civ. P. 18 joinder of claims;[16] Fed. R. Civ. P. 19(b) indispensable parties;[17] Fed. R. Civ. P. 20 permissive joinder of parties;[18] and Fed. R. Civ. P. 24(b) permissive intervention.[19]

Generally, the ancillary jurisdiction doctrine has been applied to allow federal courts to hear state law claims asserted by litigants in a defensive posture, or by persons whose rights might be irretrievably lost unless they asserted them in an ongoing action in federal court.[20] Conversely, an original plaintiff's right to use ancillary jurisdiction has been more limited. For instance, a plaintiff cannot use ancillary jurisdiction to secure subject matter jurisdiction over a defendant when it would otherwise be lacking.[21]

Ancillary jurisdiction, and the formulation of section 1367, were influenced by *Owen Equipment & Erection Co. v. Kroger*.[22] In *Owen Equipment*, the plaintiff brought a wrongful death diversity action against a utility company for negligently maintaining a power line that electrocuted her husband.[23] Plaintiff was a resident of Iowa; the utility company was a Nebraska corporation.[24] The utility company filed a third-party claim against Owen, an Iowa corporation, alleging that Owen had caused the accident by negligently operating a crane, and, therefore, should indemnify the utility company against any judgment obtained by the plaintiff.[25] The plaintiff then amended her complaint to include a claim against Owen and sought to overcome the absence of complete diversity between herself and Owen by using the doctrine of ancillary jurisdiction.[26]

---

15. *See, e.g.*, Poloron Prods., Inc. v. Lybrand, Ross Bros. & Montgomery, 66 F.R.D. 610, 615 (S.D.N.Y. 1975), *rev'd on other grounds*, 534 F.2d 1012 (2d Cir. 1976).
16. *See, e.g.*, Nishimatsu Constr. Co. v. Houston Nat'l. Bank, 515 F.2d 1200 (5th Cir. 1975); Thornton v. Allstate Ins. Co., 492 F. Supp. 645 (E.D. Mich. 1980). Such claims may involve pendent jurisdiction.
17. *See, e.g.*, Chance v. County Bd. of Sch. Trustees, 332 F.2d 971 (7th Cir. 1964).
18. FRIEDENTHAL ET AL., *supra* note 5, § 2.14, at 78 & n.23 (stating that "the extension of jurisdiction over parties joined under Rule 20 is more properly denominated 'pendent party' jurisdiction").
19. *See, e.g.*, Hougen v. Merkel, 47 F.R.D. 528 (D. Minn. 1969).
20. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978); *see also* 13 WRIGHT, FEDERAL PRACTICE, *supra* note 5, § 3523, at 104.
21. Siegel, *supra* note 4, at 220-21 (citing Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978)).
22. 437 U.S. 365 (1978).
23. *Id.* at 367.
24. *Id.*
25. *Id.* at 367-68.
26. *Id.* at 368, 370. Interestingly, Owen was initially thought to be diverse from

The United States Supreme Court held that the doctrine of ancillary jurisdiction could not be used to grant subject matter jurisdiction over the plaintiff's claim against Owen.[27] The Court emphasized the limited nature of the federal courts' jurisdiction.[28] According to the Court, the federal courts are limited by the Constitution and by Congress' statutory directives, and these limits must not be disregarded or evaded.[29] The Court reasoned that by allowing use of the ancillary jurisdiction doctrine in situations where a plaintiff has asserted a claim against a third-party defendant, "a plaintiff could defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead non-diverse defendants."[30]

Additionally, the Court noted that in determining whether jurisdiction over a nonfederal claim exists, it is crucial to examine the context in which that nonfederal claim is asserted.[31] In *Owen Equipment*, the plaintiff's claim against Owen was not dependent upon her claim against the original defendant, the utility company, in the same way that the utility company's claim for indemnity against Owen was dependent upon the original claim.[32] Further, the nonfederal claim in *Owen Equipment* was asserted by the plaintiff, who "voluntarily chose to bring suit upon a state law claim in a federal court."[33] The Court contrasted this situation with that of "a defending party haled into court against his will, or . . . another person whose rights might be irretrievably lost unless he could assert them

---

the plaintiff, Kroger. *Id.* at 368-69. When Kroger amended her complaint, she named Owen as a Nebraska corporation with its principal place of business in Nebraska. *Id.* In its answer, Owen admitted that it was a corporation organized and existing under the laws of Nebraska. *Id.* at 369. At trial, however, Owen disclosed that its principal place of business was in Iowa. *Id.*

27. *Id.* at 375-77.
28. *Id.* at 372-74.
29. *Id.* at 374.
30. *Id.*
31. *Id.* at 375-76.
32. *Id.* at 376. The Court noted that the nonfederal claim in this case was not ancillary to the federal one in the same way that the defendant's impleader of a third-party defendant is always ancillary. *Id.* For example, a third-party complaint depends, in part, upon the resolution of the primary lawsuit. *Id.* Therefore, the third-party complaint's relation to the original complaint is not "mere factual similarity but logical dependence." *Id.* In *Owen Equipment*, however, the plaintiff's claim against Owen was entirely separate from her original claim against the utility company since Owen's liability to the plaintiff did not depend upon whether or not the utility company was also liable. *Id.* "Far from being an ancillary and dependent claim, it was a new and independent one." *Id.*
33. *Id.*

in an ongoing action in a federal court."[34] The Court concluded that "[a] plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case . . ., since it is he who has chosen the federal rather than the state forum and must thus accept its limitations."[35] If the plaintiff in *Owen Equipment* was striving for the efficiency of trying all her claims in one forum, the Court suggested that she look to the state courts.[36]

B. Pendent Jurisdiction

The doctrine of pendent jurisdiction allows a plaintiff who has a jurisdictionally sufficient federal question or federal law claim to join related state law claims.[37] The test for whether pendent jurisdiction exists over a state law claim was established by the Supreme Court in *United Mine Workers v. Gibbs*.[38] In that case, Gibbs was involved in a rivalry between the United Mine Workers ("UMW") and the Southern Labor Union over representation of mine workers in the southern Appalachian coal fields.[39] Gibbs supported the Southern Labor Union.[40] Ultimately, the UMW prevailed and, apparently due to his support of the Southern Labor Union, Gibbs lost his job and was unable to locate employment in the region.[41] Gibbs filed an action in federal district court alleging that the UMW had caused his misfortunes by engaging in a secondary boycott in violation of section 303 of the Labor Management Relations Act.[42] Gibbs also raised a separate claim alleging that the UMW's conduct amounted to an illegal conspiracy under state law.[43] Because diversity of citizenship was lacking, *Gibbs* confronted the scope of the pendent jurisdiction doctrine.

The *Gibbs* Court held that, as a matter of constitutional power, pendent jurisdiction exists as long as the state and federal claims "derive from a common nucleus of operative fact,"[44] and are so related that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding . . . ."[45] The Court distinguished, how-

---

34. *Id.*
35. *Id.*
36. *Id.*
37. *See generally* Siegel, *supra* note 4, at 220.
38. 383 U.S. 715 (1966).
39. *Id.* at 718.
40. *Id.* at 720.
41. *Id.* at 718-20.
42. *Id.* at 717 (citing Labor Management Relations Act, § 303, 61 Stat. 158 (1947) (current version at 29 U.S.C. § 187 (1988))).
43. *Id.* at 720.
44. *Id.* at 725.
45. *Id.*

ever, between a court's constitutional power to hear the pendent state claim, and its discretion in using that power.[46] The exercise of this discretion should be based on "considerations of judicial economy, convenience and fairness to litigants . . . . Needless decisions of state law should be avoided . . . ."[47] The *Gibbs* Court stated that if the federal claims are dismissed before trial, for example, on a Rule 12(b)(6) motion, the court should decline to exercise its discretion to hear the pendent state claim.[48] If the federal claims were dismissed on the merits, the court would have the discretion to decide the pendent state claim; however, according to the Court, the exercise of this discretion would be unwise.[49] "Similarly, if it appears that the state issues substantially predominate, . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals."[50]

C. *Pendent Parties: The Finley Decision*

The pendent jurisdiction doctrine is usually invoked by parties to a federal claim who are raising a separate state claim.[51] A different issue exists, however, when an additional party is added to the state but not to the federal law claim.[52] This situation involves the doctrine of pendent party jurisdiction.[53]

The Supreme Court initially addressed the doctrine of pendent party jurisdiction in *Aldinger v. Howard*.[54] Aldinger was fired from her job in the county treasurer's office without a hearing.[55] She brought suit in federal district court against the treasurer, the county and several county officers claiming that her discharge violated her federal constitutional rights under section 1983, and alleging, therefore, that she was entitled to injunctive relief and damages.[56] Additionally, she asserted state law claims against the parties.[57] Jurisdiction over the federal claim was predicated upon section 1343(3), whereas jurisdiction over the state claims was predicated upon the doctrine of pendent parties.[58] Section 1343(3) of the statute gave the federal

---

46. *See id.*
47. *Id.* at 726.
48. *Id.*
49. *Id.*
50. *Id.* at 726-27.
51. Siegel, *supra* note 4, at 221.
52. *Id.*
53. *Id.*
54. 427 U.S. 1 (1976).
55. *Id.* at 3.
56. *Id.* at 3-4.
57. *Id.* at 4.
58. *Id.*

district courts jurisdiction over "any civil action authorized by law to be commenced by any person" to redress the deprivation, under color of state law, of federal constitutional rights.[59] As to the county, the district court dismissed the action finding that because the county could not be sued as a "person" under section 1983, no independent basis of jurisdiction existed.[60] Therefore, the court held that it lacked the power to exercise pendent party jurisdiction over the claim.[61] The court of appeals affirmed and an appeal was taken to the Supreme Court.[62]

On appeal, Aldinger argued that according to *Gibbs*, the Federal Rules strongly encourage the joinder of claims, parties and remedies,[63] and therefore, her use of the Rules was a matter of jurisdictional power limited only by whether the claim against the county "'derive[d] from a common nucleus of operative fact.'"[64] Thus, she argued that based on the treatment of pendent claims in *Gibbs* and the use of ancillary jurisdiction to join additional parties, her nonfederal claim against a nonfederal defendant fell within pendent party jurisdiction and satisfied the *Gibbs* test on its face.[65]

The Court declined to allow pendent jurisdiction over the state law claim presented, and held that in determining whether jurisdiction over a nonfederal claim exists the context in which the nonfederal claim is asserted is crucial.[66] The Court noted that the joinder of a new party, as Aldinger requested, was both factually and legally different from the situation that faced the Court in *Gibbs*.[67] The Court stated that

> [f]rom a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his

---

59. *Id.* at 4 n.3.
60. *Id.* at 5.
61. *Id.*
62. *Id.* at 3.
63. *Id.* at 12 (citing United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966)).
64. *Id.* at 12 (quoting *Gibbs*, 383 U.S. at 725).
65. *Id.* at 12-13.
66. *Id.* at 14-16.
67. *Id.* at 14.

claim against the second defendant "derive from a common nucleus of operative fact."[68]

Additionally, the Court acknowledged that permitting jurisdiction over the pendent state law claim would serve the same considerations of judicial economy mentioned in *Gibbs* insofar as plaintiff's claims were "such that he would ordinarily be expected to try them all in one judicial proceeding."[69] However, "the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction . . . ."[70] In contrast to the reaction to *Gibbs*, Congress did not remain silent.[71] Through the express language of the statute, Congress specifically excluded parties such as counties from liability under section 1983, and therefore, by reference in the grant of jurisdiction under section 1343(3) as well.[72] The Court held that a fair reading of the language used in section 1343, together with the scope of section 1983, required that the joinder of a municipal corporation, for purposes of asserting a state law claim not within federal diversity jurisdiction was without the statutory jurisdiction of the district court.[73] As noted by Professor Siegel, however, this conclusion did not address "whether pendent party jurisdiction might be allowed at least in the case in which the federal claim is within the exclusive jurisdiction of the federal courts, thus making it impossible to find a single forum for both claims by joining the federal one in a state action."[74]

