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Ancillary Jurisdiction: Plaintiffs’ Claims Against Nondiverse Third-Party Defendants

Pamela J. Stephens*

INTRODUCTION

Ancillary jurisdiction in federal courts is that doctrine which permits the addition of parties or claims to litigation when the claims by or against such parties would not, standing alone, support federal jurisdiction. The concept of ancillary jurisdiction rests upon the assumption that in acquiring federal subject matter jurisdiction over a particular “case,” a district court also acquires jurisdiction over the entire “controversy,” including those matters which may be considered ancillary to the claim upon which the original action is based.

The doctrine of ancillary jurisdiction, recognized by the Supreme Court as early as 1860 in Freeman v. Howe, originally was limited to situations in which its assertion was necessary if the federal courts were to function effectively as courts. In 1926, the Supreme Court set forth the modern view of ancillary jurisdiction in Moore v. New York Cotton Exchange, which held that a compulsory counterclaim based on state law was within the ancillary jurisdiction of the federal district court. For more than fifty years after its decision in Moore, the Supreme Court remained silent with regard to ancillary jurisdiction and its limits, leaving the lower courts to develop the doctrine. In the interim, the Federal Rules of Civil Procedure were adopted. Liberal

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4. 270 U.S. 593 (1926).

5. The Federal Rules of Civil Procedure were adopted in 1938 and amended several times from 1939 to 1971. See 308 U.S. 645 (1939); 308 U.S. 642 (1939); 329 U.S. 839 (1947);
joinder provisions contained in the rules greatly increased the instances in which ancillary jurisdiction might be invoked in federal court.

This article will trace the historical development of the doctrine of ancillary jurisdiction. It will consider how the Federal Rules of Civil Procedure, particularly rule 14, have influenced that development and will analyze the Supreme Court's current position on ancillary jurisdiction. More specifically, the article will analyze plaintiffs' claims against nondiverse third-party defendants and offer suggestions on how ancillary jurisdiction over such claims might develop so as to coincide with its underlying principles and the expressed concerns of the Supreme Court.

HISTORICAL DEVELOPMENT OF ANCILLARY JURISDICTION

Ancillary Jurisdiction Prior to the Federal Rules

The federal district courts are courts of limited jurisdiction, limited by both the Constitution and congressional acts. These limits have imposed upon the courts the difficult task of affording complete relief to parties properly before them, while taking care not to exceed the scope of their power and authority to adjudicate. The doctrine of ancillary jurisdiction developed as a method of resolving that conflict in certain cases. It was originally invoked in cases involving the courts' exercise of jurisdiction over property interests. In Freeman v. Howe, a United States marshall, complying with a writ issued by a federal court in Massachusetts, seized several railroad cars. After the seizure, mortgagees of the railroad cars initiated a state court replevin action against the marshall. The mortgagees were not parties to the federal suit. The Court held that where a federal court had jurisdiction over particular property, it had the power to decide all questions relating to that property, even those arising under state law. The state replevin action was thus barred. The Court rejected the mortgagees' argument that if they could

9. Id. at 453.
10. Id. at 457.
not bring their replevin action in state court, the lack of diversity of citizenship between the parties would leave them remediless. The Court found instead that since federal subject matter jurisdiction existed over the original suit, the mortgagees could have filed a bill in equity in federal court to restrain the law court's judgment without meeting diversity requirements.\(^{11}\) Such bill, the Court stated, was "not an original suit, but ancillary and dependent . . . to the original suit."\(^{12}\)

In keeping with *Freeman*, the early cases limited the uses of ancillary jurisdiction to certain "necessary" instances.\(^{13}\) The Supreme Court itself said as late as 1925 that "no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit."\(^{14}\) There were a few early cases, however, which made more expansive use of the doctrine by applying it to protect or enhance the court's jurisdiction over the principal claim.\(^{15}\)

In 1926, the Supreme Court decided *Moore v. New York Cotton Exchange*,\(^{16}\) a case which greatly expanded the doctrine of ancillary jurisdiction. In *Moore*, the plaintiff's claim was properly brought in federal court because it alleged a violation of federal antitrust laws arising out of the defendant's alleged monopoly of the sale and transportation of cotton in interstate commerce. Western Union, a non-party to the suit, had agreed to telegraph price quotations to firms approved by the defendant Exchange. When the defendant refused to allow the quotations to go to the plaintiff, thus blocking its ability to do business, the plaintiff sued.\(^{17}\) The defendant then filed a counterclaim seeking an injunction, on state law grounds, against the plaintiff's further

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11. *Id.* at 460.
12. *Id.*
13. See, e.g., Wabash R.R. v. Adelbert College, 208 U.S. 38 (1908) (court with competent jurisdiction taking possession of property withdraws jurisdiction from all other courts on issues relating to the property); *In re* Tyler, 149 U.S. 164 (1893) (state tax liability for property in possession of federal court will be decided by that court).
16. 270 U.S. 593 (1926).
17. *Id.* at 596.
"purloining" of the quotations. Under the Federal Equity Rules of 1912, the counterclaim was compulsory because it arose out of the same transaction as the plaintiff's claim, even though it did not involve a federal question. The district court in Moore dismissed the plaintiff's complaint, but awarded the defendant the relief sought under the counterclaim. In affirming the district court's actions, the Supreme Court held that the claim and counterclaim were so closely connected "that the failure of the former [established] a foundation for the latter" and that complete relief could not obtain without the issuance of an injunction.

