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PENDENT JURISDICTION—THE PROBLEM OF
“PENDENTING PARTIES”

William H. Fortune*

Federal courts have generally discouraged the joinder of a third party solely on the basis of a claim pendent to a federal cause of action. They have, however, been more liberal in allowing joinder in diversity cases. The author reviews the case law and argues that a more liberal attitude toward joinder should be adopted, except in diversity cases where, he believes, liberal joinder erodes the requirement of complete diversity. The Editors.

“Pendent jurisdiction” is the generic and descriptive term used to explain a federal court’s exercise of original jurisdiction over a claim which, standing alone, would not be within the jurisdiction of the court, but which is closely related to a substantial claim within the court’s jurisdiction. Although pendent jurisdiction has received much scholarly attention,1 the scholars have been remiss in failing to note the inconsistent and illogical results in cases in which the exercise of pendent jurisdiction would bring into the case a new party; a party against whom or by whom no claim is asserted which has an independent jurisdictional base. This occurs in all diversity cases in which application of pendent jurisdiction is sought and occurs in federal question cases if the federal claim is asserted only against one defendant and a related state claim is asserted against a co-defendant. The courts have, illogically it is felt, generally approved “pendenting parties” in diversity cases, but have

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disapproved the joining of new parties in federal question cases. Opposite results should be reached, as this article will show.

The judicial development of pendent jurisdiction clearly establishes that the concept is one of subject matter jurisdiction and that the fact that the pendent claim is asserted against a new party is irrelevant. A court which decides to exercise pendent jurisdiction must have determined that: 1) the claim of the plaintiff standing by itself is not within the subject matter jurisdiction of the court; 2) the claim was presented by the plaintiff with a substantial and closely related claim which was within the court's jurisdiction; and 3) the claim which gave the court jurisdiction either remained a part of the litigation until the end or was not dismissed until a point in the proceedings at which, in the interest of total judicial economy, fairness to the litigants, and the striking of the proper balance in the federal-state relations, the court was warranted in retaining jurisdiction over the related claim and resolving it on the merits. A federal court's power to resolve matters which by themselves are beyond the court's jurisdiction is a logical extension of Chief Justice Marshall's indisputable axiom that a federal court in deciding a claim of federal origin must be able to resolve matters of state law where necessary to resolution of the federal claim. In Siler v. Louisville & Nashville R.R. this axiom was extended to justify the resolution of a state claim which made the resolution of a federal claim based on the Constitution unnecessary, and in Hurn v. Oursler to justify the resolution of a state claim after dismissal of a federal claim on the merits.

2. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 820-24 (1824). This axiom was postulated to support Marshall's reasoned argument that the statute authorizing the Bank of the United States to sue in the federal courts was constitutional.
4. 289 U.S. 238 (1933). In Hurn the Court held, that where the federal claim (copyright infringement) and the state claim (unfair competition) were merely separate grounds for the same cause of action, the federal court could entertain the state claim after dismissal of the federal claim. Hurn was based on two cases: Moore v. New York Cotton Exch., 270 U.S. 593 (1926), in which the presence of a substantial federal claim was held to give a district court jurisdiction of a nonfederal counterclaim which, jurisdictional questions aside, would have been compulsory as it arose out of the same transaction as the original claim; and Siler v. Louisville and Nashville R.R. Siler can be explained as a case in which the result was dictated by the Court's traditional policy of avoiding constitutional questions whenever possible and Moore as an application of the compulsory counterclaim rule [it is clear, however, that the reasoning of Moore is specious—if a court lacks jurisdiction over a counterclaim it cannot be compulsory; see Shakman, supra note 1, at 272-77]. Thus Hurn, where neither avoidance of a constitutional question nor application of a unitary procedural rule was involved, established a new and broader principle for the exercise of jurisdiction over state claims, the principle that, in the interest of judicial economy a federal court is warranted in deciding a state claim which is an alternate theory of relief to the federal claim which establishes the basis for jurisdiction.
In *United Mine Workers v. Gibbs* the Court attempted to clear up the confusion created by the imprecise terminology of *Hurn* and postulated the rule for the initial exercise of jurisdiction over the "pendent" claim as follows:

The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if considered without regard to their federal or state character a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole. 7

