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Independent Jurisdictional Grounds Unnecessary to Support Claim by Original Plaintiff against Nondiverse Third-Party Defendant.

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with the provisions of rule 377(g), effective January 1, 1978, the supreme court has provided the typographical standards to be used by court reporters when preparing a statement of facts.[79] The court has also recognized its authority to provide for the fees which a court reporter may charge in civil judicial proceedings.[80] In order to exercise its authority effectively, the supreme court has ordered a comprehensive study of the official court reporter system in Texas.[81] One of the probable results of this study will be the formulation of standards to be used in determining court reporters' fees.

Johnson demonstrates the possible abuses which can result from a statute delegating legislative power without expressing sufficient standards. In refusing to follow the liberal holding of *Martin,* the *Johnson* court reaffirmed the constitutional requirement of sufficient standards in delegating statutes. The facts in *Johnson* indicate the necessity of objective standards in statutes delegating compensation setting functions to the judiciary. Through objective standards, arbitrary and unequal application of the authority delegated may be minimized.

The *Johnson* decision also emphasizes the necessity of additional legislative action in regard to the official court reporter system in Texas. Such action appears to be forthcoming from the supreme court under its rule-making authority. Hopefully, the standards promulgated will provide fair and reasonable compensation to court reporters for their services, and in addition, provide litigants with a uniform cost in proceeding through the appellate process.

James L. East

FEDERAL PROCEDURE — Third-Party Practice — Independent Jurisdictional Grounds Unnecessary to Support Claim by Original Plaintiff Against Nondiverse Third-Party Defendant

Kroger v. Owen Equipment & Erection Co.,
558 F.2d 417 (8th Cir. 1977), *petition for cert. filed,* 46 U.S.L.W. 3379 (U.S. Nov. 11, 1977) (No. 77-677).

Geraldine Kroger's husband was fatally electrocuted while helping move a large steel tank with a crane that came into contact with electric power

79. *Id.*
80. *Id.*
81. Certificate from Garson R. Jackson, Clerk of the Supreme Court of Texas, October 13, 1976.

lines.[1] On November 24, 1972 Mrs. Kroger, an Iowa resident, filed a negligence suit based on diversity against Omaha Public Power District, a Nebraska corporation. Omaha Power, in turn, filed a third-party complaint against Owen Equipment. On November 9, 1973 Kroger filed an amended complaint to state a claim against Owen Equipment, describing it as a corporation with its principal place of business in Nebraska. In its answer, Owen Equipment admitted being a corporation existing under the laws of Nebraska and denied every other allegation in the third-party complaint.[2] The trial court granted summary judgment in favor of Omaha Power against Mrs. Kroger, and Owen Equipment's motion for summary judgment was denied. On the third day of trial, more than two years after being impleaded into the suit, Owen Equipment alleged that its principal place of business was in Iowa, and challenged the court's jurisdiction on the ground of lack of diversity. The trial court rejected this contention, holding that even without an independent basis of jurisdiction it had discretion to exercise its judicial power over the case.[3] Owen appealed to the Court of Appeals for the Eighth Circuit. Held—*Affirmed.* Independent grounds for federal jurisdiction are unnecessary to support a claim by the original plaintiff against a nondiverse third-party defendant.[4]

The objective of the Federal Rules of Civil Procedure is to make federal practice more efficient and economical.[5] Consistent with this purpose, rule 14 permits a defendant to implead a third-party defendant whom the defendant asserts is liable to him for all or part of the plaintiff's claim.[6] Originally, rule 14 allowed the defendant to implead a third party who was directly liable to the plaintiff; however, in 1948 the rule was amended to permit the defendant to implead only those parties who were liable to him for contribution or indemnification.[7] Presently, the purpose of rule 14 is to

1. The crane was owned by Owen Equipment & Erection Co., allegedly a Nebraska corporation, and leased by Paxton & Vierling Steel Co., also a Nebraska corporation. In order to avoid labor problems, Owen Equipment had been formed and was solely owned by Paxton. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 418 (8th Cir. 1977).