Thus, without mentioning ancillary jurisdiction, the Court in effect expanded the doctrine to cover compulsory counterclaims, regardless of the existence of property before the court.

In addition to the question of jurisdiction over related claims, the federal courts are also faced with the question of jurisdiction over related parties. Prior to the adoption of the Federal Rules of Civil Procedure, federal courts followed state procedures in legal actions and Federal Equity Rules in equitable actions. Impleader, the practice whereby a defendant may bring into a lawsuit a third party who is or may be liable to the defendant on the claim being asserted by the original plaintiff, was thus available in federal court only in those instances where state law or the equity rules so provided.

Unlike the expansion of ancillary jurisdiction over compulsory counterclaims reflected in Moore and later cases, the use of federal impleader had no comparable development. Rather, in the few instances in which impleader was invoked in the federal

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18. Id. at 610.
19. Id. at 609. The rules referred to were the first comprehensive code of federal equity adopted by the Supreme Court as the Equity Rules of 1912, 226 U.S. 627 (1912). The particular rule at issue in Moore was Federal Equity Rule 30 which provided in part: "The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit ...." 270 U.S. at 609.
20. 270 U.S. at 609.
21. Id.
24. Id. at 408-09.
courts under state law, the courts held that the third-party complaint involved a separate controversy, necessitating an independent basis of federal subject matter jurisdiction. That federal subject matter jurisdiction existed over the original claim was not considered a sufficient basis for ancillary jurisdiction over the third-party complaint, despite the obvious dependence of the latter upon the former.

**Pendent Jurisdiction Prior to the Federal Rules**

Another influence in the development of ancillary jurisdiction in the federal courts involves the related doctrine of pendent jurisdiction. While both doctrines govern the federal courts asserting jurisdiction over matters which standing alone would not support federal jurisdiction, pendent jurisdiction is usually distinguished as permitting a state law claim to be added to an original action based on a federal question. In general, pendent jurisdiction applies only to the assertion of related state claims by the original plaintiff against the original defendant.

Pendent jurisdiction had its roots in the 1824 case of *Osborne v. Bank of the United States,* in which Chief Justice Marshall stated:

> We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The modern rule of pendent jurisdiction can be traced to *Hurn v. Oursler,* a case involving both a federal copyright infringe-


29. 22 U.S. (9 Wheat.) 738 (1824). In *Osborne,* the Court held the Bank of the United States could sue and was subject to suit in the federal courts. Jurisdiction existed under art. III, § 2 even though questions of fact were present in the case.

30. Id. at 823.

31. 289 U.S. 238 (1933).
ment claim and a state claim based on unfair competition. 32 The

district court dismissed the state claim for lack of jurisdiction but
decided the federal claim. The Supreme Court held that the dis-

tRICT court should have decided both claims since the state claim

was “inseparable from the statutory wrong.” 33 The Court found

that federal courts had jurisdiction when “two distinct grounds

in support of a single cause of action are alleged, one only of

which presents a federal question.” 34 Underlying this assertion

of jurisdiction was the policy of promoting judicial economy and

convenience. 35 The difficulty in applying Hurn, which arose

from the “single cause of action” requirement, resulted in a re-

strictive development of “pendent jurisdiction” in the lower

courts. 36 By defining “single cause of action” as those claims

proved by “substantially identical” facts, the courts excluded all

but the most closely related claims. 37


Merger of Pendent and Ancillary Jurisdiction Following
Adoption of the Federal Rules

Following the enactment of the Federal Rules of Civil Proce-
dure in 1938, 38 two clear trends emerged. First, the tests for

ancillary and pendent jurisdiction became more inclusive, 39 and

second, they began to merge into one standard applicable in

both pendent and ancillary jurisdiction cases. 40 Although Fed-


32. Id.
33. Id. at 242.
34. Id. at 246.
35. Id.
36. See, e.g., Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961) (rescission
of election by proxies not a single cause of action when combined with a federal
claim for fraudulent solicitation of such proxies); United Indus. Corp. v. Nuclear Corp. of
Am., 237 F. Supp. 971 (D. Del. 1964) (where court had jurisdiction over securities fraud
allegations arising out of a contract, the court did not have pendent jurisdiction for
breach of other clauses in same contract). The narrow result of Hurn was codified in 1948
in 28 U.S.C. § 1338(b) which provided that: “The district courts shall have original juris-
diction of any civil action asserting a claim of unfair competition when joined with a
substantial and related claim under the copyright, patent, plant variety protection or
trade-mark laws.”
38. 308 U.S. 645 (1938).
39. For example, prior to 1938 impleader actions were generally held to require an
independent basis of jurisdiction. After enactment of rule 14, however, courts have gener-
ally applied ancillary jurisdiction to such claims. See infra notes 90-96 and accompan-
ying text; see also Goldberg, supra note 28, at 416-28.
40. See generally Comment, supra note 28.
eral Rule of Civil Procedure 82 provides that “these rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ,”41 the use of ancillary and pendent jurisdiction has increased under the federal rules due to “the flexible devices for joinder of parties and claims that the rules provide.”42 The joinder provisions permit more opportunities for invoking the doctrines than previously existed, enabling the courts to “apply pre-existing jurisdictional concepts to new sets of circumstances.”43