In *Gibbs*, as in *Hurn*, the federal claim was dismissed after a trial on the merits. It required little extra expenditure of judicial energy at that point to resolve the state claim, as the evidence which had already been produced was determinative of the issues raised by the state claim. Furthermore it would have been patently unfair to the parties not to settle the matter. The plaintiff would have been given false hope of recovering on the merits and possibly induced into a lengthy trial in state court which ultimately would be resolved against him. The defendant might have been forced to defend a costly and senseless suit on issues which had been resolved once in his favor. Present also in *Gibbs* was a concern of federalism 8 that made the exercise of pendent jurisdiction over the state claim particularly appropriate. The state claim (conspiracy and interference with contract) was answered by a federal defense (pre-emption of the state tort law by the federal Taft-Hartley Act) which raised an important question of the limit of permissible state regulation in the labor field, a question of national importance which had to be decided as a matter of federal law. The district court, by deciding the state claim on the theory of pendent jurisdiction made it possible for the Supreme Court to rule on this matter at an early date. If the district court had dismissed the state claim the matter would have come before the Court much later, on appeal or certiorari from the highest state court.


7. 383 U.S. at 725.

8. It is felt that the proper functioning of the federal system existing in the United States requires that a cause of action based on a federal statute or the Constitution be freely triable in a federal court.
court, and only then if the case were prosecuted by one side or the other through the state court system to the Supreme Court. *Gibbs*, in short, was a case that clearly should have been resolved completely if the power to do so were present.

The Court foresaw, however, that district courts would be faced with cases in which the need to retain jurisdiction over the state claim was not as clear. This would occur if the federal claim was dismissed at a stage of the proceedings when further evidence would be required to dispose of the state claim, or where there was no particular federal concern which made the state claim appropriate for resolution by a federal court. Thus the Court in *Gibbs* set out guidelines to make it clear that the exercise of pendent jurisdiction was discretionary; that a district court was warranted in refusing to apply the doctrine if it became convinced at any time that the state issues predominated; and that if the federal claim was dismissed the district court could, within its discretion, dismiss or retain the state claim depending on the extent of duplication which would occur in the state court if the pendent claim were dismissed.9 Within the general guidelines of judicial economy and fairness to litigants a factor such as the running of the statutes of limitations could obviously be considered. And, from the facts of *Gibbs*, the presence of a federal issue in the state claim would warrant the retention of that claim even if there would be no great duplication of judicial energy or unfairness to litigants if the parties were forced to litigate the state claim in state court.

In both *Hum* and *Gibbs* the federal and state claims were asserted against the same defendant. Most lower courts have, in federal question cases, read this as an inherent limitation on the doctrine of pendent jurisdiction and have refused to apply the principle in cases where a federal claim is asserted against one defendant and a closely related state claim against a co-defendant.10 At the same time, however, the lower courts have, with some hesitation, gradually extended pendent jurisdiction to diversity cases where one of the claims is for less than the requisite jurisdictional amount, $10,000, if the claims arise out of the

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9. *Id.* at 726-27.

10. The following is a list of cases in which the court has denied the existence of the power to join the related claim against a co-defendant: Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972); Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); Benbow v. Wolf, 217 F.2d 203 (9th Cir. 1954); Wasserman v. Perugini, 173 F.2d 305 (2d Cir. 1949); New Orleans Public Belt R.R. v. Wallace, 173 F.2d 145 (5th Cir. 1949); Pearce v. Pennsylvania R.R., 162 F.2d 524 (3d Cir. 1947), *cert. denied*, 322 U.S. 765 (1947); Jennings v. Davis, 339 F. Supp. 919 (W.D. Mo. 1972); Barrows v. Faulkner, 327 F. Supp. 1190 (N.D. Okla. 1971).
same transaction and are closely related. Application of pendent jurisdiction to a diversity case, of course, involves the joining of either a plaintiff or defendant. Both the federal question and diversity cases will be discussed. The federal question cases, where there is a compelling need to employ pendent jurisdiction, will be examined first.

JOINING PARTIES IN FEDERAL QUESTION CASES

When the joining of an additional party raises a question of pendent jurisdiction, what is at issue is subject matter jurisdiction over a claim which happens to be asserted against a defendant against whom no claim having an independent jurisdictional base is asserted. Jurisdiction over the person of that defendant is not at issue. When the defendant objects to the jurisdiction of the court he is asserting that the court lacks subject matter jurisdiction over the claim against him, not that the court lacks jurisdiction over his person. Courts which have refused to apply pendent jurisdiction in this situation may have failed to fully comprehend that the defendant’s objections went to subject matter rather than to personal jurisdiction.12

Cases which have acknowledged the power to entertain the pended claim while refusing to do so are: Patrun v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), cert. denied, 397 U.S. 990 (1970) and Latch v. T.V.A., 312 F. Supp. 1069 (N.D. Miss. 1970).