2. Owen Equipment's answer was in violation of FED. R. CIV. P. 8(b) which requires that if the pleader seeks to deny only a part of an averment, he must specify so much of it as is true and deny only the remainder. *Id.* at 419.

3. *Id.* at 419; *see* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

4. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 427 (8th Cir. 1977). As an alternative ground of decision the court held that Owen Equipment was estopped from denying the trial court's jurisdiction. *Id.* at 427; *see* note 41 *infra.*

5. "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966); *see* Lesnik v. Public Indus. Corp., 144 F.2d 968, 973 (2d Cir. 1944); Williams v. Keyes, 125 F.2d 208, 209 (5th Cir.), *cert. denied,* 316 U.S. 699 (1942).

6. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1441, at 199 (1971); Holtzoff, *Entry of Additional Parties in a Civil Action—Intervention and Third Party Practice,* 31 F.R.D. 101, 105 (1962).

7. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1441, at 201 (1971);

promote judicial efficiency by elimination of circuity of action.[8]

The rules cannot enlarge the subject-matter jurisdiction of the federal courts,[9] and the courts have traditionally required complete diversity among adverse parties.[10] In order to accord rule 14 its fullest possible effect, the courts have sought to exercise power over third-party claims regardless of whether they were supported by independent grounds for jurisdiction. Consequently, ancillary jurisdiction has been used to accomplish this goal.[11]

Ancillary jurisdiction enables federal courts to decide claims which ordinarily are confined to state courts if they are related to a claim over which the court has subject-matter jurisdiction.[12] Under the "transactional" test defined in *Moore v. New York Cotton Exchange,*[13] a federal court has ancillary jurisdiction over additional claims by either party, including claims against new parties, which arise from the same transaction or occurrence as the plaintiff's original claim.[14]

Pendent jurisdiction is a similar principle by which federal courts exercise power over a nonfederal claim. Under this principle, no independent basis for federal subject-matter jurisdiction is required if the nonfederal claim is joined with a federal claim between the same parties.[15] In *United*

Comment, *Rule 14(a) and Ancillary Jurisdiction: Plaintiff's Claim Against Non-diverse Third-Party Defendant,* 33 WASH. & LEE L. REV. 796, 806 n.58 (1976).

8. Dery v. Wyer, 265 F.2d 804, 806-07 (2d Cir. 1959); Sklar v. Hayes, 1 F.R.D. 594, 596 (E.D.Pa. 1941).

9. *See* FED. R. CIV. P. 82. Subject-matter jurisdiction of federal courts is restricted by U.S. CONST. art. III, § 2, cl. 1.

10. *E.g.,* Treinies v. Sunshine Mining Co., 308 U.S. 66, 71 (1939); Camp v. Gress, 250 U.S. 308, 312 (1919); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). Under U.S. CONST. art. III, § 2, cl. 1, Congress is granted the power to create the federal diversity statute, 28 U.S.C. § 1332 (1970).

11. *See* Stemler v. Burke, 344 F.2d 393, 395-96 (6th Cir. 1965); Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959). Since rule 14 would have only limited effect if federal jurisdiction requirements were applied, the vitality of the rule depends on the federal courts' willingness to extend ancillary jurisdiction to parties and claims not originally before them. *See* Lesnik v. Public Indus. Corp., 144 F.2d 968, 973 (2d Cir. 1944). *See generally Fourth Circuit Review, Extension of Ancillary Jurisdiction to Plaintiffs Claims Against Nondiverse Third-Party Defendants,* 30 WASH. & LEE L. REV. 295, 295 (1973).

12. *See generally* Minahan, *Pendent and Ancillary Jurisdiction of United States Federal District Courts,* 10 CREIGHTON L. REV. 279, 280 (1976); Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines,* 22 U.C.L.A. L. REV. 1263, 1263 (1975).

13. 270 U.S. 593 (1926). "Transaction" is to be given a flexible meaning looking to the logical relationship between a series of occurrences rather than to the immediateness of their connection. *Id.* at 610.

14. *See id.* at 610; Fulton Nat'l Bank v. Hozier, 267 U.S. 276, 280 (1925).