As with ancillary jurisdiction, the test for pendent jurisdiction has undergone a transformation in the post-rules period. In 1966, the Supreme Court reconsidered the restrictive rule developed by the lower courts after Hurn in United Mine Workers v. Gibbs.44 In Gibbs, the plaintiff contended that local union members had prevented the opening of a mine, thereby interfering with his contracts to haul coal and act as a superintendent of the mine. Gibbs’ suit asserted the federal claim that he was a victim of a secondary boycott in violation of section 303 of the Labor Management Relations Act of 1947 and a state law claim that the defendant union had unlawfully conspired to interfere with his haulage and employment contracts.45

In determining that the district court had jurisdiction to hear the state claim, the Court abandoned the “single cause of action” test of Hurn. Instead, the Court noted that since Hurn had been decided before the adoption of the federal rules, and since the rules strongly encouraged the joinder of parties and claims, a more liberal test was appropriate.46 The Gibbs Court concluded, therefore, that pendent jurisdiction exists when the federal and state claims “derive from a common nucleus of operative fact,” the federal claim is substantial, and the plaintiff would ordinarily be expected to try all of his claims in one proceeding.47

41. FED. R. CIV. P. 82. See also Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978) (“[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.”).
42. Goldberg, supra note 28, at 417. Professor Goldberg takes the position that the rules have in fact expanded the jurisdictional tests used.
43. Id. “The new joinder devices simply enabled courts to apply preexisting jurisdictional concepts to new sets of circumstances . . . . In other words, the broader jurisdiction existed before the Federal Rules; it just had not been needed or used.” Id.
45. Id.
46. Id. at 724.
47. Id. at 725.
Court stated, however, that whether the power to hear the related claim would be exercised remained within the court's discretion. The court could decide not to assert jurisdiction where judicial economy, convenience and fairness to litigants so warranted.48

Elimination of the Hurn "single cause of action" test,49 to which ancillary claims had never been subject, and substitution of a test centered on a "claim" under the federal rules contributed to an erosion of the distinctions between the ancillary and pendent jurisdictional tests.50 Following Gibbs, the lower courts extended the notion of pendent jurisdiction to diversity cases and to cases involving a third party against whom a state claim was asserted.51 In the context of a "pendent party" case, the Supreme Court itself commented that "there is little profit in attempting to decide . . . whether there are any 'principled' differences between pendent and ancillary jurisdiction."52

Finally, in 1978, the Supreme Court decided its first ancillary jurisdiction case since Moore,53 and in so doing not only blurred the remaining distinctions between ancillary and pendent jurisdictions, but seemed to call a halt to the fifty-year expansion of those doctrines.

PRESENT DAY ANCILLARY JURISDICTION:

**OWEN EQUIPMENT & ERECTION CO. v. KROGER**

In Owen Equipment & Erection Co. v. Kroger,54 the plaintiff, a citizen of Iowa, sued the Omaha Public Power District (OPPD), a Nebraska corporation, in a federal diversity action, claiming

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48. *Id.* at 726.
49. Ancillary claims were never subject to the Hurn "single cause of action" test.
50. Fairness had always been an important aspect of the ancillary jurisdiction doctrine, since it was usually raised by a party in court against his will who might otherwise lose his opportunity to raise his claim. Gibbs expressly made fairness relevant to the pendent jurisdiction decision, albeit in the discretionary phase, so that both jurisdictional determinations after Gibbs must consider judicial economy, convenience and fairness. *See Comment, supra* note 28, at 1273.
52. *Id.*
53. 270 U.S. 593 (1926).
that OPPD's negligent operation of a power line caused the electrocution death of her husband. OPPD filed a third-party complaint under federal rule 14(a) against Owen Equipment and Erection Co. (Owen), alleging that Owen's negligence had in fact been the proximate cause of Kroger's death. OPPD subsequently moved for summary judgment and while that motion was pending, plaintiff was granted leave to file an amended complaint naming Owen as an additional defendant. The district court granted OPPD's motion for summary judgment and the case went to trial between the plaintiff and Owen, the third-party defendant.55

When the trial commenced, it appeared that the district court had jurisdiction over the case on the basis of diversity of citizenship, since plaintiff had alleged and Owen had admitted in its answer that Owen was "a Nebraska corporation with its principal place of business in Nebraska."56 But after the trial began it was determined that Owen's principal place of business was actually in Iowa, not Nebraska, and thus complete diversity did not exist between the plaintiff and Owen.57 Owen moved for dismissal, a motion ultimately denied by the district court, which entered judgment on the jury's verdict for plaintiff.

The Eighth Circuit Court of Appeals affirmed the district court judgment,58 holding that under United Mine Workers v. Gibbs, the court had the power to take jurisdiction over the plaintiff's claim because it arose from the "core of 'operative facts' giving rise to both [plaintiff's] claim against OPPD and OPPD's claim against Owen."59 Moreover, the court of appeals held that the district court had properly exercised its discretion to decide the case in light of the fact that Owen had concealed its true citizenship.60

In its review of the Eighth Circuit decision, the Supreme Court noted that while federal rule 14(a) permits a plaintiff to file a claim against a third-party defendant, it does not indicate whether such a claim requires an independent basis of federal jurisdiction.61 After asserting, once again, that the federal rules

55. Id. at 367-68.
56. Id. at 368.
57. Id.
58. 558 F.2d 417 (8th Cir. 1977).
59. Id. at 424.
60. Id. at 417.
61. 437 U.S. at 370.
neither create nor withdraw federal jurisdiction, the Court considered whether the Eighth Circuit was correct in relying on Gibbs to define the constitutional limits of ancillary jurisdiction. The Court acknowledged that although Gibbs was, strictly speaking, a pendent jurisdiction case, it posed the same question as Kroger: “Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?”