The Second Circuit has clearly held that a state claim against one defendant can be joined to a related federal claim against a co-defendant. Leather’s Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971). In Leather’s Best the court followed Astor-Honor Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971) in which the Second Circuit held that a state unfair competition claim against one defendant could be joined to a copyright claim against a co-defendant. Prior to Leather’s Best it would have been possible to read the principle enunciated in Astor-Honor as limited to unfair competition cases where there is a special jurisdictional statute. Leather’s Best, however, makes it clear that the Second Circuit has embraced the broad proposition that joinder of state claims and federal claims against different defendants is proper. 451 F.2d at 809-11.

Other cases in which the state claim was joined are: Shannon v. United States, 417 F.2d 256 (5th Cir. 1969); Eidschun v. Pierce, 335 F. Supp. 603 (S.D. Iowa 1971); Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970).


What are the situations in which a plaintiff has a federal claim against one defendant but only a state claim against a co-defendant? It is possible of course for this to occur with any federal claim. For example a claim of patent infringement might be asserted against defendant A but only a state claim of unfair competition, although closely related to the patent claim, against defendant B. In the vast majority of cases, however, the plaintiff could assert a colorable claim for patent infringement against defendant B as well as defendant A. The case then falls squarely within the *Gibbs* pattern and the court is not faced with the problem of joining a defendant against whom the only claim asserted is a pendent state claim. A number of claims are federal claims, however, because of the identity of the parties. Broadly speaking diversity cases fall within this category. They are justiciable in federal court because of the citizenship of the parties, not the nature of the claims. For the purpose of this article, however, a distinction will be drawn between diversity cases, in which state law is applied and no federal interests are involved, and cases whose justiciability in federal court depends in part on the identity of the parties but which involve federal substantive rights or the application of federal law. Diversity cases will be said to involve *state* claims actionable in federal court; cases of the second category will be said to involve federal claims. Jurisdictional statutes governing suits against the United States or claims based on federal substantive rights against certain kinds of defendants are statutes which regulate the second category of cases. These statutes serve to define jurisdiction at least in part by reference to the identity of the defendant, making it impossible for a plaintiff with a related claim against another type defendant to state a colorable federal claim against him. Three examples will illustrate the problem and the degrees of unfairness to the plaintiff in refusing to join the state claim against the co-defendant.

The first example, in which unfairness to the plaintiff is obvious, is a case where the federal court has exclusive jurisdiction over the claim against one defendant and the state court exclusive jurisdiction over the claim against the other. Interrelated claims against the United States and a private person often present such a case.\(^\text{13}\) Suppose the plaintiff is struck by a car driven by a federal employee. The employee has an insurance policy affording liability coverage for injuries caused by his negligent acts except while in the course and scope of his employment, and the insurance company takes the position that there is no coverage

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13. Primarily the plaintiff will be proceeding under the Federal Torts Claims Act, the jurisdictional statute of which is 28 U.S.C. § 1346(b) (1970).
as the employee was on United States business at the time of the accident. The United States, however, takes the position that the employee was on his own business and that the insurance company should pay the loss. The United States can be sued only in federal court, the insurance company only in state court. The plaintiff is forced to bring two suits and try to prove agency in one court and lack of agency in the other. And because neither defendant can be bound adversely by a decision to which it is not a party it is possible for the plaintiff to lose both cases and go uncompensated.\textsuperscript{14}

This inequitable result represents the view of a majority of courts which have considered the matter,\textsuperscript{15} although several recent cases\textsuperscript{16} have permitted the state claim to be joined in recognition of the injustice of forcing the plaintiff to divide his case.\textsuperscript{17}

Forcing the plaintiff to divide his claims follows naturally from statutes giving the federal courts exclusive jurisdiction over claims against the United States. When the jurisdictional statute provides for concurrent jurisdiction in the state and federal courts the plaintiff may have the choice of dividing his claims between the state and federal courts or giving up his right to have the federal claim tried in a federal tribunal. There are cases where neither choice is a happy one. The