15. Application of pendent jurisdiction is appropriate when the relationship between the state and federal claim is such that they comprise but one constitutional case. United Mine Workers v. Gibbs, 383 U.S. 715, 722 (1966). *See generally* 2 CYCLOPEDIA OF FEDERAL PROCEDURE § 2.441(a), at 35-40 (Supp. 1977); Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction,* 33 U. PITT. L. REV. 759, 762 n.24 (1972).

Mine Workers v. Gibbs[16] the Supreme Court developed a two-part test, similar to the "transactional" test, for the exercise of pendent jurisdiction.[17] Pursuant to the *Gibbs* test, the federal court must first determine whether it has the power to exercise jurisdiction over the state claim.[18] In this respect the *Gibbs* test and the "transactional" test are analogous: A factual relationship must exist between the two claims before the court has *power* to exercise jurisdiction.[19] If it is found that jurisdictional power exists, the *Gibbs* test further requires the court to determine whether its exercise is appropriate.[20]

The doctrines of ancillary and pendent jurisdiction evolved separately and for different purposes.[21] Modern decisions, however, have developed a trend toward expansion and merger of these two doctrines.[22] Although pendent jurisdiction traditionally had been employed to join claims against parties already in the suit rather than to join claims of new parties,[23] the *Gibbs* decision has been used to expand pendent jurisdiction to

16. 383 U.S. 715 (1966).

17. *Id.* at 725.

18. *Id.* at 725.

19. *Compare* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) *with* Moore v. New York Cotton Exch., 270 U.S. 593, 610 (1926).

20. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). This second determination is a matter of discretion for the court. The court must weigh the value of applying the doctrine in terms of judicial economy, convenience, and fairness to the litigants against factors such as whether the court is making a needless decision of state law, whether the federal claim is substantial, whether the federal claim was dismissed before trial, whether the state claim predominates, and whether there is a likelihood of jury confusion. *Id.* at 726-27. *See generally* 2 CYCLOPEDIA OF FEDERAL PROCEDURE § 2.441(b), at 40-42 (Supp. 1977).

21. The doctrine of ancillary jurisdiction was originally developed to promote fairness and avoid prejudice to the defendant. *See generally Fourth Circuit Review, Extension of Ancillary Jurisdiction to Plaintiffs' Claims Against Nondiverse Third-Party Defendants,* 30 WASH. & LEE L. REV. 295, 302 (1973). On the other hand, pendent jurisdiction was used to avoid prejudice to the plaintiff and to promote judicial economy and convenience. *See generally* Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines,* 22 U.C.L.A. L. REV. 1263, 1264 (1975).

22. *Gibbs* might have begun a "new era in which traditional distinctions will meld into one theory of pendent jurisdiction using the same criteria for all purposes." Jacobs v. United States, 367 F. Supp. 1275, 1277 n.1 (D. Ariz. 1973). The Supreme Court has said "there is little profit in attempting to decide. . .whether there are any. . .differences between pendent and ancillary jurisdiction. . . ." Aldinger v. Howard, ___ U.S. ___, ___, 96 S. Ct. 2413, 2419, 49 L. Ed. 2d 276, 285 (1976). *See generally* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction,* 33 U. PITT. L. REV. 759, 762 (1972); Minahan, *Pendent and Ancillary Jurisdiction of United States Federal District Courts,* 10 CREIGHTON L. REV. 279, 280 (1976); Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines,* 22 U.C.L.A. L. REV. 1263, 1280, 1287 (1975). The applications of the two doctrines have merged to the point that both are aimed at the same purposes. *Compare* Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961) (court applied ancillary jurisdiction doctrine to promote fairness, convenience, and economy) *with* B. F. Goodrich Co. v. A.T.I. Caribe, Inc., 366 F. Supp. 464, 472 (D. Del. 1973) (same purposes were accomplished through pendent jurisdiction application).