The Court addressed *Aldinger*'s unanswered questions in *Finley v. United States*.[75] In *Finley*, the plaintiff was the widow of a pilot who, with two of the plaintiff's children, had been killed when his private plane struck power lines while approaching a municipal airport under the air traffic control of the federal government.[76] The plaintiff sued the federal government in federal district court because this was the only forum available to her under the exclusive jurisdiction mandated by the Federal Tort Claims Act ("FTCA").[77] In her amended complaint, the plaintiff sought to join as defendants the municipal owner and operator of the airport as well as the power company responsible for illuminating the electric transmission lines

---

68. *Id.* (quoting *Gibbs*, 383 U.S. at 725).
69. *Id.* at 14-15.
70. *Id.* at 15.
71. *Id.*
72. *Id.* at 16.
73. *Id.* at 17.
74. Siegel, *supra* note 4, at 221.
75. 490 U.S. 545 (1989); *see also* Siegel, *supra* note 4, at 221.
76. *Finley*, 490 U.S. at 546.
77. *Id.* at 546-47.

with which the plane collided.[78] Since diversity jurisdiction did not exist, the federal court lacked an independent jurisdictional basis to adjudicate plaintiff's claims against the pendent party defendants.[79]

In a five to four decision, the Court rejected the application of pendent party jurisdiction even in this compelling situation.[80] The majority opinion authored by Justice Scalia implied that, unless Congress had affirmatively stated in this particular statute that new parties to related pendent state law claims may be brought into the federal litigation, such pendent party jurisdiction would not be allowed.[81] According to the Court, Congress remained silent about whether additional parties to pendent state claims could be added where the jurisdiction was based upon the FTCA.[82] The Court interpreted this silence to indicate that the plaintiff could not join the additional defendants.[83] The Court stated that "with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly."[84]

The majority was not oblivious to the possible need for a legislative response to the problem presented in *Finley*. The Court stated that "[w]hatever we say regarding the scope of jurisdiction . . . can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretative rules, so that it may know the effect of the language it adopts."[85] According to the majority, proper respect for the limited jurisdiction of the federal courts forbade the exercise of pendent party jurisdiction absent a clear congressional authorization.[86]

Justice Stevens, in dissent, argued that pendent party jurisdiction should be allowed at least in cases, like this one, where the dispute between all the parties derives from a "common nucleus of operative fact" and the forum is the only one in which all claims against the parties can be heard.[87] The dissenters would have followed precedent

---

78. *Id.* at 546.
79. *Id.*
80. *Id.* at 556.
81. *See id.* at 554-56.
82. *Id.* at 552-54.
83. *Id.* at 553.
84. *Id.* at 549.
85. *Id.* at 556.
86. *Id.* at 548-49. "As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court capacity to take it, and an act of Congress must have supplied it . . . ." *Id.* (quoting Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868)).
87. *Id.* at 569-70 (Stevens, J., dissenting). Justice Stevens was joined in dissent by

and interpreted this congressional silence to mean that pendent party jurisdiction would be allowed.[88] The consequence of the majority approach, the dissent noted, was that the plaintiff would have to pursue one suit against the United States in federal court, then waste judicial resources by relitigating many of the same facts in a separate state court suit against the other defendants.[89] In addition to the criticism noted by the dissent, the *Finley* decision also provided a substantial possibility of an inconsistent outcome if the state and federal claims were separately adjudicated. A combination of findings in two separate courts could leave a plaintiff clearly entitled to a remedy but wholly without recourse if each court concluded that the only liable party was the defendant before the other court.

D. Motivations and Concerns of Congress in Enacting 28 U.S.C. § 1367

In enacting the new section 1367, Congress accepted the *Finley* Court's suggestion to legislate on the meaning of supplemental jurisdiction. In the House of Representatives report introducing the statute, the legislators acknowledged that jurisdiction under the ancillary and pendent doctrines had "enabled federal courts and litigants to take advantage of the federal procedural rules on claim and party joinder to deal economically - in single rather than multiple litigation - with related matters, usually those arising from the same transaction, occurrence, or series of transactions or occurrences."[90] Moreover, by exercising supplemental jurisdiction, the district courts would make the federal courts a practical arena for the resolution of an entire controversy and effectuate "Congress' intent in the jurisdictional statutes to provide plaintiffs with a federal forum for litigating claims within original federal jurisdiction."[91]

Congress specifically cited *Finley* as an example of the Supreme Court "cast[ing] substantial doubt on the authority of federal courts to hear some claims within supplemental jurisdiction."[92] The report stated that the Court's rationale in this case "threaten[ed] to eliminate other previously accepted forms of supplemental jurisdiction."[93] As further evidence of the necessity of a congressional statement on this

---

Justices Brennan and Marshall. Justice Blackmun filed a separate dissenting opinion.

88. *Id.* at 573-75 (citing Aldinger v. Howard, 427 U.S. 1, 18 (1976)).
89. *Id.* at 576-77.
90. H.R. REP. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6873, 6874.
91. *Id.*
92. *Id.*
93. *Id.*

matter, Congress noted that "some lower courts have interpreted *Finley* to prohibit the exercise of supplemental jurisdiction in formerly unquestioned circumstances."[94] Thus, Congress took the initiative to create this statute and stated that "[t]his section would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understandings of the authorization for and the limits on other forms of supplemental jurisdiction."[95]

With regard to federal question cases, the statute "broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims, including claims involving joinder of additional parties."[96] In diversity cases, the statute authorizes the district courts to exercise supplemental jurisdiction, "except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute."[97]

The doctrines of ancillary and pendent jurisdiction "traditionally have been thought to permit a federal court to adjudicate state law claims over which the court has no express statutory jurisdiction," and their use, therefore, raises concerns regarding federalism.[98] "These concerns magnify when a federal court decides state law claims that far outdistance their federal counterparts in novelty, complexity, or importance."[99] Further, "when jurisdictionally insufficient state law claims overrun a lawsuit, they may greatly increase a federal district court's" workload.[100] For years, a debate has raged over whether federal district courts should continue the practice of handling diversity cases.[101] In reaction to criticism over the diversity jurisdiction of the federal courts, Congress raised the amount in controversy requirement from $10,000 to $50,000.[102] Implicitly recognizing these concerns, Congress stated in the legislative history of section 1367 that "in both [federal question and diversity] cases, the district courts, as under current law, would have discretion to decline supplemental jurisdiction in appropriate circumstances."[103]

---

94. *Id.* & n.14 (citing Aetna Casualty & Sur. Co. v. Spartan Mechanical Corp., 738 F. Supp. 664, 673-77 (E.D.N.Y. 1990) (impleader) (reviewing conflicting district court decisions)).
95. *Id.* at 6874.
96. *Id.*
97. *Id.*
98. Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247, 249.
99. *Id.*
100. *Id.*
101. FRIEDENTHAL ET AL., *supra* note 5, § 2.5, at 25 & n.7.
102. *See Report of Federal Courts Study Committee Implementation Act of 1990, reprinted at* 150 Cong. Rec. H13301-07 (daily ed. Oct. 27, 1990) at 14-15 (justifying recommendation to abolish diversity jurisdiction on grounds that the federal courts should primarily resolve disputes over federal law).
103. H.R. REP. No. 734, 101st Cong., 2d Sess., 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6873, 6874.

III. OPERATION OF SUPPLEMENTAL JURISDICTION UNDER SECTION 1367

A. Subsection (a)

Subsection (a) of the new section 1367 states the general rule regarding supplemental jurisdiction:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have 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. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.[104]

Jurisdiction is conferred in broad terms. Subsection (a) uses the "case or controversy" statement of the outer limits of federal jurisdiction found in Article III of the Constitution.[105] By using this outer constitutional limit, this subsection echoes the holding in *Gibbs*.[106]

Expressly overruling *Finley*,[107] and "explicitly fill[ing] the statutory gap noted" in that case,[108] "[t]he second sentence of subsection (a) make[s] explicit the federal courts' authority to hear supplemental claims that involve the joinder or intervention of additional parties."[109] The drafters of the statute noted that this sentence also, in part, reinstates prior settled law.[110] For example, "impleader claims against non-diverse third-party defendants are authorized [by § 1367(a)], as are compulsory counterclaims and crossclaims involving additional parties."[111] Most importantly, through the last sentence of section 1367(a), Congress authorized pendent party jurisdiction, with

---

104. 28 U.S.C. § 1367(a) (Supp. 1991).
105. *See* Siegel, *supra* note 4, at 221; *see also* H.R. REP. No. 734, 1990 U.S.C.C.A.N. at 6873-74.
106. H.R. REP. No. 734, 1990 U.S.C.C.A.N. at 6874 n.15; *see* Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 215 (1991) ("Typically, courts have understood the same constitutional case or controversy to include all claims arising out of a single transaction or occurrence or related series of transactions or occurrences.").
107. Mengler et al., *supra* note 106, at 215.
108. H.R. REP. No. 734, 1990 U.S.C.C.A.N. at 6874-75.
109. Mengler et al., *supra* note 106, at 215.
110. H.R. REP. No. 734, 1990 U.S.C.C.A.N. at 6874.
111. Mengler et al., *supra* note 106, at 215.

some exceptions in diversity cases, as provided in section 1367(b). By these terms, Congress has indicated that supplemental jurisdiction with regard to pendent claims is mandatory, subject only to a right of exclusion as a matter of judicial discretion under section 1367(c).[112]

Since the passage of this statute, a number of courts have used section 1367(a) as a basis for allowing supplemental jurisdiction over claims.[113] Section 1367(a) was recently applied in *Rosen v. Chang*.[114]

---

112. Siegel, *supra* note 4, at 221.

113. *See* Lewis v. United States, 812 F. Supp. 620 (E.D. Va. 1993) (allowing supplemental jurisdiction over a pendent party's general maritime claims in an admiralty suit against the United States); *In re* Storage Technology Corp. Sec. Litig., 804 F. Supp. 1368, 1375 (D. Colo. 1992) (allowing supplemental jurisdiction over plaintiff's state law fraud and negligent misrepresentation claims because they were based on the same facts supporting the plaintiff's federal securities claims and formed part of the same case or controversy); United States v. Rockwell Int'l Corp., 795 F. Supp. 1131 (N.D. Ga. 1992) (allowing supplemental jurisdiction of common law claims because they were based on a single set of operative facts and formed part of the same case or controversy as plaintiff's Federal False Claims Act claims); Roe v. Little Co. of Mary Hosp., 800 F. Supp. 620 (N.D. Ill. 1992) (allowing supplemental jurisdiction over state negligence claims against non-diverse parties arising out of delivery of contaminated blood); United States *ex rel.* Chicago Bldg. Restoration, Inc. v. Tazzioli Constr. Co., 796 F. Supp. 1130 (N.D. Ill. 1992) (allowing the plaintiff to bring a claim, in addition to its "Miller Action" claim, against a subcontractor and its surety under supplemental jurisdiction since both claims arose out of the same work); Freiburger v. Emery Air Charter, Inc., 795 F. Supp. 253 (N.D. Ill. 1992) (allowing supplemental jurisdiction over breach of contract claim, but denying supplemental jurisdiction over claims of defamation and retaliatory discharge because they did not derive from common operative facts under the federal question claim); Leith v. Lufthansa German Airlines, 793 F. Supp. 808 (N.D. Ill. 1992) (allowing supplemental jurisdiction over the personal injury action of an individual airline employee because this action was pendent to the airline's suit; the complaints, answers and affirmative defenses were the same; and most of the evidence would apply to both claims); Estate of Bruce v. City of Middletown, 781 F. Supp. 1013 (S.D.N.Y. 1992) (applying supplemental jurisdiction to a third-party complaint filed by the city against a movie theater for contribution, after the estate of the decedent filed an action against the city).