In fashioning a response to that question, the Court examined the statutory as well as the constitutional limits of federal court jurisdiction. It was true that the “common nucleus of operative fact” test of Gibbs delineated constitutionally permissible federal jurisdiction based on diversity of citizenship. But it was also true, the Court stated, that Congress had limited diversity jurisdiction even further. In its general diversity jurisdiction statute, Congress conferred upon federal district courts jurisdiction over “all civil actions where the matter in controversy exceeds the sum or value of $10,000 . . . and is between . . . citizens of different States . . . .” As the Court pointed out, this jurisdictional grant has been held consistently to require complete diversity; that is, each defendant must be a citizen of a state different from that of each plaintiff. Accordingly, the Kroger Court determined that since the plaintiff could not have originally brought suit against OPPD and Owen as codefendants, she should not be able to achieve the same result simply because Owen was initially brought into the suit by a third-party complaint. To allow her to do so would allow her to “defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants.”

The Court acknowledged that ancillary jurisdiction over non-diverse parties had often been upheld in situations involving impleader, cross-claims or counterclaims, but distinguished those

63. Id. at 370.
64. Id. at 371-72.
65. Id. at 372.
67. 437 U.S. at 373 (citing, inter alia, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)).
68. Id. at 375.
69. Id. at 374.
cases from the situation at hand.70 In Kroger, the Court found, the nonfederal claim was not ancillary to the federal claim in the same way that the defendant's claim against a third-party always is.71 Whereas a third-party complaint manifests a logical dependence on the resolution of the primary lawsuit,72 the plaintiff's claim in Kroger was new and independent of the main claim.73 In addition, the plaintiff in Kroger voluntarily chose to assert a state-law claim in a federal court.74 That differed, the Court stated, from typical ancillary jurisdiction cases which involve claims by a defendant appearing involuntarily before the court, or by one whose rights would be lost unless asserted in the ongoing federal suit.75 Finally, while recognizing the seeming contradiction in its treatment of the Kroger claim and other multi-party claims, the Court declared that the practical considerations attending ancillary jurisdiction are not sufficient to extend the doctrine "to a plaintiff's cause of action against a citizen of the same State in a diversity case."76

Justice White's dissent, joined by Justice Brennan, contended that there was no support for the majority's opinion in either the Constitution or any federal statute.77 The majority had relied

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70. Id. at 375 (citing, inter alia, Moore v. New York Cotton Exch., 270 U.S. 593 (1926)) (counterclaims); LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969); H.L. Peterson Co. v. Applewhite, 383 F.2d 430 (5th Cir. 1967) (impleader).
71. 437 U.S. at 376. The federal claim was a wrongful death action against a diverse defendant. The nonfederal claim was also for wrongful death but against a nondiverse defendant.
73. 437 U.S. at 376.
74. Id. See also Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (4th Cir. 1972) ("[T]he efficiency plaintiff seeks so avidly is available without question in the state courts.").
75. 437 U.S. at 377. The Court states:

It is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction. But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case.

Id.
76. Id. at 378 (White, J., dissenting).
heavily on *Aldinger v. Howard* to support its view that statutory limits constrained the district court from asserting jurisdiction over Mrs. Kroger's claim. The dissent, however, distinguished *Aldinger*. In that case, the plaintiff's state claim against a county was closely connected with the federal civil rights claim against a county officer, yet the Court held there was no pendant jurisdiction over the state claim because Congress had intended not to bestow on federal courts jurisdiction over state based civil rights claims against cities and counties.

In *Kroger*, no such specific congressional intent was ascertainable from the complete diversity requirement of 28 U.S.C. § 1332. Moreover, as the dissent pointed out, *Aldinger* was concerned with the plaintiff's attempted joinder of a party who was not otherwise a proper party to the lawsuit. Mrs. Kroger, on the other hand, "merely sought to assert against Owen a claim arising out of the same transaction that was already before the court." Because of the distinctions between *Aldinger*’s pendant party claim and the plaintiff’s claim against Owen, the dissent urged a rule that would allow the district court to exercise its discretion in retaining such a claim based on considerations of judicial economy, convenience and fairness.

**CURRENT PRACTICE AFTER KROGER**

Federal Rule of Civil Procedure 14(a), which provides for third-party practice in the federal courts, authorizes several different

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80. 427 U.S. at 16 (citing *Monroe v. Pape*, 365 U.S. 167, 187-91 (1961) and *Kenosha v. Bruno*, 412 U.S. 507, 511-13 (1973)). Thus, the Court refused to allow the "federal courts to fashion a jurisdictional doctrine under the general language of Art. III enabling them to circumvent this exclusion . . . ." *Id.*

81. *Kroger*, 437 U.S. at 381.

82. *Id.* at 382. The dissent correctly points out that the *Aldinger* decision was expressly made a narrow one by the Court:

There are, of course, many variations in the language which Congress has employed to confer jurisdiction upon the federal courts, and we decide here only the issue of so-called "pendent party" jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result.