23. Jacobs v. United States, 367 F. Supp. 1275, 1277 (D. Ariz. 1973); *see* Moor v. County

allow addition of pendent parties who are only implicated in the state law claim.[24] Presently, most courts will allow the joinder of pendent parties where the transaction comprises but one constitutional case.[25]

In view of the merger of the two doctrines, it has been urged that the *Gibbs* test be used by the courts for determining whether to exercise either ancillary or pendent jurisdiction.[26] Today, pendent and ancillary jurisdiction are applied to joinder of third parties under rule 14(a), and courts do not require an independent ground of jurisdiction to support a defendant's claim against a third-party defendant.[27]

The courts were divided originally on the issue of whether to allow a third-party defendant to assert a claim against the original plaintiff without independent grounds of jurisdiction. The more recent decisions, however, allow these claims under the doctrine of ancillary jurisdiction.[28] In *Revere Copper & Brass, Inc. v. Aetna Casualty & Surety Co.*[29] the court defined "logical relationship" in order to apply the "transactional" test set forth in *Moore.* Under this definition "a claim is ancillary when it bears a logical relationship to the aggregate core of operative facts which constitute the main claim. . . ."[30]

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of Alameda, 411 U.S. 693, 713 (1973); Hymer v. Chai, 407 F.2d 136, 137-38 (9th Cir. 1969).

24. Moor v. County of Alameda, 411 U.S. 693, 713 (1973); *see* Jacobs v. United States, 367 F. Supp. 1275, 1277 (D. Ariz. 1973). *See generally* Comment, *Aldinger v. Howard and Pendent Jurisdiction,* 77 COLUM. L. REV. 127 (1977).

25. *See, e.g.,* Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809 (2d Cir. 1971) (common sense considerations of *Gibbs* extends jurisdiction to pendent-party claims); Astor-Honor, Inc. v. Grosset & Dunlap Inc., 441 F.2d 627, 629 (2d Cir. 1971); Jacobson v. Atlantic City Hosp., 392 F.2d 149, 153 (3d Cir. 1968) (applied to diversity jurisdiction tort case presenting closely related claims based on same operative facts). *Contra,* Ayala v. United States, 550 F.2d 1196, 1200 (9th Cir. 1977) (reaffirming *Hymer*); Hymer v. Chai, 407 F.2d 136, 137-38 (9th Cir. 1969) (joinder of claims rather than joinder of parties is the purpose of pendent jurisdiction). These pendent-party claims are really indistinguishable from ancillary jurisdiction. *See* Aldinger v. Howard, ___ U.S. ___, ___, 96 S. Ct. 2413, 2419, 49 L. Ed. 2d 276, 285-86 (1976); Davis v. United States, 350 F. Supp. 206, 208 (E.D. Mich. 1972). *See generally* Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases,* 62 VA. L. REV. 194, 206-08, 230-31 (1976).

26. *See* note 22 *supra;* Nelson v. Keefer, 451 F.2d 289, 291 n.4 (3d Cir. 1971) (*Gibbs* test applies to either ancillary or pendent jurisdiction). *See generally* Note, *Rule 14 Claims and Ancillary Jurisdiction,* 57 VA. L. REV. 265, 282-83, 289 (1971).

27. *E.g.,* Stemler v. Burke, 344 F.2d 393, 395-96 (6th Cir. 1965); Waylander-Peterson Co. v. Great N. Ry., 201 F.2d 408, 415 (8th Cir. 1953); Williams v. Keyes, 125 F.2d 208, 209 (5th Cir.), *cert. denied,* 316 U.S. 699 (1942).

28. *See, e.g.,* Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763, 772 (7th Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974); Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 716 (5th Cir. 1970); Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486, 489 (D. Neb. 1965). *Contra,* James King & Son, Inc. v. Indemnity Ins. Co., 178 F. Supp. 146, 148 (S.D.N.Y. 1959).

29. 426 F.2d 709 (5th Cir. 1970).

30. *Id.* at 714. *See generally* 59 KY. L.J. 506 (1970). The test is similar, if not identical, to the test formulated by the Supreme Court in *Gibbs. See generally* Note, *Rule 14 Claims and Ancillary Jurisdiction,* 57 VA. L. REV. 265, 283-84 (1971).