Some courts, however, have overlooked the existence of the new section 1367. An unpublished opinion by the United States District Court for the District of Maryland, Fisher v. United States R.R. Retirement Bd., Civil Nos. H-91-909 and H-91-1105 (D. Md. Oct. 2, 1991) presents such a situation. Plaintiffs, George and Frances Fisher, filed a complaint against the defendants, the United States Railroad Retirement Board ("USRRB") and the United States. In a separate civil action, Stanley Fisher filed a complaint against the defendants, the USRRB, the United States and George Fisher. The court consolidated the suits.

Each complaint alleged that an automobile operated by George Fisher was involved in a collision with a vehicle which was negligently driven by an employee of the USRRB acting within the scope of his employment. At the time of the accident, Stanley Fisher was a passenger in the car driven by

In *Rosen*, "a civil rights suit was brought against various prison authorities on behalf of a deceased inmate."[115] The claim was premised on the "allegation that repeated complaints of abdominal pain were improperly diagnosed as an upset stomach and treated with Metamucil, when in fact the decedent was suffering from acute appendicitis, which ultimately caused his death."[116] The plaintiff asserted three claims: Count I was a claim against the named defendants in their individual and official capacities as employees of the State of Rhode Island pursuant to 42 U.S.C. § 1983 to redress alleged deprivations of rights secured by the Eighth and Fourteenth Amendments to the United States Constitution; Count II sought recovery against all defendants, except the State, pursuant to the Rhode Island Wrongful Death Act; and Count III asserted that the State was liable for the wrongful conduct of its employees under the doctrine of respondeat superior.[117]

With regard to Count II, the court reviewed the standard announced in *United Mine Workers v. Gibbs* — that pendent jurisdiction exists whenever (1) there is a federal claim arising under the grounds set out in Article III, section 2 of the Constitution; (2) the

---

George Fisher. George Fisher and Stanley Fisher were seriously injured in the accident. Frances Fisher, the wife of George Fisher, sought recovery for harm to her marital relationship caused by the employee's alleged negligence. Both of these suits were filed under the Federal Torts Claim Act ("FTCA"). George, Frances and Stanley Fisher were all Maryland residents. After the court ordered the cases consolidated, the United States made a motion to dismiss the USRRB from the case, contending that it was not a proper party because the FTCA authorizes actions only against the United States and not against any of its agencies. The government further asserted that the court lacked subject matter jurisdiction over the claim asserted by Stanley Fisher against George Fisher.

In an opinion authored by Senior United States District Judge Harvey, the court concluded that the government's motion to dismiss the claims against the USRRB and George Fisher would be granted. With regard to defendant George Fisher, the court, citing *Finley*, stated that the Supreme Court rejected the notion of pendent-party jurisdiction in a case brought under the FTCA and, accordingly, held that a plaintiff in an FTCA suit cannot proceed against non-federal defendants for whom no independent ground of jurisdiction exists. The court then held that "*Finley* clearly applies here and mandates dismissal of George Fisher as a defendant in the joined action, inasmuch as it is undisputed that the claim against him is not supported by an independent basis of federal jurisdiction."

Neither the court nor counsel in their briefs acknowledged the existence of section 1367. The statute, however, clearly applied since this case was filed after December 1, 1990 and involved the type of situation covered by subsection (a).

114. 758 F. Supp. 799 (D.R.I. 1991).
115. *Id.*
116. *Id.* at 801.
117. *Id.* at 800-01.

federal and state claims taken together comprise one constitutional "case;" and (3) the state and federal claims derive from a common nucleus of operative fact.[118] The *Rosen* court then recognized that this standard had been codified in section 1367.[119] Further, the court noted "that the operative facts underlying the wrongful death claim [were] the same facts underlying the [section] 1983 claim and that the claims [were], therefore, part of the same 'case or controversy.'"[120] The court then concluded that it had the power to exercise supplemental jurisdiction over the wrongful death claim.[121]

With regard to Count III, the court acknowledged that the precedents of *Aldinger v. Howard*[122] and *Clark v. Taylor*[123] did not preclude the court from hearing Count III in light of the recent passage of section 1367.[124] The court stated that "the statute *explicitly* grants the courts the power to exercise supplemental jurisdiction and states that '[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention claims of additional parties.'"[125] The *Rosen* court found that because of the new statute's passage, the court now had the power to assert jurisdiction over the respondeat superior claim against the State.[126] The court held that this state law claim was part of the same case or controversy as the federal section 1983 claim because the respondeat superior "case against the State [would] be based almost entirely on the proof used against the individual defendants."[127] The court also concluded "that it would serve the interests of judicial economy to try these related claims together."[128]

Another case employing section 1367(a) is *Godfrey v. Perkin-Elmer Corporation*.[129] In *Godfrey*, a "[f]emale employee brought a Title VII action against her employer and three of its employees and asserted state law claims for wrongful discharge, intentional and negligent infliction of emotional distress, and slander."[130] The employee's husband presented a derivative claim for loss of consortium.[131] The defendants filed a motion to dismiss the state claims for

---

118. *Id.* at 802 (citing United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).
119. *Id.* at 802.
120. *Id.* at 803.
121. *Id.*
122. 427 U.S. 1 (1976).
123. 710 F.2d 4 (1st Cir. 1983).
124. Rosen v. Chang, 758 F. Supp. 799, 803 (D.R.I. 1991).
125. *Id.* (quoting 28 U.S.C. § 1367(a)).
126. *Id.*
127. *Id.* at 803-04.
128. *Id.* at 804.
129. 794 F. Supp. 1179 (D.N.H. 1992).
130. *Id.*
131. *Id.* at 1181-82.

lack of subject matter jurisdiction.[132] The court denied this motion, holding that it had supplemental jurisdiction over the plaintiff's state claims since these claims were "all based upon the same alleged discriminatory acts" as the sexual harassment claim which provided the basis for federal subject matter jurisdiction.[133]

While acknowledging the parties' debate as to whether a federal court "can or should exercise pendent jurisdiction over state law claims in the context of a Title VII action," the court found that this question was now resolved through the supplemental jurisdiction provisions of section 1367(a).[134] The court decided that the "plaintiff's claims pass[ed] muster" under the *Gibbs* standard, which had been incorporated into section 1367(a).[135] According to the court, the plaintiff's sexual harassment claim under Title VII provided the basis for federal subject matter jurisdiction, and the plaintiff's federal and state claims were all based upon the same alleged discriminatory acts.[136] The court then stated that "given the duplication and waste of judicial resources that separate trials would entail, [the] plaintiff would be expected to try them all in a single proceeding."[137] Accordingly, the court held "that it had the power to exercise supplemental jurisdiction over the plaintiff's state law claims, subject only to the narrow circumstances detailed by Congress [in section 1367(c)]."[138] Indeed, the court, citing *Cedillo v. Valcar Enterprises & Darling Delaware Co.*[139] with approval, stated that "[i]f the claim is within the court's supplemental discretion, the court *must* exercise such jurisdiction unless one of the four categorical exceptions in [section] 1367(c) is satisfied."[140]

The *Godfrey* court found no reason to decline supplemental jurisdiction under any of the grounds noted in section 1367(c). Since the Title VII claim had not been dismissed, section 1367(c)(3) did not apply.[141] The "plaintiff's state claims [did] not present any novel or complex issues of state law[,]" nor did they predominate over the Title VII claims.[142] In addition, "there [was] no comprehensive plan

---

132. *Id.* at 1183.
133. *Id.* at 1184.
134. *Id.* at 1183-84. Since the parties framed their arguments in terms of whether "pendent" jurisdiction should apply, they were apparently unaware of section 1367. *See id.* at 1184.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. 773 F. Supp. 932 (N.D. Tex. 1991).
140. *Godfrey*, 794 F. Supp. at 1184 (quoting Cedillo v. Valcar Enter. & Darling Delaware Co., 773 F. Supp. 932, 939 (N.D. Tex. 1991)) (emphasis added).
141. *Id.* at 1184.
142. *Id.* at 1185.

of state regulation at issue[;]"[143] therefore, the court concluded that sections 1367(c)(1) and (c)(2) did not apply.[144]

Finally, the *Godfrey* court addressed the claims of the employee's husband's derivative claim for loss of consortium.[145] This claim rendered the husband a pendent party plaintiff.[146] The court noted that prior to the passage of section 1367, the debate existed as to whether the husband's claim could be joined under *Finley*.[147] After the passage of section 1367(a), pendent party jurisdiction would be allowed; and therefore, the husband could be joined.[148]

Section 1367(a), as applied by the courts, has facilitated a litigant's desire for a unified action in federal court where the constitutional jurisdictional requisites have been met. *Corporate Resources, Inc. v. Southeast Suburban Ambulatory Surgical Center, Inc.*,[149] however, exemplifies a situation where the court, attempting to follow section 1367, has produced a result that clearly exceeds Congress' intent when it enacted the statute. In *Corporate Resources*, the plaintiff, Corporate Resources, Inc. ("C.R.I.") was a Michigan corporation having its principal place of business in Michigan.[150] C.R.I.'s business consisted of providing financing for leased equipment.[151] The defendant, Southeast Suburban Ambulatory Surgical Center ("Southeast") was an Illinois corporation, having its principal place of business in Illinois.[152] Southeast was in the business of providing medical care.[153] The defendants, eight individually named physicians, were citizens and residents of Illinois.[154] Southeast contracted with C.R.I. to lease medical and other types of equipment.[155] Pursuant to this agreement, the parties entered into three separate lease orders between January 5, 1989, and May 25, 1989.[156] Each defendant made a "written personal guarant[y] to C.R.I. on behalf of Southeast."[157] The defendants promised C.R.I. "the prompt payment in full, when due, or accelerated following default, of every Lease Payment due under the Lease Agreement or any Lease Order"

---

143. *Id.*
144. *Id.* at 1184-85.
145. *Id.* at 1185.
146. *Id.*
147. *Id.*
148. *Id.*
149. 774 F. Supp. 503 (N.D. Ill. 1991).
150. *Id.* at 504.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*

entered into by Southeast.[158] In its suit, C.R.I. alleged that in November 1990, Southeast ceased making its monthly payments.[159] In Count I of its complaint, C.R.I. sued Southeast for breach of contract in the amount of $243,429.69; in Count II, C.R.I. sought $174,398.80 for lease payments after it exercised the acceleration clause.[160] Counts III through X were directed against each of the eight individual physicians.[161] These counts requested amounts ranging from $21,908.66 to $243,429.60, with five of the counts being less than $50,000.[162] The plaintiff argued that each of the counts in its ten-count complaint arose under the court's diversity jurisdiction.[163] The five individual defendants who were being sued for less than $50,000 moved for dismissal of the counts against them because these amounts did not meet the statutory amount in controversy requirement for a diversity case.[164]