427 U.S. at 18.
ancillary jurisdiction

claims in the context of that practice. First, a defending party is authorized to cause a summons and complaint to be served upon a person who is not a party to the action and who, the defending party alleges, is or may be liable for all or part of the plaintiff's claim. Second, the third-party plaintiff may assert any counterclaims or cross-claims against the third-party plaintiff and other third-party defendants respectively. Third, the third-party defendant is allowed to bring claims which arise out of the subject matter of the principal claim against the original plaintiff. Fourth, the plaintiff may assert any claims which arise out of the subject matter of the principal claim against the third-party defendant. As illustrated by Kroger, simply finding that a claim fits within one of the authorized categories does not answer the question of whether a federal district court should retain jurisdiction over such a claim when it lacks an independent basis of federal subject matter jurisdiction. Each of these authorized claims must therefore be considered in light of Kroger, the traditional ancillary jurisdiction doctrine, and recent interpretations of such claims.

Original Defendant v. Third-Party Defendant

Although pre-rule case law required that third-party claims independently satisfy the federal jurisdictional requirements,

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84. Fed. R. Civ. R. 14(a) provides in part: "[A] defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."
85. Fed. R. Civ. P. 14(a) provides in part: "[T]he third-party defendant shall make his 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."
86. Fed. R. Civ. P. 14(a) provides in part: "The third-party defendant may . . . 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."
87. Fed. R. Civ. P. 14(a) provides in part: 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 his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13.
88. 437 U.S. at 370.
89. See, e.g., Galveston, Harrisburg & San Antonio Ry. v. Hall, 70 F.2d 608 (5th Cir. 1934); Lowry & Co. v. National City Bank, 28 F.2d 895 (S.D.N.Y. 1928).
following the adoption of the Federal Rules of Civil Procedure, a vast majority of courts held that ancillary jurisdiction existed over third-party claims allowed under rule 14. In the wake of the Supreme Court’s decision in *Kroger*, however, several courts have reconsidered that firmly entrenched rule. For example, a district court in Pennsylvania was presented with the argument that a plaintiff in a medical malpractice action might sue a diverse “nonhealth care defendant” on the assumption that the defendant would join the nondiverse doctor and hospital. Thus, the plaintiff could defeat the general diversity statute and get its entire case into federal court. In line with the Supreme Court’s statement in *Kroger* that “[i]t is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit . . . ,” courts faced with this argument have continued to find ancillary jurisdiction applicable to a defendant’s claim against a third-party defendant, with one major factual exception. Federal rule 18 allows a party in the position of a third-party plaintiff to join all claims which he may have against a third-party defendant. There is no requirement in rule 18 that these claims be related to each other or to the transaction or occurrence which is the subject matter of plaintiff’s claim against the third-party plaintiff. As a general rule, however, courts have found that ancillary jurisdiction does not support the assertion of federal subject matter


92. 437 U.S. at 377. Moreover, the Court mentioned with seeming approval the exercise of ancillary jurisdiction in the basic impleader situation. Id. at 375.


94. Fed. R. Civ. P. 18(a) provides: “A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.” See 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1582 (1971).

95. See C. WRIGHT & A. MILLER, supra note 94, § 1582.
jurisdiction over such joined claims.\textsuperscript{96}

\textit{Third-Party Defendant v. Third-Party Plaintiff}

Rule 14(a) provides that a third-party defendant who asserts counterclaims against a third-party plaintiff and cross-claims against other third-party defendants shall do so as provided in rule 13.\textsuperscript{97} Thus, in determining whether or not it has ancillary jurisdiction over such claims, the court must examine case law interpretations of the various provisions of rule 13.\textsuperscript{98}

Since \textit{Moore v. New York Cotton Exchange},\textsuperscript{99} federal courts have asserted ancillary jurisdiction over counterclaims which arise out of the transaction that is the subject matter of the main suit.\textsuperscript{100} The Court in \textit{Moore} broadly defined "transaction" to be a "word of flexible meaning," which may consist of many occurrences logically if not immediately connected.\textsuperscript{101} In drafting the federal rules, the advisory committee adopted this notion of "transaction"\textsuperscript{102} and devised a scheme categorizing counterclaims as either "compulsory" or "permissive."\textsuperscript{103} Compulsory counterclaims are those arising out of the transaction or occurrence that is the subject matter of the opposing party's claim,\textsuperscript{104} which must be raised in the original suit or be forever barred.\textsuperscript{105} Per-


\textsuperscript{97} FED. R. CIV. P. 14(a) provides in relevant part: "The person served with the summons and third-party complaint . . . shall make his 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."

\textsuperscript{98} FED. R. CIV. P. 13; see, e.g., Moore v. New York Cotton Exch., 270 U.S. 593 (1926) (counterclaims); LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969) (cross-claims); Scott v. Fancher, 369 F.2d 842 (5th Cir. 1966) (cross-claims).

\textsuperscript{99} 270 U.S. 593 (1926).

\textsuperscript{100} See, e.g., Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193 (10th Cir. 1974); Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), cert. denied, 414 U.S. 1146 (1974); Union Paving Co. v. Downer Corp., 276 F.2d 468 (9th Cir. 1960); Lesnik v. Public Indus. Corp., 144 F.2d 368 (2d Cir. 1944).