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\item \textsuperscript{14} The fact situation and result are taken from Guthrie v. United States, 238 F. Supp. 855 (E.D. Wis. 1965), a claim under the Federal Torts Claims Act.
\item \textsuperscript{16} Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970) is the only case which has clearly held that a claim against a private person may be joined with a claim against the United States under the Federal Torts Claims Act. Shannon v. United States, 417 F.2d 256 (5th Cir. 1969) sanctioned the joining of a claim against a private insurance company to a claim against the United States brought under the Serviceman's Group Life Insurance Act, 38 U.S.C. §§ 765 et seq. (1970). The jurisdictional statute for that act is 38 U.S.C. § 775 (1970). In Shannon, at 263, the Court alluded to the dilemma of a plaintiff faced with defendants suable only in different courts:
\begin{quote}
To this point appellant has been whipsawed between the position of the United States (suable only in federal court) that it has no duty except to buy insurance, and the position of Prudential (which insists it is suable only in state court) that it has been discharged of its duty as insurer by paying in accordance with information furnished by the government. . . . The appellant is not required to bounce from court to court to find which shell the pea is under.
\end{quote}
\item \textsuperscript{17} "There is a vice . . . , as we have recognized by liberal rules of joinder, in forcing plaintiffs who have multiple bases of action to pursue their remedies in pieces and in different courts. . . . The balance is achieved if jurisdiction is extended generally to claims that under joinder rules may be asserted in a single action, subject to discretion in the court to dismiss without prejudice claims resting upon state law." Wechsler, \textit{Federal Jurisdiction and the Revision of the Judicial Code}, 13 \textit{Law & Contemp. Prob.} 216, 232-33 (1948) (footnotes omitted).
\end{itemize}
majority of cases in which plaintiffs have asked that a state claim against a co-defendant be joined are claims asserted under the Federal Employers Liability Act\textsuperscript{18} (FELA) (and the closely related Jones Act)\textsuperscript{19} and claims under the Civil Rights Act of 1871.\textsuperscript{20} Both acts have jurisdictional statutes providing for concurrent jurisdiction in state and federal court.\textsuperscript{21} Both provide for monetary relief to remedy invasion of a federal right but only against certain defendants. The federal right under FELA grows out of the employment contract and an FELA claim can be asserted only against an employer. Under the Civil Rights Act individuals acting under color of state law are responsible in damages to those whose civil rights they infringe; cities and counties, however, while subject to injunctive relief, are not answerable in damages under the Civil Rights Act for the wrongs of their employees.\textsuperscript{22}

Civil rights cases in which joinder was refused have resulted in substantial prejudice to the plaintiffs and show a lack of appreciation for the federal character of the action; FELA cases reaching the same result strike the same imbalance in weighing the state and federal interests involved, but in these cases there is little evidence of actual prejudice to the plaintiff.

First take the example of the plaintiff with a civil rights action for damages against an individual officer and a state claim, based on respondeat superior, against the city for whom the officer worked. Assume a case in which there is controversy over the facts of the incident. The plaintiff maintains he was beaten without cause; the policeman will assert that the plaintiff resisted arrest. Assuming the federal court is not willing to "pendent parties" the plaintiff's choice is between suing the officer alone in federal court (with a possibility of a later action in state court against the city) or suing the city in state court and possibly joining the officer as a defendant. The plaintiff realizes that the evidence will present a jury question as to liability and that it will be extremely difficult to convince a jury to take his word over that of a local policeman. He would like to proceed in federal court where, in rural areas, the jury will be drawn from a multi-county district and where, in any case, the aura of the federal court will hopefully create a more serious

\textsuperscript{19} 46 U.S.C. § 688 (1970). This statute simply makes all statutes modifying or extending the common law right of railway employees applicable to seamen.
\textsuperscript{22} Monroe v. Pape, 365 U.S. 167 (1961).
and impartial mood than could be expected in a state court of general jurisdiction. If the policeman is bonded in an amount adequate to satisfy any judgment likely to be rendered, the plaintiff will probably sue in federal court, there being no real need to name the city as a defendant except for the strategic purpose of implying to the jury that the policeman will not have to personally satisfy the judgment. If, however, the policeman is inadequately bonded the plaintiff is faced with a dilemma. If he sues the policeman in federal court and the city does not take an active role in the policeman’s defense the city will not be bound by adverse determinations of fault or damages. The judgment against the policeman may be worthless and the plaintiff will then be forced to sue the city in state court with relitigation by a state court jury of liability and damages. If, however, the federal court decides the case in favor of the policeman the city, whose liability is based solely on respondeat superior, can use the judgment to estop the plaintiff in a subsequent action in state court. The plaintiff can thus have his claim against the city hurt but not helped by the outcome of the suit against the policeman. This lack of mutuality, plus the problem of the running of the statute of limitations on the state action against the city, will force the plaintiff in a case where the policeman is inadequately bonded to bring his action for damages in state court. That court will, however, rarely be a neutral tribunal because of the local selection of the jurors (who, besides naturally siding with the local police, will fear that any judgment for damages against the governmental unit will result in a drain on the treasury with possibly increased taxes to offset the loss) and the natural identification of the court itself with the city and county in which it sits. The federal district courts are more capable of achieving neutrality than local courts of general jurisdiction and the district courts could, by simple reference to the expression of judicial power in Gibbs, exercise pendent jurisdiction over the state claim against the governmental unit. This the courts, even courts which have applied pendent jurisdiction in diversity cases, have refused to do.