The court agreed that it had diversity jurisdiction over the plaintiff's claim against Southeast, but recognized that with regard to the individual physician defendants, "if a single plaintiff asserts claims against more than one defendant and each defendant's liability is several on the respective claims, jurisdiction attaches only to those claims which individually involve matters exceeding the jurisdictional amount."[165] Thus, the court determined that the claims against the physicians lacked independent subject matter jurisdiction, and therefore, that the physicians were pendent parties to the plaintiff's claim against Southeast.[166] The court then had to decide if it could "exercise 'pendent party jurisdiction' over the claims against the physicians."[167] The court began its analysis by recognizing that "Congress . . . overrode the *Aldinger* and *Finley* decisions [which rejected the doctrine of pendent party jurisdiction] when it passed the Judicial Improvement Act of 1990."[168] The court next quoted the provisions of section 1367(a), erroneously identifying it as section 1367(b).[169] Relying on section 1367(a), the court concluded that "it may, consistent with Article III of the Constitution, exercise jurisdiction over

158. *Id.*
159. *Id.*
160. *Id.* at 504-05.
161. *Id.* at 505.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* (citing Motorists Mut. Ins. Co. v. Simpson, 404 F.2d 511 (7th Cir. 1968)).
166. *Id.* at 506.
167. *Id.*
168. *Id.*
169. *Id.*

all the individual defendants."[170] The court reasoned that its exercise of supplemental (pendent party) jurisdiction with respect to all of the counts against the individual defendants is in the interests of judicial economy, because all the counts in this action "derive from a common nucleus of operative facts" and are such that a plaintiff would "ordinarily be expected to try them in one judicial proceeding."[171]

This action was brought as a diversity action by the plaintiff. Because the defendant physicians were alleged to be severally liable on the respective claims, they could be joined as parties to the action under Fed. R. Civ. P. 20. Thus, the correct section for the court to rely on was section 1367(b). By analyzing the case under section 1367(a), the court accepted jurisdiction over the five physicians who were each being sued for less than $50,000. Thus, the court allowed the plaintiff to join parties over which a federal court would not have had jurisdiction if they had been sued separately, since plaintiff's claims against them did not meet the amount in controversy requirement. As the court correctly stated, section 1367(a) was enacted to overrule *Finley*. However, *Finley* involved pendent party jurisdiction where the original action was based on federal question jurisdiction, over which the federal courts had exclusive jurisdiction, and the plaintiff wished to join related state parties in claims over which the court had no independent federal subject matter jurisdiction. The legislative history of the statute states that "[i]n federal question cases, [the statute] broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims including claims involving the joinder of additional parties."[172] In diversity cases, however, "the district courts may exercise supplemental jurisdiction, *except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute.*"[173]

Corporate Resources does not present *Finley* concerns because it did not involve a federal question that could only be litigated in federal court. Yet, in a case founded on diversity, the court permitted the plaintiff to avoid a requirement of the diversity statute, contrary to the stated intent of Congress. *Moore's Federal Practice* states that "[a]ny remaining doubt as to the permissibility of exercising pendent party jurisdiction in diversity actions should be resolved by [section 1367(b)]."[174] "Because both complete diversity and the amount in

---

170. *Id.*
171. *Id.* (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).
172. H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6873, 6874.
173. *Id.* (emphasis added).
174. 3A JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 20.07, at 88-89 (2d ed. 1992).

controversy are 'jurisdictional requirements' under [section] 1332, neither can be evaded by an appeal to supplemental or pendent party jurisdiction."[175] This interpretation is clearly borne out by the legislative history of the statute. Evidently, the *Corporate Resources* court did not understand the proper application of the statute.

B. Subsection (b)

Subsection (b) of section 1367 applies in actions in which subject matter jurisdiction is based solely on diversity of citizenship under 28 U.S.C. § 1332. Section 1367(b) provides as follows:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.[176]

This subsection does not preclude courts from exercising supplemental jurisdiction in diversity cases in general, but merely mandates its preclusion in a number of specific instances.[177] Siegel asserts that the repetition of the word "plaintiffs" at several rule-citing junctures in subsection (b) makes clear that the subsection is "concerned only with efforts of a plaintiff to smuggle in claims that the plaintiff would not otherwise be able to interpose against certain parties in certain specific contexts for want of [diversity] jurisdiction."[178]

Diversity under section 1332 has been construed to require that each plaintiff differ in citizenship from each defendant.[179] This rule of "complete diversity" was announced in *Strawbridge v. Curtis*.[180] Commentators have agreed that Congress intended that this complete diversity requirement remain intact after the passage of section 1367.[181] This notion is further strengthened by the concluding language of section 1367(b)—"when exercising supplemental jurisdiction over such

---

175. *Id.*
176. 28 U.S.C. § 1367(b) (Supp. 1991).
177. *Id.*
178. *Id.*
179. *Id.*
180. 7 U.S. (3 Cranch) 267 (1806); *see also* Siegel, *supra* note 4, at 222.
181. *See, e.g.*, Siegel, *supra* note 4, at 222; Oakley, *supra* note 2 at 765.

claims would be inconsistent with the jurisdictional requirements of section 1332."[182] Similarly, in enacting subsection (b), Congress has, in effect, codified the principal rationale of *Owen Equipment & Erection Co. v. Kroger*.[183] Subsection (b) fully implements the *Owen Equipment* rationale by prohibiting the district courts, in actions founded solely on diversity, from exercising supplemental jurisdiction over claims asserted by plaintiffs against persons made parties through any of the several joinder devices of the Federal Rules of Civil Procedure when doing so "would be inconsistent with the jurisdictional requirements of section 1332."[184]

While subsection (b) prohibits the exercise of supplemental jurisdiction in connection with the joinder or intervention of plaintiffs when it would be inconsistent with section 1332, class actions under Fed. R. Civ. P. 23 are not included in the diversity cases to which the restrictions in subsection (b) apply.[185] The legislative history clarifies that section 1367 was not intended to affect the jurisdictional requirements previously determined to apply to class actions.[186] "Thus, the Supreme Court's holdings that only the named class representatives must satisfy the citizenship requirement of [section] 1332 but that all class members must satisfy the amount in controversy requirements remains good decisional law."[187] It is unfortunate, however, that the drafters of the statute did not see fit to expressly lay out these rules within the statute itself. Professor Freer, one of the most outspoken critics of the statute, has stated with regard to this omission that "[e]vidently, we must hope that judges dealing with the statute have a copy of the legislative history."[188]

Fed. R. Civ. P. 14 is the procedural rule governing the third-party practice of impleader.[189] This rule allows a defendant alleging

---

182. 28 U.S.C. § 1367(b) (Supp. 1991).
183. 437 U.S. 365 (1978); *see* Mengler et al., *supra* note 106, at 215.
184. Mengler et al., *supra* note 106, at 215.
185. *Id.*
186. H.R. REP. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6873, 6874; *see also* Mengler et al., *supra* note 106, at 215.
187. Mengler et al., *supra* note 106, at 215 (citing Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921); Zahn v. International Paper Co., 414 U.S. 291 (1973)).
188. Freer, *Compounding Confusion*, *supra* note 3, at 486.
189. Rule 14 provides as follows:

> (a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise

that a third-party is liable to him for all or part of the plaintiff's claim against him to implead such a person as a third-party defendant. Traditionally, the defendant's impleader claim against the third-party defendant qualified for ancillary jurisdiction if either the original parties were of diverse citizenship or the plaintiff's claim against

---

the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(b) When Plaintiff May Bring in Third Party.

When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) Admiralty and Maritime Claims.

When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

FED. R. CIV. P. 14.

the original defendant raised a federal question;[190] section 1367 does not change this. Section 1367 does, however, exclude supplemental jurisdiction over any claim the plaintiff may assert against the third-party defendant after the defendant impleads the third-party defendant.[191] Procedurally, Fed. R. Civ. P. 14(a) allows such a direct claim if the plaintiff can show that the court has subject matter jurisdiction over this claim asserted against a third-party defendant.[192] Indeed, the rules could not dispense with such a showing because Congress has barred the rule makers from disturbing the requirements of subject matter jurisdiction.[193] However, the language of section 1367(b) clarifies that supplemental jurisdiction will still not support this type of claim asserted by a plaintiff because it is inconsistent with section 1332.[194] Section 1367 thereby adopts the Supreme Court's holding in *Owen Equipment*.[195]

Professor Freer notes that both kinds of Rule 14(a) claims (i.e., a claim by a plaintiff against the third-party defendant, and a claim by a third-party defendant against the plaintiff) are permitted only if they "arise from the same transaction or occurrence as the underlying dispute,"[196] thereby satisfying the constitutional test for supplemental jurisdiction under *Gibbs* and section 1367(a).[197] Freer notes that the Report of Federal Courts Study Committee and at least one draft of supplemental jurisdiction legislation called for overruling the *Owen Equipment* result, which allowed supplemental jurisdiction over a Rule 14(a) claim by a third-party defendant against a plaintiff, but did not allow a 14(a) claim by a plaintiff against a third-party defendant.[198] Freer is disturbed that the final statute chose to codify this "schizophrenic treatment of 14(a) claims."[199] Freer concedes that in order to codify established pre-*Finley* practice, it would be necessary to codify the result that occurred in *Owen Equipment*.[200]

---

190. *See* WRIGHT, FEDERAL COURTS, *supra* note 4, at 515.
191. Siegel, *supra* note 4, at 222.
192. *Id.*
193. *Id.* (citing FED. R. CIV. P. 82). Rule 82 provides:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

FED. R. CIV. P. 82.
194. Siegel, *supra* note 4, at 222.
195. *Id.*
196. Freer, *Compounding Confusion*, *supra* note 3, at 475.
197. *Id.*
198. *Id.* at 475-76.
199. *Id.*
200. *Id.*

Nevertheless, Freer believes that the *Owen Equipment* result exemplifies an anti-diversity bias by the courts to limit or discourage claims brought into federal court, and that this bias was codified into section 1367.[201]

Freer's criticism is valid only if the enactment of section 1367 was intended to revive the entire area of diversity jurisdiction. The legislative history of the statute indicates, however, that Congress intended only to restore diversity practice prior to *Finley*.[202] Nevertheless, one can certainly argue that having undertaken to enter the field of supplemental jurisdiction legislatively via section 1367, Congress should not have limited itself to simply restoring pre-*Finley* practice, but should have undertaken to address other issues, such as *Owen Equipment*'s treatment of Rule 14(a) claims.

As noted by Professor Mengler, "subsection (b), in prohibiting certain *claims* by a plaintiff, is silent regarding *counterclaims* by the plaintiff in reaction to the claims of joined parties against the plaintiff."[203] In the past, federal courts have held that ancillary jurisdiction may be properly asserted over compulsory counterclaims.[204] Freer illustrates a potential problem with the statute by describing a situation in which a third-party defendant files a Rule 14(a) claim against a non-diverse plaintiff and the plaintiff asserts a transactionally related claim against the third-party defendant.[205] Because the third-party defendant and the plaintiff are now opposing parties, the claim by the plaintiff is a compulsory counterclaim with respect to the third party's Rule 14(a) claim.[206] Freer notes that section 1367(b), as written, precludes supplemental jurisdiction over this compulsory counterclaim by the plaintiff.[207]

In response to Freer's argument, the drafters assert that the word "claims" in this provision does not encompass "counterclaims," a subject on which the statute remains silent.[208] According to the drafters' argument, the courts are free to follow prior case law, authorizing supplemental jurisdiction over these claims.[209] Freer, in addressing this argument, notes that "while courts ultimately may permit supplemental jurisdiction over such counterclaims [as was the

---

201. *Id.*
202. H.R. REP. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6873, 6874.
203. Mengler et al., *supra* note 106, at 215 n.17.
204. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375 n.18 (1978) (citing Moore v. New York Cotton Exch., 270 U.S. 593 (1926)).
205. Freer, *Compounding Confusion*, *supra* note 3, at 481.
206. *Id.*
207. *Id.* Section 1367(b) precludes supplemental jurisdiction "over claims by plaintiffs against persons made parties under Rule 14." *Id.*
208. *Id.* (citing Mengler et al., *supra* note 106, at 215 n.17).
209. *Id.*

accepted prior practice], the statute does not compel them to do so."[210] Arguably, an express provision of this rule in the statute would better guide the courts.