In the converse situation most courts have not allowed the original plaintiff to state a claim against a nondiverse third-party defendant without independent grounds for subject-matter jurisdiction.[31] Even though the majority view has been supported by several circuit courts of appeal, a minority view has developed in some district courts.[32] These district court decisions have enjoyed the support of most commentators who have recently discussed the issue.[33]

In *Kroger v. Owen Equipment & Erection Co.*[34] the Court of Appeals stated that *Gibbs* had swept away the underpinnings of the restrictive majority view.[35] Therefore, the court adopted *Gibbs'* two-step process for resolving the "ancillary-pendent" jurisdiction problem.[36] Considering that all the parties were before the court and that Mrs. Kroger's claim against Owen Equipment arose out of the same core of operative facts which gave rise to the original claim, the majority felt it anomalous to disallow the plaintiff's claim.[37]

Having found the requisite judicial power to allow the plaintiff's claim, the court then applied the second step of the *Gibbs* test to determine whether the trial court had abused its discretion.[38] The court, stating that the advantages in judicial economy and convenience were self-evident, admonished Owen Equipment for attempting to gain an advantage by concealing the jurisdictional defect.[39] Based upon these considerations, the

31. *See, e.g.*, Fawvor v. Texaco, Inc., 546 F.2d 636, 642-43 (5th Cir. 1977) (comprehensive list of majority cases at 639 n.7); Saalfrank v. O'Daniel, 533 F.2d 325, 330 (6th Cir. 1976); Parker v. W.W. Moore & Sons, Inc., 528 F.2d 764, 766 (4th Cir. 1975); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 895 (4th Cir. 1972).

32. *E.g.*, Hood v. Fireman's Fund Ins. Co., 412 F. Supp. 846, 848 (S.D. Miss. 1976); Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 704 (D. Kan. 1975); CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259, 1260 (E.D. Pa. 1975); Davis v. United States, 350 F. Supp. 206, 208 (E.D. Mich. 1972); *see* Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486, 489 (D. Neb. 1965); *cf.* Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227, 1233 n.17 (3d Cir. 1976) (noting criticism of majority view). Additional cases that are consistent with the minority rule are listed in Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 n.9 (4th Cir. 1972).

33. *See, e.g.*, 3 J. MOORE, FEDERAL PRACTICE ¶ 14.27[1], at 14-570 (1974); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1444, at 229-32 (1971); Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 42-43 (1963); Holtzoff, *Entry of Additional Parties in a Civil Action—Intervention and Third Party Practice*, 31 F.R.D. 101, 110 (1962). *Contra*, 8 RUT.-CAM. L.J. 164, 169 (1976).

34. 558 F.2d 417 (8th Cir. 1977).

35. *Id.* at 422.

36. *Id.* at 422-24.

37. *Id.* at 424. "To say, in a modern court, under modern rules, that a third-party defendant may sue a plaintiff of the same state, but not the converse, is a monument to the triumph of rule over reason. . . ." *Id.* at 424 (footnote omitted).

38. *Id.* at 425.

39. *Id.* at 425, 427. The majority felt that Owen Equipment's belated challenge to jurisdiction was an attempt to "play fast and loose with the judicial machinery and deceive the courts." *Id.* at 425; *see* Di Frischia v. New York Cent. R.R., 279 F.2d 141, 144 (3d Cir. 1960).

court rejected allegations of the trial court's abuse of discretion in allowing Mrs. Kroger's claim to be heard.[40] The majority noted that even if the trial court had abused its discretion, the defendant's conduct estopped it from asserting abuse of discretion.[41]

The dissenting justice maintained that the *Gibbs* test did not apply to pendent-party jurisdiction.[42] Since there was no federal claim between Mrs. Kroger and Owen Equipment for the pendent state claim to attach to, he felt the court had no power to take jurisdiction.[43]

By applying the *Gibbs* test the *Kroger* majority apparently made no distinction between ancillary and pendent jurisdiction.[44] Since other extensions of third-party practice have been based on ancillary jurisdiction,[45] the court probably should have applied the *Moore* "transactional" test to assert judicial power over the claim.[46] While ancillary jurisdiction probably is the most theoretically sound basis for allowing jurisdiction over Mrs. Kroger's claim against Owen Equipment, the *Gibbs* pendent jurisdiction test could equally apply to this situation.[47] Under this test, a court faced

40. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 426 (8th Cir. 1977).