24. Id.
25. Eidschun v. Pierce, 335 F. Supp. 603 (S.D. Iowa 1971) is the only case in which the court has allowed joinder of a state claim against a governmental unit. In Patrum v. Martin, 292 F. Supp. 370 (W.D. Ky. 1968), aff’d sub nom., Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), cert. denied, 397 U.S. 990 (1970), the court acknowledged the power to allow joinder but, as a matter of discretion, did not exercise that power. On appeal the appellant argued that he would be forced into a forum biased against him if the state claim were not joined. To this argument the court suggested that he seek a change of venue in the state court. 419 F.2d at 1302, n.2. This was
The Federal Employers Liability Act (FELA) imposes liability on railroads engaged in interstate commerce for injuries suffered by their employees as a result of the negligence of an employee of the railroad. The Jones Act does the same for seamen. The federal and state courts have concurrent jurisdiction over claims by injured employees; a suit under FELA or the Jones Act has the attributes of a common law negligence action except for the abrogation of the fellow servant rule and the substitution of comparative negligence for the common law principle of contributory negligence. The employee must, through the application of respondeat superior prove fault on the part of his employer to recover. The injured employee may thus be faced with a classic joint tort-feasor situation in which either his employer or a third party or both negligently caused his injuries. It is to the employee’s advantage to sue both in the same action as the contest over liability will then be, not between plaintiff and defendants, but between co-defendants each seeking to fix the blame on the other. In Pearce v. Pennsylvania R.R. the plaintiff attempted to sue both his employer under FELA and a third party on a state negligence claim in federal district court. The court rejected this attempted joinder of the state claim and certiorari was ultimately denied. Pearce has served as one of the leading authorities for the broad proposition that joinder of a party against whom only a pendent claim is asserted is not proper. There are several reasons,

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however, why *Pearce* should not have been applied out of the
FELA—Jones Act context. 30 In the first place an FELA or Jones Act
claim will involve application of comparative negligence to the fault of
the employee while the claim against the third party will ordinarily
involve the application of contributory negligence. It is difficult to see
how the same jury could deal with different standards of fault applied
to the plaintiff’s conduct. These cases may generally be unsuited for trial
as a unit and, if this is so, the compelling reasons for the exercise of
pendent jurisdiction—judicial economy and fairness to the parties—are
absent. Secondly, it is clear that in practice there is generally no preju-
dice to the plaintiff if he is forced to bring his FELA or Jones Act case
in state court. There is no inherent bias in a state court against the
imposition of liability on a railroad or shipping line. The history of
FELA in fact suggests that the converse is true—that state court judges
and juries are more sympathetic to the employee’s federal right than
their federal court counterparts.31 If this is true FELA and Jones Act
cases are qualitatively different from cases, such as civil rights cases, in
which state court judges and juries are inherently hostile to the federal
claim. There is no compelling need to judicially change a rule which
forces plaintiffs, in a limited number of cases, to state court for vindica-
tion of their federal rights under FELA or the Jones Act. There is an
affront to federalism, however, in any case where, as a practical matter,
a federal right cannot be vindicated in a federal court.31 This will hap-
pen in the FELA context in a case in which the plaintiff is afraid to
proceed independently against two tort-feasors, one his employer and
one a third party, for fear each will succeed in laying the blame on the
other. The interests of federalism would be better served by flatly hold-
ing that the district court has power to entertain any state claim which
is closely related to a federal claim, whether or not the state and federal
claims are asserted against the same defendant. The district court would
always have discretion under *Gibbs* to dismiss the state claim if preju-

and *Wallace* were cited as the authority for the conclusion of the leading pre-*Gibbs* Note that the
pendent claims must be asserted against the same defendant. Note, The Evolution and Scope of

30. The rule in FELA and Jones Act cases clearly is that the joining of state claims against
independent parties is not permitted. New Orleans Public Belt Line R.R. v. Wallace, 173 F.2d 145
(5th Cir. 1949) (FELA); Gautreau v. Central Gulf S.S. Corp., 255 F. Supp. 615 (E.D. La. 1966);

31. The vast majority of cases annotated in 45 U.S.C.A. § 51 (1954) and subsequent sec-
tions are state appellate cases, indicating plaintiffs’ preference for state court. The fact that Con-
gress at an early date forbade removal of FELA actions indicates that historically at least defendants
dice would not otherwise result.