A related problem arises in determining whether the plaintiff can implead a non-diverse third party or assert a cross-claim against a non-diverse co-plaintiff in response to a counterclaim. Freer notes that in these situations, "under prior practice, either claim by the plaintiffs would seem to invoke supplemental jurisdiction."[211] The language of section 1367(b), however, would preclude supplemental jurisdiction over these claims because both impleader claims and cross-claims in this type of situation would be "claims by plaintiffs."[212] The impleader claim would be a claim against a party joined under Rule 14 and the cross-claim would be a claim against a party joined under Rule 20.[213] Both claims, therefore, fall within the prohibition of supplemental jurisdiction in 1367(b).[214] The result of this prohibition "would force the plaintiff to litigate her claims for indemnity or contribution in a state court while the underlying claim and counterclaim would proceed in federal court."[215] This situation would open the plaintiff to precisely the kind of prejudice that the joinder rules attempted to avoid.[216]

Freer asserts that courts can avoid these ridiculous results only through "creative interpretation," and suggests that the most logical interpretation for the courts to adopt would be that plaintiffs against whom a counterclaim has been filed would no longer be considered "plaintiffs," but rather would be classified as "defendants."[217] If this position is adopted, Freer questions how far the courts will be required to go in this creative reinterpretation of the parties. Will courts reclassify defendants who assert counterclaims, cross-claims or impleader claims as plaintiffs?[218] Freer notes that if the courts take this route, then supplemental jurisdiction risks being destroyed.[219] If a defendant asserting a counterclaim, cross-claim or impleader

---

210. *Id.* at 481-82. Professor Freer notes that this same problem arises when the defendant in a diversity case files a counterclaim against the plaintiff and the plaintiff seeks to assert a cross-claim against a non-diverse co-party who owes the plaintiff an indemnity or contribution for the counterclaim. *Id.* In this case, the cross-claim is a claim by a plaintiff against a party joined under Rule 20, also falling within the confines of section 1367(b).
211. *Id.* at 463 n.103, 482.
212. *Id.* at 482.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 483.
218. *Id.*
219. *Id.* at 483-84.

claim is a "plaintiff for purposes of affirmative claims, then her counterclaims, cross-claims and impleader claims cannot invoke supplemental jurisdiction because, under section 1367(b)[,] they are claims by a plaintiff against a party joined under Rules 14 and 20."[220]

Freer's analysis reflects a lack of appreciation as to why plaintiffs and defendants are treated differently for purposes of supplemental jurisdiction. As the Court in *Owen Equipment* emphasized, "[i]t is a fundamental precept that federal courts are courts of limited jurisdiction."[221] These limits, "whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."[222] Situations will exist where all of a plaintiff's claims cannot be tried together in a federal forum because some of the claims do not fall within the necessary constitutional and/or statutory confines.[223] The *Owen Equipment* Court noted that in determining whether jurisdiction over a nonfederal claim exists, a court must examine the context in which the nonfederal claim is asserted.[224] A plaintiff voluntarily bringing a state law claim into federal court is quite different from those claims of "a defending party [who is] haled into court against his will," or of "another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in federal court."[225] Thus, a plaintiff who voluntarily brings a state law claim in a federal court "cannot complain if [supplemental] jurisdiction does not encompass all of his possible claims in one case, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations."[226]

Additional joinder situations arise under Fed. R. Civ. P. 19, compulsory joinder, Fed. R. Civ. P. 20, permissive joinder, and Fed. R. Civ. P. 24, intervention—three rules specifically cited in section 1367(b). Subsection (b) generally denies the use of supplemental jurisdiction to a plaintiff when the plaintiff seeks to assert a claim against a person joined under those rules where no independent subject matter jurisdiction exists for these claims.[227]

Fed. R. Civ. P. 19[228] describes two types of parties that may be joined. Rule 19(a) concerns "necessary" parties.[229] Necessary parties

---

220. *Id.* at 484.
221. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). The federal courts are limited both by the Constitution and by Congress through its statutes. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 375-76.
225. *Id.* at 376.
226. *Id.*
227. *See* 28 U.S.C. § 1367(b) (Supp. 1991).
228. Rule 19 provides:

are those parties who have an interest in the controversy and who, in the interest of complete justice, should be joined.[230] Rule 19(b) deals with "indispensable" parties.[231] Indispensable parties are those parties that "not only have an interest in the controversy, but [this] interest is of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a

---

(a) Persons To Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

FED. R. CIV. P. 19.

229. *See generally* 3A MOORE, *supra* note 174, ¶ 19.01. "Necessary party" terminology was developed in the case of Shields v. Barrow, 58 U.S. (17 How.) 158, 160 (1854), which occurred prior to the 1966 revision of the law, and still provides a useful means of interpreting present Rule 19. *See also* Provident Tradesmen's Nat'l Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

230. *See* 3A MOORE, *supra* note 174, ¶ 19.01, at 17 (citing Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1854)).

231. *See id.* ¶ 19.01, at 17 n.194.

condition that its final termination may be wholly inconsistent with equity and good conscience."[232] Rule 19(b) indispensable parties are so vital to the action that if their joinder is impossible, the whole action must be dismissed.[233] Under decisions issued prior to the enactment of section 1367, if the joinder of a party found to be a necessary defendant under Rule 19 was inconsistent with the jurisdictional requirements of section 1332, the party could not be joined on the basis of pendent or ancillary jurisdiction.[234] Under section 1367, however, a person found to be a necessary defendant under Rule 19 may theoretically be joined under supplemental jurisdiction, but the plaintiff may not assert a claim against that person unless the requisite diversity requirements are satisfied.[235]

Fed. R. Civ. P. 24[236] provides for two kinds of intervention: intervention as a matter of right, Rule 24(a), and permissive intervention, Rule 24(b). Under Rule 24(a), a party *shall* be permitted to intervene in an action if a federal statute confers an unconditional right to intervene, or if the party claims an interest relating to the property or transaction, which is the subject of the action, and is so situated that the disposition of the action may impair or impede his ability to protect his interest.[237] Under Rule 24(b), a party *may* be

---

232. *See id.* ¶ 19.01, at 17 n.195.
233. *See generally* FRIEDENTHAL ET AL., *supra* note 5, § 6.5, at 334-35; *see also* Haas v. Jefferson Nat'l Bank, 442 F.2d 394, 395 (5th Cir. 1971).
234. Mengler et al., *supra* note 106, at 215 n.23.
235. *Id.*
236. RULE 24 provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24.
237. FED. R. CIV. P. 24(a) (emphasis added).

permitted to intervene if a federal statute confers a conditional right to intervene or if a party's claim or defense and the main action have a question of law or fact in common.[238] It has been generally understood that the doctrine of ancillary jurisdiction would not apply to the permissive intervention claim of Rule 24(b); however, a general consensus exists in the federal courts that the doctrine would apply to the intervention-of-right claim meeting the requirements of subdivision (a).[239]

From the language of section 1367(b), one can infer that Congress never intended supplemental jurisdiction to be applied to intervention situations to support a claim on the plaintiff's side.[240] Siegel notes that "[t]he second reference to Rule 24 in subdivision (b) of [section] 1367 makes it explicit that one seeking to intervene as a plaintiff under Rule 24 is not to be given supplemental jurisdiction of the claim the intervenor proposes to plead."[241] Further, the "earlier reference to Rule 24 precludes supplemental jurisdiction from helping a claim by the original plaintiff against a person who has intervened under Rule 24."[242] Nevertheless, if a party, meeting the requirements of Rule 24, intervenes as a defendant and interposes a counterclaim against the plaintiff, over which an original federal jurisdictional basis exists, then section 1367(b) does not appear to prohibit a court from exercising supplemental jurisdiction over this claim.[243]

Professors Mengler, Burbank, and Rowe, who participated in the drafting of the legislation that codified supplemental jurisdiction, note that "[a] person can neither intervene as a plaintiff under Rule 24(a) nor be joined as a plaintiff under Rule 19 if intervention or joinder would be inconsistent with diversity requirements."[244] Therefore, they contend that "courts should not only deny intervention or joinder [in these circumstances], but also consider dismissing the entire action pursuant to Fed. R. Civ. P. 19 when significant interests would be prejudiced by the absentee's exclusion from the action."[245]

Fed. R. Civ. P. 20 is the procedural rule governing permissive joinder.[246] Rule 20 allows a plaintiff to join other plaintiffs or to

---

238. FED. R. CIV. P. 24(b) (emphasis added).
239. Siegel, *supra* note 4, at 221.
240. *Id.* at 223.
241. *Id.*
242. *Id.*; *see also* Freer, *Compounding Confusion*, *supra* note 3, at 476-78.
243. Siegel, *supra* note 4, at 221.
244. Mengler et al., *supra* note 106, at 215.
245. *Id.*
246. Rule 20 provides:

> (a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or

make several parties co-defendants to a claim, if all claims asserted in the lawsuit are joint, several or arising out of the same transaction or series of transactions and there exists any question of law or fact common to all claims.[247] While the "provisions of Rule 20 governing permissive joinder of parties should be construed liberally to promote trial convenience and avoid multiple lawsuits," jurisdictional and venue requirements are serious limitations upon permissive joinder.[248] All parties, whether plaintiffs or defendants, joined under Rule 20 must meet federal subject matter jurisdictional requirements[249] because ancillary jurisdiction does not apply to Rule 20 joinder.[250] If the action is brought as a diversity action, "each plaintiff must be of diverse citizenship to each defendant."[251] However, Thomas Arthur and Professor Freer note that section 1367(b) does not codify this complete diversity rule by precluding supplemental jurisdiction over claims made by a non-diverse plaintiff subsequently joined under Rule 20.[252] Surely this omission was not intended to overrule the prior requirement of complete diversity in this situation; however, the statutory language was not clearly drafted, thereby providing little guidance.

Professor Siegel suggests that the "last clause of [section 1367(b)] may offer the courts some leeway in avoiding an overly rigid construction of the subdivision."[253] As applied to a situation where a

---

fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

FED. R. CIV. P. 20.

247. *See id.*
248. *See* 3A MOORE, *supra* note 174, ¶ 20.05, at 22-23.
249. *Id.* ¶ 20.07, at 40.
250. FRIEDENTHAL, *supra* note 5, § 2.14, at 78.
251. *See* 3A MOORE, *supra* note 174, ¶ 20.07, at 41 & n.9 (citing Strawbridge v. Curtiss, 7 U.S. (7 Dall.) 267 (1806)).
252. Arthur & Freer, *Burnt Straws*, *supra* note 3, at 982.
253. Siegel, *supra* note 4, at 223.

non-diverse plaintiff is joined under Rule 20, Siegel emphasizes that the exclusion of supplemental jurisdiction in this case only applies if the exercise of supplemental jurisdiction would be inconsistent with the jurisdictional requirements of section 1332.[254] Siegel states that "if the situation is one in which the court can be convinced that the exercise of supplemental jurisdiction would not undermine the complete diversity requirement of section 1332," and that exercising jurisdiction would expedite the case's disposition without substantially increasing the work load, "the final clause of subdivision (b) should afford the court a tool with which to sustain supplemental jurisdiction of the added claim."[255] For example, Siegel asserts that supplemental jurisdiction should be exercised where a court clearly has jurisdiction over the claims already pending before the court and these claims "would have to remain for adjudication even if the added claim should be rejected."[256] If Siegel's interpretation is accurate, then the statute represents a more liberal approach to supplemental jurisdiction than the *Owen Equipment* and *Aldinger* decisions, which emphasized the limited nature of federal jurisdiction.