41. *Id.* at 427. This alternate ground of decision is decidedly a minority viewpoint. A party cannot be precluded from raising a question of jurisdiction by waiver or estoppel, and generally jurisdiction may be attacked at any time. *See, e.g.*, American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951) (defendant who sought removal to federal court allowed to attack the court's jurisdiction after unfavorable verdict); Mansfield, C. & L. M. Ry. v. Swan, 111 U.S. 379, 382-83 (1884); Hospoder v. United States, 209 F.2d 427, 429 (3d Cir. 1953). *Contra*, Di Frischia v. New York Cent. R.R., 279 F.2d 141, 144 (3d Cir. 1960); Young v. Handwork, 179 F.2d 70, 73 (7th Cir. 1949) (having invited court to take jurisdiction, defendant estopped from asserting lack of diversity on appeal). *See generally* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 366-69 (1969).

42. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 430 (8th Cir. 1977) (dissenting opinion).

43. *Id.* at 430-31 (dissenting opinion). The dissenting justice stated that to allow the plaintiff to assert her claim against Owen Equipment would in effect make Owen Equipment a co-defendant and thereby destroy the requirement of complete diversity. *See id.* at 431 (dissenting opinion). While agreeing with the majority's critical view of the defendant's tactics, he felt the court's remedy was unsupportable. *Id.* at 431 (dissenting opinion). Alternatively, he proposed charging Owen Equipment for the plaintiff's expenses caused by the defendant's misconduct. *Id.* at 432 (dissenting opinion); *see* Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379, 386-87 (1884); Basso v. Utah Power & Light Co., 495 F.2d 906, 911 (10th Cir. 1974).

44. *See* Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 424 (8th Cir. 1977).

45. *See, e.g.*, Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 713-14 (5th Cir. 1970) (third-party defendant's claim against plaintiff); Waylander-Peterson Co. v. Great N. Ry., 201 F.2d 408, 415 (8th Cir. 1953) (defendant's claim against third party); Olson v. United States, 38 F.R.D. 489, 491 (D. Neb. 1965) (plaintiff's claim against third-party defendant).

46. *See* Saalfrank v. O'Daniel, 533 F.2d 325, 329 (6th Cir. 1976); Mickelic v. United States Postal Serv., 367 F. Supp. 1036, 1039 (W.D. Pa. 1973). *See also* Walmac Co. v. Isaacs, 220 F.2d 108, 113-14 (1st Cir. 1955).

47. Since the recent extension of pendent jurisdiction to claims against pendent parties

with a motion by the original plaintiff to file a claim against a nondiverse third-party defendant must make two determinations. First, it must decide if it has the power to exercise jurisdiction,[48] and second, if it has such power, the court must decide whether the exercise of jurisdiction is appropriate in the particular case.[49] Since Kroger's claims against Owen Equipment and Omaha Power arose from a common nucleus of operative fact, and the state and federal claims were such that the plaintiff would ordinarily expect them to be tried in one judicial proceeding, it is reasonable to conclude that the court could exercise ancillary jurisdiction over both claims.[50]

When *Kroger* and *Revere* are compared, it appears that there are no constitutional, as opposed to policy, distinctions between allowing Mrs. Kroger's claim against Owen Equipment in the instant case and allowing the third-party defendant to state a claim against the original plaintiff in *Revere*.[51] The only apparent constitutional problem in allowing Mrs. Kro-

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is virtually indistinguishable from ancillary jurisdiction, the *Gibbs* test can be used to support the court's jurisdiction. See notes 22-30 *supra* and accompanying text. *Gibbs* was an attempt to formulate a general jurisdictional test applicable to cases containing pendent and ancillary problems. Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 765 (1972); *see* Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 701 (D. Kan. 1975); Davis v. United States, 350 F. Supp. 206, 208 (E.D Mich. 1972).