\textsuperscript{101} 270 U.S. at 610.

\textsuperscript{102} The flexible definition of "transaction" had its roots in Federal Equity Rule 30, 226 U.S. 627, 657 (1912).

\textsuperscript{103} See FED. R. CIV. P. 13(a), (b).

\textsuperscript{104} FED. R. CIV. P. 13(a)

\textsuperscript{105} Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Mesker Bros. Iron. Co. v. Donata
missive counterclaims are all other counterclaims, namely, those
"not arising out of the transaction or occurrence that is the sub-
ject matter of the opposing party's claims."106

Consistent with Moore, cases interpreting rule 13 have found
ancillary jurisdiction over compulsory counterclaims,107 but have
required an independent basis of jurisdiction for permissive
counterclaims.108 Cases prior to Kroger applied this rule of con-
struction to counterclaims raised by third-party defendants
against third-party plaintiffs,109 and nothing in the Court's opin-
ion in Kroger appears to dictate a different result. Ancillary
jurisdiction would thus be invoked by a defending party "haled
into court against his will," who is required by federal practice to
raise his claim or lose it.110 In the usual case, such a counter-
claim will evince the kind of "logical dependence" that the Court
identified in Kroger.111 Assertion of ancillary jurisdiction in such
a context will generally result in a net savings in terms of judi-
cial economy and convenience.

Cross-claims against co-third-party defendants are likewise
governed by rule 13.112 Subsection (g) of rule 13 allows, but does
not require, such a claim to be asserted when it arises "out of the
transaction or occurrence that is the subject matter of the origi-
 nal action."113 As the similar language in rules 13(g) and 13(a)
governing compulsory counterclaims might suggest, a proper

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107. See, e.g., United States ex rel. D'Agostino Excavators, Inc. v. Heyward-Robinson
Co., 430 F.2d 1077 (2d Cir. 1970). The accepted view is that of the Third Circuit that "the
issue of the existence of ancillary jurisdiction and the issue as to whether a counterclaim
is compulsory are to be answered by the same test." Great Lakes Rubber Corp. v. Herbert
108. See, e.g., Chance v. County Bd. of School Trustees, 332 F.2d 971 (7th Cir. 1964);
110. 437 U.S. at 376.
111. Id.
112. FED. R. CIV. P. 14(a).
113. FED. R. CIV. P. 13(g) provides in part:
A pleading may state as a cross-claim any claim by one party against a co-
party arising out of the transaction or occurrence that is the subject matter
either of the original action or of a counterclaim therein or relating to any prop-
erty that is the subject matter of the original action.
cross-claim under rule 13(g) is generally held to be within the ancillary jurisdiction of the federal courts, at least when the party asserting it is a defending party. This result, for the same reasons that federal courts assert ancillary jurisdiction over compulsory counterclaims, should continue to be valid after Kroger.

Third-Party Defendant v. Original Plaintiff

Rule 14(a) permits a third-party defendant to assert any claim against the original plaintiff "arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff." While this provision is very similar to the rule 13(a) compulsory counterclaim provision, it is expressly made permissive, to be asserted at the third-party’s option, and is neither a counterclaim nor a cross-claim.

The early cases interpreting rule 14(a) refused to allow such a claim by the third party against the plaintiff out of concern that to do so would promote collusion. Although the 1948 amendments to the rule expressly authorized such a claim, the courts’ early reluctance colored their decisions regarding application of the rule and the assertion of ancillary jurisdiction. That reluctance manifested itself in narrow interpretations of the standard for the “transaction or occurrence that is the subject matter of plaintiff’s claim against the third party plaintiff.” Some cases

114. See, e.g., LASA Per L’Industria Del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969); Scott v. Fancher, 369 F.2d 842 (5th Cir. 1966); Glen Falls Indem. Co. v. United States ex rel. Westinghouse Elec. Supply Co., 229 F.2d 370 (9th Cir. 1955).
115. Moreover, cross-claims were one of several joinder provisions over which prior cases had granted ancillary jurisdiction and which were cited with approval by the Kroger majority. 437 U.S. at 375 n.18.
116. FED. R. CIV. P. 14(a).
117. See Wright, supra note 22, §§ 1444, 1458.
120. See supra note 36.
held that even though such a claim met the rule 14(a) standard and was a validly stated claim, it failed to satisfy the ancillary jurisdiction requirements of the federal courts.\textsuperscript{122} These cases are certainly difficult to reconcile with the drafters' apparent intention to parallel the language of rules 13(a) and 13(g), and thereby include 13(g) claims within the scope of ancillary jurisdiction as established by the Supreme Court in \textit{Moore}.\textsuperscript{123}

The leading and perhaps best-reasoned case allowing a third-party claim against a plaintiff to fall within the ancillary jurisdiction of the federal courts is \textit{Revere Copper & Brass, Inc. v. Aetna Casualty & Surety Co.},\textsuperscript{124} decided before \textit{Kroger}. Revere and Fuller had entered into a contract whereby Fuller was to supply materials for the construction of a plant to be operated by Revere. Aetna, as surety for Fuller, was obligated to pay Revere any damages resulting from Fuller's failure to perform. Revere sued Aetna on the surety bonds for damages of over $2,000,000, alleging Fuller's breach of warranties, negligence and failure to maintain a competent staff.\textsuperscript{125} Aetna impleaded Fuller alleging an agreement to indemnify, and Fuller brought a claim against Revere alleging breach of warranty, misrepresentation, negligence and Revere's unjust enrichment in the amount of $1,328,880.\textsuperscript{126} Inasmuch as the third-party defendant, Fuller, and the plaintiff, Revere, were both citizens of Maryland, no independent basis of jurisdiction existed over Fuller's claim.\textsuperscript{127}