Few courts have discussed section 1367(b).[257] Recent cases, however, involving subsection (b) include *C.D.S. Diversified v. Franchise Finance Corp.*[258] and *Unique Concepts, Inc. v. Manuel.*[259] In *C.D.S. Diversified*, the plaintiff, C.D.S., was a New York corporation having its principal place of business in New York.[260] One defendant, Ticor Title Insurance Company ("Ticor"), was organized under the laws of California, and maintained its principal place of business in Arizona.[261] Therefore, complete diversity existed between these parties.[262]

---

254. *Id.*
255. *Id.*
256. *Id.*
257. While of limited precedential value, a number of unpublished cases have relied upon section 1367(b) to defeat the application of supplemental jurisdiction. *See, e.g.*, Atheron v. Casey, No. 92-1283, 1992 WL 235894 (E.D. La. Sept. 4, 1992) (denying supplemental jurisdiction over a Rule 24(a)(2) intervention plaintiff because it would destroy complete diversity); Bradbury v. Robertson-Ceco Corp., No. 92-3408, 1992 WL 178648 (N.D. Ill. July 22, 1992) (denying supplemental jurisdiction in a diversity case over claims asserted by plaintiffs that did not meet the requisite amount in controversy requirement); Pellegino v. Pesch, No. 91-C-4967, 1992 WL 159169 (N.D. Ill. June 29, 1992) (denying supplemental jurisdiction over parties that did not meet the requisite amount-in-controversy requirement); Blum v. Toyota Motor Sales, U.S.A., Inc., No. 90-2428-R, 1991 WL 50258 (D. Kan. March 5, 1991) (denying supplemental jurisdiction over claims because complete diversity of the parties was lacking).
258. 757 F. Supp. 202 (E.D.N.Y. 1991).
259. 930 F.2d 573 (7th Cir. 1991).
260. *C.D.S. Diversified*, 757 F. Supp. at 203.
261. *Id.*
262. *Id.*

In 1987, C.D.S. entered into a sale/leaseback agreement with another defendant, FFCA/IIP 1985 Property Company, in connection with property where a Burger King restaurant was operated.[263] "The agreement provided that FFCA was to purchase all real property and equipment and, in turn, lease it back to C.D.S. for a period of eight to twenty years."[264] As a condition of entering into this agreement, C.D.S. was required to obtain a rent insurance policy with United Guaranty Insurance Company ("United Guaranty").[265] "Ticor acted as the title insurer as well as escrow agent for the sale-leaseback transaction."[266]

After C.D.S. failed to make its monthly rental payment to FFCA,[267] FFCA terminated the lease for nonpayment.[268] C.D.S. then sued FFCA, Ticor and United Guaranty, stating seven causes of action, including wrongful termination of the lease, conversion, fraud and breach of contract.[269] The plaintiff's sole claim against Ticor alleged that Ticor had converted $36,000, which had been held in escrow for the plaintiff, by conspiring with FFCA.[270] Pursuant to Fed. R. Civ. P. 12(b)(1), defendant Ticor moved to dismiss the claim for lack of subject matter jurisdiction, since the amount in controversy did not exceed the required jurisdictional amount of $50,000.[271] C.D.S. requested the court to exercise pendent jurisdiction over the claim against Ticor.[272]

Since this action was filed in August, 1989, the court correctly held that section 1367 was not applicable.[273] Nevertheless, the court noted that even if the statute had been binding, it would still have barred the exercise of supplemental jurisdiction over the claim against Ticor because this claim did not independently meet the amount in controversy requirement.[274] In reaching this conclusion, the court noted that "with regard to pendent jurisdiction in diversity cases as opposed to 'federal question' cases, the legislature simply codified and made clear existing case law."[275] The court then cited *Zahn v. International Paper Co.*[276] and *Owen Equipment & Erection Co. v.*

---

263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 204.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* at 205.
274. *Id.* at 205-06.
275. *Id.* at 205.
276. 414 U.S. 291 (1973).

Kroger[277] to support the proposition that pendent party jurisdiction is not viable "where the amount in controversy is below the required jurisdictional amount or where diversity of citizenship is absent."[278] Thus, the *C.D.S. Diversified* court had little difficulty in correctly interpreting the provisions of section 1367(b), unlike the court in *Corporate Resources, Inc. v. Southeast Suburban Ambulatory Surgical Center, Inc.*,[279] which reached a contrary conclusion by erroneously interpreting a similar situation under section 1367(a).

The Seventh Circuit also considered the application of section 1367(b) in *Unique Concepts, Inc. v. Manuel*.[280] In *Unique Concepts*, the defendant, Manuel, quit his employment at Unique Concepts and started his own firm.[281] "Unique Concepts believed that Manuel's new business was producing products for which it held a patent, and it filed suit under the patent laws."[282] Manuel "responded with a counterclaim based on the state law of defamation and a state consumer protection" statute, because Unique Concepts had sent a letter to Manuel's customers stating that his products were unsafe and mentioning the pending patent litigation.[283] "These counterclaims were permissive rather than compulsory, because they arose out of different transactions" than did the original claims asserted by Unique Concepts against Manuel.[284] Diversity of citizenship supplied an independent jurisdictional basis for these counterclaims.[285]

The district court bifurcated the case, trying the state consumer protection claims first.[286] The jury returned a verdict of $200,000 in Manuel's favor.[287] "Unique Concepts then asked for leave to dismiss its claims without prejudice, a maneuver designed to avoid the possibility of preclusion in a contributory infringement suit Unique Concepts [had] pending in New York against Manuel's supplier."[288] The district court granted Unique Concept's motion on the condition that it execute a covenant not to refile the patent suit against Manuel.[289] The district court then entered a final judgment affecting all claims and counterclaims.[290]

---

277. 437 U.S. 365 (1978).
278. *Id.* at 205-06.
279. 774 F. Supp. 503 (N.D. Ill. 1991).
280. 930 F.2d 573 (7th Cir. 1991).
281. *Id.*
282. *Id.*
283. *Id.* at 574.
284. *Id. See also* FED. R. CIV. P. 13(a).
285. *Unique Concepts*, 930 F.2d at 574.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*

Eventually, the case reached the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit concluded that the case properly belonged in the Court of Appeals for the Federal Circuit, and ordered it transferred to that court.[291] As a result, the Seventh Circuit did not decide any of the substantive issues. Nevertheless, the Seventh Circuit acknowledged that a federal court has supplemental jurisdiction (formerly ancillary jurisdiction) over compulsory counterclaims, but that permissive counterclaims require their own jurisdictional basis.[292]

Contrary to the United States District Court for the Eastern District of New York and the Seventh Circuit, the United States District Court for the Southern District of New York appears to have misconstrued section 1367(b) in *ZB Holdings, Inc. v. White*.[293] *ZB Holdings* was a stockholders' derivative suit. In 1989, a stock purchase transaction took place in which the defendant, BBA Group PLC ("BBA") acquired an eighty percent interest in IGH, Inc. ("IGH").[294] IGH was a closely held corporation owned by Jerry Zucker and James G. Boyd.[295] The plaintiff, ZB Holdings, Inc. ("ZB Holdings"), was a corporation formed by Zucker and Boyd to serve as a depository for Zucker and Boyd's twenty percent interest in IGH.[296] ZB Holdings alleged that various injuries had occurred to IGH based upon the post-acquisition operation of the corporation and asserted claims sounding in common-law fraud and misrepresentation.[297] ZB Holdings named BBA, BBA Industrial Textiles, Inc., Guthrie North America, Inc., and various individuals as defendants.[298] Jurisdiction was based exclusively on diversity of citizenship.[299] ZB Holdings was a South Carolina corporation having its principal place of business in South Carolina; none of the defendants were citizens of South Carolina.[300] IGH, the corporation on whose behalf ZB Holdings purported to sue, was neither named as a party nor served with process.[301]

On April 6, 1992, the defendants moved to dismiss the derivative complaint for lack of subject matter jurisdiction.[302] The defendants argued "that IGH was an indispensable party whose joinder was

---

291. *Id.*
292. *Id.*
293. 144 F.R.D. 42 (S.D.N.Y. 1992).
294. *Id.* at 43.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.* at 43-44.
299. *Id.* at 44.
300. *Id.*
301. *Id.*
302. *Id.*

required by Fed. R. Civ. P. 19(b) and that IGH should have been aligned as a defendant in the action because of the antagonism that existed between the plaintiff [ZB Holdings] and the management of IGH."[303] Since both IGH and ZB Holdings were South Carolina corporations, ZB Holdings concluded that joinder would destroy complete diversity of citizenship and the federal court would lack subject matter jurisdiction.[304] The court denied this motion, finding that "even if the joinder of IGH destroyed diversity, the court had authority to assert supplemental jurisdiction over IGH pursuant to [section 1367(a)]."[305]

The defendants then filed another motion to join IGH as a party-defendant, pursuant to Fed. R. Civ. P. 19(a), renewing the argument that joinder was required and would have the effect of barring the court from exercising supplemental jurisdiction over the derivative claims under section 1367(b).[306] In response to this motion, the court acknowledged that it erred when it denied the defendants' previous motion to dismiss.[307] The court granted the defendants' motion to join IGH as a defendant pursuant to Fed. R. Civ. P. 19(b) and, since this joinder served to destroy complete diversity, the court dismissed the derivative complaint in its entirety for lack of subject matter jurisdiction.[308]

In the court's analysis of the situation, it recognized the well-established rule requiring joinder of the corporation on whose behalf a derivative suit is brought.[309] The court stated that "without the presence of the corporation complete relief cannot be achieved, and the corporation's interests cannot be protected."[310] Therefore, the court found that IGH was an indispensable party under Rule 19(b) and, accordingly, was required to be joined as a party.[311]

Having established this threshold issue, the court then had to decide whether to align IGH as a defendant and destroy complete diversity, or as a plaintiff, in which case the court would possess subject matter jurisdiction over the action. According to the court, the general rule is "that the corporation in a derivative suit should be aligned as a plaintiff since it is the real party in interest."[312] An exception to this rule exists, however, "where aligning the corporation

---

303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 45.
310. *Id.*
311. *Id.*
312. *Id.*

as a plaintiff would not provide a 'real collision' of interests."[313] In this situation, the court concluded that the requisite antagonism existed between the plaintiff, ZB Holdings, and IGH and, therefore, it aligned IGH as a defendant.[314] The joinder of IGH as a defendant destroyed complete diversity, and the court stated "that it lack[ed] subject matter jurisdiction over the controversy and the suit must be dismissed pursuant to Rule 12(b)(1) absent some other authority for [the] [c]ourt to proceed."[315]

The plaintiff argued that section 1367 provided the requisite authority for the court to proceed.[316] The court, however, was not convinced. In determining that it did not have subject matter jurisdiction over the plaintiff's claims, the court curiously sidestepped an analysis under section 1367(b) and based its holding on the premise that section 1367(a) prevented the exercise of supplemental jurisdiction over this claim.[317] The court found that section 1367(a) required it to have "original jurisdiction" over the action in order to grant supplemental jurisdiction over other constitutionally related claims.[318] The court interpreted "original jurisdiction" to mean "jurisdiction in the first instance over a viable lawsuit, without regard to parties to be joined later."[319] The court then concluded that "where a derivative suit brought in diversity is subject to dismissal for failure to join an indispensable, non-diverse party, supplemental jurisdiction is not available to join that non-diverse party because, under 1367(a), the court never had 'original jurisdiction' over the derivative action."[320]

The court's analysis seems strained, and, at the very least, incomplete. While it is logical to begin an analysis of a statute by looking at the first section to see if it applies, the court should have completed the process by addressing the subsequent provisions of section 1367(b). As filed, jurisdiction in *ZB Holdings* was based solely upon diversity jurisdiction;[321] therefore, it would seem that the court did have original jurisdiction over the named parties. The court could have simply moved to section 1367(b) which addresses this specific situation—cases founded "solely on section 1332 of this title."[322] Had the court considered section 1367(b), it would have

313. *Id.* (quoting Smith v. Sperling, 354 U.S. 91, 97 (1957)).
314. *Id.* at 47.
315. *Id.*
316. *Id.*
317. *Id.* at 47.
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at 44.
322. 28 U.S.C. § 1367(b) (Supp. 1991).

held that this section prohibited suit in federal court.[323] Instead of relying on section 1367(b), the court concluded its confusing analysis by defensively stating:

> This court does not believe the new supplemental jurisdiction statute was intended to provide a federal forum for derivative actions in which no federal question is raised or where diversity is lacking. If such was Congress' intent, Congress should have striven for greater clarity.[324]

If the court had engaged in a section 1367(b) analysis, perhaps Congress' intent would have been apparent.