The Supreme Court has not decided the issue of whether pendent jurisdiction may be extended to claims against pendent parties. *See* Moor v. County of Alameda, 411 U.S. 693, 713-15 (1973). Nor did the Court overrule the concept in Aldinger v. Howard, ___ U.S. ___, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976). In refusing to exercise pendent-party jurisdiction over counties where Congress had exempted them from liability under 42 U.S.C. § 1983 (1970), the Court noted that impleading a new party was both factually and legally different from the situation in *Gibbs*. *Id.* at ___, ___, 96 S. Ct. at 2420, 2422, 49 L. Ed. 2d at 286, 288. The Court, however, chose not "to lay down any sweeping pronouncement upon the existence or exercise of pendent party jurisdiction" and limited its holding to the facts saying "other alignments of parties and claims might call for a different result." *Id.* at ___, 96 S. Ct. at 2422, 49 L. Ed. 2d at 288-89; *see* Ayala v. United States, 550 F.2d 1196, 1199-1200 (9th Cir. 1977).

48. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

49. *Id.* at 726.

50. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); Hadinger v. Bentley Laboratories, Inc., 427 F. Supp. 994, 995 (E.D. Pa. 1977); Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 700 (D. Kan. 1975). *See generally* 3 J. MOORE, FEDERAL PRACTICE ¶ 14.27[1], at 14-568 to 14-570 (1974); Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 763 (1972) (congressional enactments have extended rather than restricted ancillary jurisdiction).

51. *Compare* Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 714-16 (5th Cir. 1970) *with* Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 422-24 (8th Cir. 1977) *and* Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 704-05 (D. Kan. 1975). *See generally Fourth Circuit Review, Extensions of Ancillary Jurisdiction to Plaintiffs' Claims Against Nondiverse Third-Party Defendants*, 30 WASH. & LEE L. REV. 295, 311 (1973) (*Revere* casts a long shadow). In *Revere* the Fifth Circuit made only policy distinctions between the two converse situations. *See* Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 716 (5th Cir. 1970).

ger's claim against Owen Equipment is that once she is permitted to assert it, Owen Equipment appears to be a co-defendant.[52] If Owen Equipment is a co-defendant, complete diversity would be destroyed,[53] and the doctrines of ancillary and pendent jurisdiction would not apply because they are inapplicable where complete diversity between plaintiff and defendants does not exist.[54] Owen Equipment, however, was brought into the suit by Omaha Power's third-party claim and not by Mrs. Kroger. This intermediate step makes the present situation distinguishable from a situation in which the plaintiff originally sues two defendants, one of which is nondiverse.[55] As such, the third-party defendant is not a true co-defendant, and once he is in the action, it is reasonable that the plaintiff be allowed to assert a related claim against him.[56]

A federal court, therefore, apparently has the power to exercise ancillary jurisdiction over the plaintiff's claim against a third-party defendant where no independent grounds of federal jurisdiction exist. Most of the majority decisions since *Gibbs*, however, have refused to allow such claims, basing this refusal on policy arguments rather than lack of power to hear the plaintiff's claim.[57]

The primary policy argument in support of the majority view is that it prevents collusion whereby the plaintiff and defendant implead a third-

52. *See* McPherson v. Hoffman, 275 F.2d 466, 470 (6th Cir. 1960); Hoskie v. Prudential Ins. Co., 39 F. Supp. 305, 306 (E.D.N.Y. 1941). *Kroger* appears to involve an Iowan *plaintiff* on one side and an Iowan *defendant* on the other.

53. See note 10 *supra.*

54. Seyler v. Steuben Motors, Inc., 462 F.2d 181, 181 (3d Cir. 1972); Wolgin v. Atlas United Financial Corp., 397 F. Supp. 1003, 1009 (E.D. Pa. 1975); *see* Mobil Oil Corp. v. Kelly, 493 F.2d 784, 789 n.2 (5th Cir. 1974). *But see* Stone v. Stone, 405 F.2d 94, 97 (4th Cir. 1968).

55. The original plaintiff and the third-party defendant are not really "opposing" parties. *See* Finkel v. United States, 385 F. Supp. 333, 335 n.1 (S.D.N.Y. 1974); Markus v. Dillinger, 191 F. Supp. 732, 736 n.11 (E.D. Pa. 1961); United States v. Raefsky, 19 F.R.D. 355, 356 (E.D. Pa. 1956). *See generally* 3 J. MOORE, FEDERAL PRACTICE ¶ 14.17, at 14-379 to 14-380 (1974). *But see* Atlantic Coast Line R.R. v. United States Fidelity & Guar. Co., 52 F. Supp. 177, 185 (M.D. Ga. 1943).

56. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 424 (8th Cir. 1977); *see* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). The fact that Omaha Power brought Owen Equipment into the suit means that Mrs. Kroger has not expanded the jurisdiction of a federal court in violation of FED. R. CIV. P. 82. Application of ancillary jurisdiction over her claim is permissible since it is merely a means of broadening the scope of an action already before the court by providing an opportunity to invoke pre-existing jurisdiction in additional situations. Lesnik v. Public Indus. Corp., 144 F.2d 968, 973-74 (2d Cir. 1944); Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 703 (D. Kan. 1975). *See generally* 3 J. MOORE, FEDERAL PRACTICE ¶ 14.27[1], at 14-572 (1974).

57. *See, e.g.*, Fawvor v. Texaco, Inc., 546 F.2d 636, 641 (5th Cir. 1977); Saalfrank v. O'Daniel, 533 F.2d 325, 330 (6th Cir. 1976); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893-94 (4th Cir. 1972). *Contra*, Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398, 1399 (W.D. Pa. 1969) (apparently holding that it is a question of power rather than discretion); Palumbo v. Western M. Ry., 271 F. Supp. 361, 363 (D. Md. 1967) (question of jurisdiction not discretion).

party defendant who is solely liable to the plaintiff, and whom the plaintiff could not have sued directly in federal court.[58] The 1948 amendment to rule 14, however, has made collusion less likely since it prevents the defendant from impleading a third party who is solely liable to the plaintiff.[59] Moreover, title 28, section 1359 of the United States Code allows dismissal of an action which has been collusively made or joined to invoke the court's jurisdiction,[60] thereby providing a court with a sufficient tool to deal with collusion on a case by case basis.[61] Fear of collusion, therefore, should not necessitate a wholesale denial of all claims in this situation.[62]

A second policy argument is that the courts should not let a plaintiff do indirectly what he could not do directly.[63] Since the plaintiff cannot be assured that the defendant will implead the third-party defendant, recognition of ancillary jurisdiction would not necessarily encourage the plaintiff to initiate actions in the hope that the third party would be impleaded.[64] Once the third-party defendant has been impleaded by a defendant and the court has taken jurisdiction over him, there is no substantial reason why the plaintiff should not be allowed to assert a claim against the third party.[65]

A final policy consideration in support of the majority rule is that federal courts, already overcrowded, should not reach out for state-based litigation.[66] One counter-consideration to this policy argument is that under the concept of federalism, the federal courts have a higher duty to end all court congestion.[67] If the federal courts refuse to litigate all the claims before them which arise out of the same transaction, then the unlitigated claim will have to be tried in a state court. Such circuity of action is neither judicially economical nor efficient[68] and is in apparent conflict with the avowed purpose of the federal rules.[69]

Since the parties in *Kroger* were already before the court, and the claims

58. Fawvor v. Texaco, Inc. 546 F.2d 636, 641 (5th Cir. 1977); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893-94 (4th Cir. 1972).

59. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1444, at 231 (1971); see text accompanying note 7 *supra*.

60. *See* 28 U.S.C. § 1359 (1970).

61. *See* Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 702 (D. Kan. 1975).

62. *See id.* at 702; Olson v. United States, 38 F.R.D. 489, 491-92 (D. Neb. 1965).

63. Fawvor v. Texaco, Inc., 546 F.2d 636, 641 (5th Cir. 1977); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893 (4th Cir. 1972).

64. Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 703 (D. Kan. 1975); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1444, at 231 (1971).

65. See notes 51-57 *supra* and accompanying text.

66. Fawvor v. Texaco, Inc., 546 F.2d 636, 641 (5th Cir. 1977); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (4th Cir. 1972).

67. 3 J. MOORE, FEDERAL PRACTICE ¶ 14.27[1], at 14-572 (1974).

68. *See* Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 704 (D. Kan. 1975); 3 J. MOORE, FEDERAL PRACTICE ¶ 14.27[1], at 14-572 (1974).

69. See note 5 *supra* and accompanying text.