In determining whether the court could assert ancillary jurisdiction over the claim, the Fifth Circuit first rejected any kind of "mutuality" notion that because no ancillary jurisdiction existed over a plaintiff's claim against a nondiverse third-party, the

\textsuperscript{122} See, e.g., Stahl v. Ohio River Co., 424 F.2d 52 (3d Cir. 1970) (allowable contingent claim by third-party defendant may be asserted only against a person not a party to proceeding).


\textsuperscript{125} 426 F.2d at 710.

\textsuperscript{126} \textit{Id.} at 711.

\textsuperscript{127} \textit{Id.}
reverse should also be true.\textsuperscript{128} More importantly, however, the court attempted to formulate criteria for determining whether ancillary jurisdiction exists in any given case by evaluating the logical relationship between the third-party claim and the original claim. The court stated that a logical relationship exists where both claims arise out of the same aggregate of operative facts.\textsuperscript{129} This logical relationship forms the basis for asserting ancillary jurisdiction. In \textit{Revere}, because Aetna was a surety for the contract at issue, a logical relationship existed between Fuller's claim against Revere and Revere's claim against Aetna. Thus, assertion of ancillary jurisdiction over Fuller's claim accorded with both the pre-rules doctrine and rule 82.\textsuperscript{130}

Subsequent courts agreed with the Fifth Circuit's reasoning in finding claims by the third-party defendant against the original plaintiff to be within the ancillary jurisdiction of the district courts.\textsuperscript{131} Following \textit{Kroger}, however, at least one commentator found that it "is in the area of a claim by the third-party back against the plaintiff that the impact of \textit{Kroger} is most uncertain."\textsuperscript{132} Yet the invalidity of such a claim does not seem to follow logically from \textit{Kroger}. Rather, the logic of the \textit{Revere} court that a third-party's claim against a plaintiff does not present the risk of collusion with which the Court in \textit{Kroger} seemed concerned is still persuasive. Nor is there any other strong policy reason for denying the third-party defendant the opportunity to raise his claim.

\textsuperscript{128} The court stated:

Suffice it to say that the two situations are the converse of each other only superficially and that there are differences which militate against identical treatment. First of all, the plaintiff has the option of selecting the forum where he believes he can most effectively assert his claim, he has not been involuntarily brought to a forum, faced with the prospect of defending himself as best he can . . . . Moreover, there is the possibility, whether real or fanciful, of collusion between the plaintiff and an overly cooperative defendant impleading just the right third party.

\textit{Id.} at 716.

\textsuperscript{129} \textit{Id.} at 715 (provided "that the same aggregate [is] the basis of both claims; or (2) that [the claim and the original aggregate of facts] activate additional legal rights in a party defendant that would otherwise remain dormant.").

\textsuperscript{130} \textit{Id.}


In one post-Kroger case, the court found that although the plaintiff could not have brought an action originally against the third-party defendant in the absence of a federal question or diversity of citizenship, nor made a claim against him after he had been impleaded, the third-party defendant need not be similarly curtailed. After all, the plaintiff controls the choice of forum in the first instance and may choose the most effective court for litigating his claims. The third-party defendant, on the other hand, is an involuntary litigant "who should not be saddled with rules that inhibit him from effectively defending himself." Kroger was concerned with collusion and subversion of the complete diversity requirement. Such concerns, however, are not relevant to a third party's claim against a plaintiff, and consequently, no narrowing of ancillary jurisdiction should take place in this regard.

**Plaintiff v. Third-Party Defendant**

Rule 14(a) allows a plaintiff to bring any claims which he may have against a properly impleaded third-party defendant arising out of the transaction or occurrence that is the subject matter of plaintiff's original claim against the defendant. The majority of courts addressing this issue before 1978 required an independent basis of subject matter jurisdiction for such a claim. Thus, the Supreme Court's conclusion in Kroger was not a surprising one. What was surprising about the decision, however, was its

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134. In First Federal, the Savings & Loan sued Aetna seeking a declaratory judgment that Aetna was liable on a blanket bond for losses sustained through the misconduct of First Federal's former vice-president. Aetna impleaded Harris, the vice-president. Harris filed a claim against First Federal for libel and slander. First Federal sought to have the court dismiss the claim for lack of jurisdiction. Id. at 1-2.
135. Id. at 4.
136. Id.
137. FED. R. CIV. P. 14(a).
inflexibility. By holding in its broadest language that "neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case," the Court failed to leave itself or the lower courts the maneuvering room available in earlier cases. Instead, the Court suggested there were no instances in which a plaintiff might proceed against a third-party without an independent basis of jurisdiction.

Nevertheless, several possible exceptions to the rigid rule of *Kroger* have been suggested by courts and commentators. First, the Supreme Court itself suggested in *Aldinger v. Howard* that were it presented with a case in which no forum other than a federal one existed wherein all related claims might be heard, it might reach a different result. Such a case might arise because of personal jurisdiction or venue limitations which prevent a plaintiff from suing all defendants in a state court, or where the main claim is one over which the federal courts have exclusive jurisdiction. In the latter instance, a plaintiff would not in fact have the option of bringing all his claims together in state court. While legitimate reasons seem to exist in such cases for allowing a district court to assert ancillary jurisdiction over the nonfederal claims involved, post-*Kroger* decisions have shown little inclination to bend the rule.