C. Subsection (c)

Subsection (c) of section 1367 sets out four grounds upon which the court may decline to exercise supplemental jurisdiction over a claim under subsection (a). Subsection (c) states:

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.[325]

The use of the term "may" in this subdivision indicates that the court has discretion.[326] However, this discretion only applies in four situations, as opposed to the grant of supplemental jurisdiction in general.[327] Professor Mengler explains:

> Under subsection (c), a district court may dismiss a supplemental claim if it raises a novel or complex issue of state law, substantially predominates over the claim or claims

---

323. Section 1367(b) states that the "district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under [Rule 19] when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." *Id.*
324. *ZB Holdings*, 144 F.R.D. at 47.
325. 28 U.S.C. § 1367(c) (Supp. 1991).
326. Siegel, *supra* note 4, at 223.
327. *Id.*

> over which the district court has original jurisdiction, or if the district court has dismissed all claims over which it had original jurisdiction and judicial efficiency does not clearly favor adjudicating the supplemental claim. Additionally, the subsection accommodates exceptional circumstances, [which are not] defined, in which grounds for dismissal of the supplemental claim may be compelling.[328]

In all of the above instances, "the House Report cautions, that the district court in exercising its discretion must undertake a case-specific analysis."[329] Subsection (c) thus "codifies those factors that the Supreme Court in *United Mine Workers v. Gibbs* recognized as providing a sound basis for a lower court's discretionary decision to decline supplemental jurisdiction"[330] and the common law doctrine of abstention.[331]

---

328. Mengler et al., *supra* note 106, at 216 (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988)).

329. *Id.* at 216 (citing H.R. REP. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6873, 6875); *see also* Siegel, *supra* note 4, at 224.

330. Mengler et al., *supra* note 106, at 216 (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966)). In *Gibbs*, Justice Brennan stated that

> [n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Gibbs, 383 U.S. at 726.

331. *See* Siegel, *supra* note 4, at 224; *see also* Oakley, *supra* note 2, at 766-67 n.118.

Oakley suggests that the House Report "is misleading insofar as it characterizes the subsection (c) factors as simply a restatement of the factors discussed in *Gibbs* as pertinent to the district court's discretion." Oakley, *supra* note 2, at 767 n.118. According to Oakley, "this is true only of § 1367(c)(2), which substantially parallels the second factor discussed in *Gibbs*." *Id.* Oakley states that § 1367(c)(4) is "substantially narrower . . . than the parallel language in *Gibbs* acknowledging that 'there may be reasons independent of jurisdictional considerations . . . that would justify separating state and federal claims for trial' such that 'jurisdiction ordinarily should be refused.'" *Id.* (quoting *Gibbs*, 383 U.S. at 727). Oakley also asserts that § 1367(c)(3) is narrower than its *Gibbs* counterpart. *Id.* at 767. Oakley contends that § 1367(c)(3) simply "codifies a scenario that *Gibbs* offered merely as an illustration of the exercise of a broader discretion to avoid 'needless decisions of state law.'" *Id.* (quoting *Gibbs*, 383 U.S. at 726). As to § 1367(c)(1), Oakley finds no counterpart in *Gibbs*. *Id.* at 767. Subsection (c)(1) has language that Oakley describes as "language of abstention." *Id.* For an example of abstention, see Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976), reiterating that "[a]bstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar."

Gibbs held that if the federal claims are dismissed before trial, the court should decline to exercise its discretion to hear the pendent state claim.[332] If the federal claim is dismissed on the merits, the court has the power to decide the pendent state claim, but *Gibbs* indicated that the exercise of this discretion would be unwise.[333] "Similarly, if it appears that the state issues substantially predominate, . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals."[334]

The first two clauses of subsection (c), addressing situations in which the claim seeking supplemental jurisdiction "raises a novel or complex issue of state law or substantially predominates over the claim or claims over which the district court has original jurisdiction, overlap, as they did under prior law as well as under the so-called 'abstention' doctrines."[335] "'Abstention' refers to judicially created doctrines which 'justify either rejection or postponement of the assertion of federal court power even though Congress has vested jurisdiction in the federal courts to hear the cases in question.'"[336] A federal court might order abstention on various grounds.[337] Abstention may be invoked

> (1) [w]here clarification of state law might avoid a federal constitutional ruling (commonly called *Pullman* abstention);[338] (2) where the decision of an unclear issue of state law in a diversity case might threaten important state interests (commonly called *Thibodaux* abstention);[339] (3) where an assertion of federal jurisdiction might interfere with important state administrative goals (commonly called *Burford* abstention);[340] (4) where there are simultaneously pend-

---

332. *Gibbs*, 383 U.S. at 726.
333. *Id.* at 726-27.
334. *Id.*
335. Siegel, *supra* note 4, at 223-24.
336. Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. REV. 321, 335 (quoting M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 233 (1980), and citing New Orleans Pub. Serv. v. Council of New Orleans, 491 U.S. 350, 358 (1989); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15, 20-21 (1987); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236-37 (1984); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 815, 817 (1976)).
337. For a full discussion on the doctrine of abstention and its origins, see Lee & Wilkins, *supra* note 336, at 335-38.
338. Lee & Wilkins, *supra* note 336, at 335 (citing Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941)).
339. *Id.* (citing Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959)).
340. *Id.* at 335-36 (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943)).

> ing state court proceedings (commonly called *Younger* abstention);[341] and (5) where there are duplicative state and federal court proceedings (commonly called *Colorado River* abstention).[342]

One commentator, Professor Siegel, notes that the situation described in section 1367(c)(1) closely approximates the *Pullman* category of abstention, and he suggests that this section should be applied in a manner compatible with *Pullman*.[343] Siegel comments that the abstention doctrines are not lightly invoked by federal courts, and hopes that the statement of these analogous, if not duplicative, bases in section 1367(c) will not encourage any looser application of them.[344]

Siegel is particularly wary of section 1367(c)(2), under which a state claim dependent upon supplemental jurisdiction may be found to predominate over the underlying federal claim which supports jurisdiction.[345] Under the abstention doctrine, decisions can be found that will result in a dismissal rather than merely a stay of the federal action.[346] Siegel states that

> [w]hen a dismissal rather than a stay appears to be the consequence of an abstention, the bar must hope that the courts will be as circumspect now as before in invoking the doctrine, either as an "abstention" directly or in the guise of a "mere" declination of supplemental jurisdiction under [section] 1367(c) when supplemental jurisdiction exists in the case. A seemingly innocent declination under section 1367(c) can prove just as virulent [to a party asserting a claim] as an "abstention" under abstention case law.[347]

Subsection (c)(3), which allows the district court to decline supplemental jurisdiction where it has dismissed all claims over which it had original jurisdiction, conforms with substantial prior case law.[348] Embodied in this clause is a considerable degree of discretion.[349] Siegel suggests that a court's decision regarding whether a dismissal of the original claim (or remand in a removal situation)

---

341. *Id.* at 336 (citing Younger v. Harris, 401 U.S. 37 (1971)).
342. *Id.* (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)).
343. Siegel, *supra* note 4, at 224; *see also* Administaff, Inc. v. Kaster, 799 F. Supp. 685, 690 (W.D. Tex. 1992). *But cf.* Oakley, *supra* note 2, at 767 n.118 (stating that clause (1) of § 1367 resembles *Colorado River* abstention).
344. Siegel, *supra* note 4, at 224.
345. *Id.*
346. *Id.* (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943)).
347. *Id.* at 224.
348. *See generally id.*
349. *Id.*

"should bring about a dismissal of the dependent claim for want of supplemental jurisdiction should depend on the moment within the litigation when the dismissal of the original claim takes place, and on the other surrounding circumstances."[350] For example, Siegel notes that

> if the main claim is dismissed early in the action before any substantial preparation has gone into the dependent claims, dismissing or remanding the latter upon declining supplemental jurisdiction seems fair. But, if the dismissal of the main claim occurs late in the action, after there has indeed been substantial expenditure in time, effort and money in preparing the dependent claims, [declining supplemental jurisdiction] may not be fair, nor is it by any means necessary. The discretion implicit in the word "may" in subdivision (c) of 1367 permits the district court to weigh and balance all of these factors.[351]

Subsection (c)(4) was included as a final ground under which a court "can decline supplemental jurisdiction in other 'exceptional circumstances' that present 'compelling reasons.'"[352] The House Report states that subsection (c)(4) "acknowledges that occasionally there may exist other compelling reasons for a district court to decline supplemental jurisdiction, which the subsection does not foreclose a court from considering in exceptional circumstances."[353] In his analysis, Siegel states that "[r]ather than constitut[ing] a separate category for declining supplemental jurisdiction, distinct from the first three, the language of clause (4) indicates that all declinations of supplemental jurisdiction should be reserved for situations in which there are 'compelling reasons.'"[354]

Siegel's analysis, however, does not seem completely accurate in light of the language of the House Report. While courts declining to exercise supplemental jurisdiction under section 1367(c)(4) must do so only in compelling circumstances, the language of the House Report indicates that this clause does indeed constitute a separate ground for dismissal. Contrary to Siegel's position, this clause authorizes a court to use its discretion, but limits the exercise of such discretion with the "exceptional circumstances" requirement.

Several courts have availed themselves of the provisions of section 1367(c).[355] Three significant decisions discussing section 1367(c)

---

350. *Id.*
351. *Id.*
352. *Id.*; *see also* United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966) (stating that one reason to decline the exercise of supplemental jurisdiction for exceptional circumstances includes the likelihood of jury confusion).
353. H.R. REP. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6873, 6875.
354. Siegel, *supra* note 4, at 224-25.
355. *See* Rhyne v. Henderson County, 973 F.2d 386 (5th Cir. 1992) (dismissing

include *Perkins v. City of Philadelphia*,[356] *Rosen v. Chang*,[357] and *James v. Sun Glass Hut of California*.[358] In *Perkins*, the district court, following the dismissal of federal civil rights claims, declined to exercise pendent jurisdiction over a state law negligence claim and remanded the case to the state court.[359] The negligence claim was brought by the mother of the decedent against the police department, alleging that the department had conducted an inadequate investigation regarding the decedent's disappearance.[360]

---

state claims in a § 1983 case under § 1367(c)(3) after the federal question claims had been dismissed); Packett v. Stenberg, 969 F.2d 721 (8th Cir. 1992) (affirming district court's declination under § 1367(c)(3) to exercise jurisdiction over a purely state claim determining whether an assistant attorney general, who was in a policy-making position, was protected from termination by the newly elected Attorney General); Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992) (holding that once state law claims against University officials in their official capacity had been remanded to state court, the district court properly remanded the same state law individual capacity claims under § 1367(c)(4)), *cert. denied*, 113 S. Ct. 1067 (1993); Administaff, Inc. v. Kaster, 799 F. Supp. 685 (W.D. Tex. 1992) (remanding, in the context of a § 1983 case, related state claims under §§ 1367(c)(1) & (c)(2) because the state claims predominated; novel issues of state law existed; and resolution of the state law claims made a determination of federal constitutional claims unnecessary); Mill Inv., Inc. v. Brooks Woolen Co., 797 F. Supp. 49 (D. Me. 1992) (holding that while court had the power to extend supplemental jurisdiction over the action even where the basis for federal subject matter jurisdiction was lost, the court also had the power to order the case remanded under § 1367(c)); Arawana Mills, Co. v. United Tech. Corp., 795 F. Supp. 1238 (D. Conn. 1992) (allowing supplemental jurisdiction over pendent state law claims in a case involving CERCLA, and rejecting the defendant's argument that it should decline to do so under §§ 1367(c)(1) & (2)); Freiburger v. Emery Air Charter, Inc., 795 F. Supp. 253 (N.D. Ill. 1992) (dismissing claims under § 1367(c) because the claims of retaliatory discharge and discharge for participation in a union did not arise from a common nucleus of fact); Carlucci v. United States, 793 F. Supp. 482 (S.D.N.Y. 1992) (declining to grant supplemental jurisdiction under § 1367(c)(1) over a third-party state law contribution claim); Lahaza v. Azeff, 790 F. Supp. 88 (E.D. Pa. 1992) (declining to apply supplemental jurisdiction under § 1367(c)(3) to state law claims where it had dismissed the federal question claims); Anspec Co. v. Johnson Controls, Inc., 788 F. Supp. 951 (E.D. Mich. 1992) (declining to apply supplemental jurisdiction under §§ 1367(c)(1)-(2) to state law claims in a CERCLA case because state law claims substantially predominated over the CERCLA claim and raised novel and complex issues of state law); Manela v. Gottlieb, 784 F. Supp. 84 (S.D.N.Y. 1992) (declining to exercise supplemental jurisdiction under § 1367(c)(3) over state law claims after it dismissed the federal claim alleging violations of securities laws); Hudson County News Co. v. Metro Assocs., 141 F.R.D. 386 (D. Mass. 1992) (declining to assert supplemental jurisdiction under § 1367(c)(2) in a federal declaratory action filed under RICO over additional related claims already pending in a state court action).

356. 766 F. Supp. 313 (E.D. Pa. 1991).
357. 758 F. Supp. 799 (D.R.I. 1991).
358. 799 F. Supp. 1083 (D. Colo. 1992).
359. *Perkins*, 766 F. Supp. at 318.
360. *Id.* at 314.

The lawsuit, initially brought in state court, was removed to federal court by the defendants because, in addition to a state negligence claim, the plaintiff alleged violations of federal law under section 1983.[361] The *Perkins* court, relying on sections 1367(c)(1) and (c)(3), declined to exercise supplemental jurisdiction over the negligence claim because the complex issues raised by the state law negligence action had not been previously decided by state courts and the federal claims had been dismissed.[362] In reaching its decision to remand, the court cited *Carnegie-Mellon University v. Cohill*,[363] and held that a federal district court could remand a properly removed case to state court when only the state law claims remained to be litigated.[364] The *Perkins* court stated that "[u]nder *Cohill*, we have the power to remand the case; under the balancing test of *Gibbs*, we deem it prudent to do so."[365] Further, the court stated that "Congress codified the doctrine of pendent jurisdiction and the case law of *Gibbs* and *Cohill* in . . . [section] 1367."[366]

In *Rosen v. Chang*,[367] the court, citing section 1367(c), stated that "it is within a court's discretion to exercise supplemental jurisdiction."[368] The court commented that it was "concerned about the potential confusion in the jurors' minds when they must consider both the Eighth Amendment standard for Count I and the negligence standard for Count II."[369] Using a balancing test, the court determined that "[s]uch concerns, however, are outweighed by the furtherance of judicial economy in trying these closely related claims together, particularly when clear jury instructions may alleviate any juror confusion."[370] In its discretion, the court chose to exercise supplemental jurisdiction over the wrongful death claim.[371]

In *James v. Sun Glass Hut of California, Inc.*,[372] the plaintiff alleged that she was terminated from her employment because of age discrimination.[373] In her second through seventh claims for relief, the plaintiff alleged breach of contract, promissory estoppel, fraud, negligent misrepresentation, bad faith, and outrageous conduct.[374]

---

361. *Id.* at 315.
362. *Id.* at 317-18.
363. 484 U.S. 343 (1988).
364. *Perkins*, 766 F. Supp. at 317.
365. *Id.*
366. *Id.*
367. 758 F. Supp. 799 (D.R.I. 1991).
368. *Id.* at 803.
369. *Id.*
370. *Id.*
371. *Id.*
372. 799 F. Supp. 1083 (D. Colo. 1992).
373. *Id.* at 1084.
374. *Id.*

Jurisdiction existed only by virtue of plaintiff's federal Age Discrimination in Employment Act claim.[375] In determining whether to allow supplemental jurisdiction over the plaintiff's state law claims, the court began with the premise that "[t]he decision whether to exercise pendent jurisdiction has traditionally been a matter within the court's discretion."[376] The court then recognized "[b]ecause [section] 1367 codifies pendent jurisdiction, the discretionary element is necessarily retained."[377] The court acknowledged that "'the statute also cabins that discretion by mandating that supplemental jurisdiction be exercised unless one of the categories in section 1367(c) is met.'"[378] In reviewing section 1367(c), the court stated that the state law claims

> clearly predominate over the lone federal claim. Plaintiff's contract and fraud claims required elements of proof that were distinct and foreign to her ADEA claim. These claims would substantially expand the scope of this case. Moreover, all the state law claims involve[d] damages not available under ADEA, again causing a substantial expansion of this action beyond that necessary and relevant to the federal claim.[379]

Therefore, the court concluded that the state law claims substantially predominated over the federal claim and declined to exercise its supplemental jurisdiction under section 1367(c)(2).[380]

D. Subsection (d)

Subsection (d) extends the limitations period for supplemental claims dismissed under section 1367 as well as other claims dismissed in the same action. Subsection (d) provides:

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.[381]

If, pursuant to subsection (c), a district court dismisses a party's supplemental claim, a party may choose to refile that claim in state

---

375. *Id.*
376. *Id.* (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)).
377. *Id.* (citing Cedillo v. Valcar Enter., 773 F. Supp. 932, 940 (N.D. Tex. 1991)).
378. *Id.* (quoting *Cedillo*, 773 F. Supp. at 940) (emphasis in *James*).
379. *Id.* at 1085.
380. *Id.*
381. 28 U.S.C. § 1367(d) (Supp. 1991).

court. In addition, if a supplemental claim is dismissed pursuant to subsection (c), a party may move to dismiss without prejudice his or her other claims for the purpose of refiling the entire action in state court.[382]

A party who wishes to refile a claim in state court after it has been dismissed by the federal court may face a statute of limitations problem.[383] To address this situation, section 1367(d) provides:

> a 30 day period of tolling of statutes of limitations [or defers to the specific state's statute of limitations if that period is longer than 30 days] for any supplemental claim that is dismissed under [section 1367] and for any other claims in the same action voluntarily dismissed at the same time or after the supplemental claim is dismissed.[384]

The purpose of subsection (d) is to prevent the loss of claims to state statutes of limitations, which do not toll with respect to supplemental claims pending in federal court.[385] Section 1367(d) proce-

---

382. *See* Mengler et al., *supra* note 106, at 216; Siegel, *supra* note 4, at 225-26. Mengler and Siegel note that the standards developed under FED. R. CIV. P. 41(a) govern whether a motion to dismiss should be granted. Mengler et al., *supra* note 106, at 216; Siegel, *supra* note 4, at 225-26. Rule 41(a) provides:

> (a) Voluntary Dismissal: Effect Thereof.
>
> (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
>
> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

FED. R. CIV. P. 41(a).

383. *See* Mengler et al., *supra* note 106, at 216.

384. H.R. REP. No. 734, 101st Cong., 2d Sess. 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6873, 6875-76.

385. Mengler et al., *supra* note 106, at 216 (citing H.R. REP. No. 734, 1990 U.S.C.C.A.N. at 6875-76).

dure also eliminates any disincentive by a plaintiff to present an entire case to a state court after a federal court has dismissed the supplemental claim.[386]

The House Report regarding section 1367(d) states that if a federal court declines to exercise supplemental jurisdiction over a state claim, and that state claim "reaches final judgment in the state court before the federal district court has resolved the claims over which it retained jurisdiction,"[387] the federal court "should accord no claim preclusive effect to a state court judgment on the dismissed supplemental claim."[388] The statute's drafters, Mengler, Burbank and Rowe, note that a "state court['s] determinations on common issues could provide a basis for issue preclusion in the federal action."[389]

For an example of a case in which section 1367(d) was discussed see *Freer v. Mayer*.[390] In *Freer*, because the state claims tended to predominate over the federal claim, the court dismissed the federal claim.[391] Relying upon sections 1367(c)(2) and (c)(3), the court also dismissed the state claims.[392] The court acknowledged that the "plaintiff suffers no prejudice by this dismissal. He may refile his state law claims within six months of this decision [under 1367(d)]."[393]

IV. CONCLUSION

A number of critics have asserted that section 1367 is "poorly drafted, creating ambiguity for cases that formerly were clear and creating numerous problems in others."[394] Thomas Arthur and Richard Freer suggest that these ambiguities stem from the quick passage of the statute at the end of a congressional session and the absence of a "thorough public ventilation and congressional scrutiny."[395]

Quite frankly, supplemental jurisdiction is a complex area of the law. Before the statute's enactment, the rules were developed through years of case law. In addition, the various judicial decisions were far from uniform. Through the enactment of section 1367, Congress not only clarified but also codified the case law prior to *Finley*, thereby reversing *Finley*'s erosion of federal court jurisdiction. Section 1367, therefore, serves as a single source of authority to be

386. *Id.*
387. Mengler et al., *supra* note 106, at 216.
388. H.R. REP. No. 734, 1990 U.S.C.C.A.N. at 6876.
389. Mengler et al., *supra* note 106, at 216.
390. 796 F. Supp. 89 (S.D.N.Y. 1992).
391. *Id.*
392. *Id.* at 94.
393. *Id.*
394. Arthur & Freer, *Burnt Straws*, *supra* note 3, at 964.
395. *Id.*

used in determining under what circumstances a federal court must exercise supplemental jurisdiction and when a federal court may decline to exercise jurisdiction over supplemental claims. By passing this statute, Congress reinstated the federal courts as accessible forums for the resolution of entire cases or controversies that present claims outside of the courts' original federal jurisdiction.

On the other hand, the statute provides little definitive guidance in a number of areas, particularly with respect to the implementation of section 1367(b). Several courts have misapplied the statute—an indication that the statute could be drafted more clearly. Further commentary and a body of case law accurately interpreting section 1367(b) are necessary before one can expect uniform application in the courts and an accurate understanding within the bar. Ultimately, the achievement of less complicated rules regarding supplemental jurisdiction inherently depends upon continued reform in the legislature and in the judiciary. Significantly, section 1367 represents one important step in the process of reformation and simplification.

M. Ashley Harder