Finally, one claim by a plaintiff against a third-party defendant which has yet to be addressed decisively by the courts is that asserted by a plaintiff in response to a claim by a third-party defendant, a claim analogous to a compulsory counterclaim. Should such a claim fall within the ancillary jurisdiction of the courts or be barred by the *Kroger* rationale? Read most rigidly,

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139. See generally Berch, supra note 132.
143. 427 U.S. at 18.
147. See *FED. R. CIV. P.* 13(a), 14(a).
Kroger seems to prohibit ancillary jurisdiction over any claim by a plaintiff against a third party. However, there are several reasons why this claim should fall outside the rule of Kroger.

First, the fear of collusion is lessened by the nature of the responsive claim. However real the Court’s perceived risk of collusion may be, that a plaintiff would sue a nondiverse party, hope for impleader and then wait for a claim by the third-party defendant as a means of circumventing the complete diversity requirement seems less than credible. A plaintiff in such a position has no certainty of obtaining a desired result and no way to compel one. Second, practical considerations of judicial economy, convenience and fairness to the parties loom large in such a setting. Not only does it make sense to hear the related claims in one forum, but a plaintiff may be compelled to bring his related “counterclaim” or risk losing it. Fairness would therefore seem to require a judicially-created exception to the “compulsory” feature of such “counterclaims.” Most significant, however, is that the plaintiff, at the point when he raises his responsive claim, takes the position of defending party. Such a change in position has been recognized in other contexts and should be recognized here, with the result that Kroger’s rule not be strictly applied.

SUGGESTED APPROACH

The Supreme Court has left unanswered the question of whether a district court may ever assert ancillary jurisdiction over a plaintiff’s claim against a third-party defendant. In resolving this issue in light of Aldinger and Kroger, the lower courts should take a reasoned approach which incorporates not only the rules of those cases, but the principles traditionally supporting the exercise of ancillary jurisdiction.

If a plaintiff asserts a claim against a third-party defendant, assuming a relationship which satisfies constitutional require-

148. See supra notes 96-103 and accompanying text.
149. See, e.g., Danner v. Anskis, 256 F.2d 123 (3d Cir. 1958) (interpreting Fed. R. Civ. P. 13(g) to require a plaintiff to be in a defensive position before he may file a cross-claim against a co-plaintiff).
ments exists, the court should first examine that claim in light of Aldinger; that is, the court should determine whether the plaintiff’s claim is one which Congress has clearly intended should not be brought in the federal courts. Where this specific congressional intent exists, the district court should not take ancillary jurisdiction over the claim. In addition to specific statutory limitations, the general diversity requirement might bar a plaintiff’s claim against a third-party defendant. However, as the Court in Kroger acknowledged, the complete diversity requirement is not an absolute bar to assertions of ancillary jurisdiction given certain policy considerations.

A court must, therefore, balance several other factors against the diversity requirement. First, the court should consider whether judicial economy and convenience will be served by hearing all related claims in one case. This factor would encompass determinations of how strongly related the plaintiff’s claim against the third-party defendant is to the primary claim, and perhaps its relationship, if any, to the third-party plaintiff’s claim against the third-party defendant. Second, the court should consider the fairness to the litigants of requiring separate suits. Third, the court should determine the availability of another forum in which all the claims might be heard together. Fourth, the court should consider the jurisdictional basis of the primary claim. Is it a federal question case? If so, the federal court might be more willing to exert ancillary jurisdiction over a related state claim, so as to encourage the bringing of federal questions in federal court. Finally, the court should consider how strong the risk of collusion really is in a given case or type of case. After weighing all the factors, the court would be in a position to make a rational determination as to whether the related claims constituted one case or controversy over which federal jurisdiction should be asserted.

CONCLUSION

That the Kroger case has affected and will continue to affect the doctrine of ancillary jurisdiction cannot be denied. Its effect, however, is not necessarily only a negative one. Kroger and sub-

151. See Aldinger v. Howard, 427 U.S. 1, 16 (1976).
152. Kroger, 437 U.S. at 373-74.
153. Id. at 375.
sequent cases have left intact much of the post-rules approach to ancillary jurisdiction. The Court has shown no inclination to invalidate the expansion of the doctrine which has taken place since 1938, despite rule 82. Consequently, federal courts continue to recognize ancillary jurisdiction over third-party plaintiff's claims against third-party defendants, and third-party defendant's claims against third-party plaintiffs, co-third-party defendants and the original plaintiff. Moreover, Kroger may have at least two potentially positive consequences. One of these results from the Court's acknowledgment that ancillary and pendent jurisdictions are more similar than not, a move that will no doubt contribute to a conscious merger of the two standards. Second, by indicating that the doctrine of ancillary jurisdiction does in fact have outer limits, the Court will likely compel lower courts to take a more reasoned approach to exercising such jurisdiction. It is this reasoned approach which will enable the courts to deal consistently and fairly with the remaining major area of uncertainty: plaintiff's claims asserted against a nondiverse third-party defendant.