The examples above are illustrative of the range of problems created by the refusal of court to join parties in federal question cases. The examples demonstrate the overriding reasons why this refusal is wrong. Forcing the plaintiff to choose between dividing a cause of action between federal and state court or trying his federal claim in state court runs counter to the principle that a federal claim should be fully justiciable in federal court. In certain instances the plaintiff's case is prejudiced, and it is impossible to justify a refusal to join claims where refusal means that there is no court in which the entire case can be tried. There are a number of logical arguments, some of which have already been alluded to, which can be marshalled in further support of the joinder of state claims against co-defendants in federal question cases.

First, pendent jurisdiction is a concept of subject matter jurisdiction over claims, not personal jurisdiction over parties. If the plaintiff joins a party on a pendent claim, he is really asking the court to exercise jurisdiction over a claim against a party who is admittedly subject to the court's jurisdiction. The court should concern itself with the relation of that claim to the claim which serves as the basis for jurisdiction; conceptually the fact that the two claims are asserted against different defendants is irrelevant. There is nothing in Gibbs which indicates that claims against different parties should be treated any differently from claims against the same party. In fact the reference by the Court in Gibbs to the liberal joinder provisions for claims and parties in the Rules of Civil Procedure is evidence that joining a third party on a pendent claim was within the Court's concept of pendent jurisdiction.32

Second, courts have been willing since Freeman v. Howe33 in 1860 to bring in a party after the commencement of the action, on a claim which has no independent jurisdictional base, under the theory of ancillary jurisdiction. Freeman v. Howe was compelled by the fact that the court could not otherwise fully adjudicate the claims over which it had jurisdiction. Later cases, however, extended the concept of ancillary jurisdiction to the assertion of a claim against a new party in the interest of full adjudication of all aspects of the controversy—in other words judicial economy and fairness to the parties, the factors specified in Gibbs.34 In the interest of full adjudication a new party may be added

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32. 383 U.S. at 724. The district court in Hipp v. United States, 313 F. Supp. 1152, 1154 (E.D.N.Y. 1970), pounced on the reference to joinder of parties in Gibbs to justify joining a claim against a private party to the claim against the United States under the Federal Torts Claims Act. In Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971), the court quoting the definition of judicial power given in Gibbs, reached a similar result in a case involving a copyright claim against one defendant and a state unfair competition claim against a co-defendant.

33. 65 U.S. (24 How.) 450 (1860).

34. See Note, Civil Procedure—Ancillary Jurisdiction—The Third Party Defendant's Claim
without an independent jurisdictional base on a counterclaim, cross-claim, or third party complaint. All that is required is a common nucleus of operative fact with a claim over which the court has jurisdiction. What possible justification is there for treating a claim by the plaintiff against a new party differently from a defendant’s cross-claim bringing in a new party? The jurisdictional considerations are the same, and there is no procedural rule which compels a more restrictive treatment of pendent claims than ancillary claims. Rule 19 provides that an action shall be dismissed if the joinder of an out-of-court party would oust the jurisdiction of the court and the action cannot fairly proceed without him. But this Rule by defining the conditions for ouster in terms of jurisdiction turns the query back to the underlying question in all pendent and ancillary claims—whether there is a common factual base between the secondary and primary claims.

Finally, as noted before, a majority of circuits which have considered the matter have been willing to apply pendent jurisdiction to diversity cases. Any application of pendent jurisdiction to a diversity case by definition involves the joinder of a party by whom or against whom a claim is asserted without an independent jurisdictional base. It is totally illogical for a court to refuse to join a party in a federal question case but to do so in a diversity case where jurisdiction results from the chance location of the parties’ residence and where there is no presumption of special competency in the federal courts over the issues to be tried.

Policy and logic demand that courts acknowledge the power to join claims against additional parties in federal question cases. The same considerations, however, are not present in diversity cases, where courts generally have been willing to allow such joinder. The balance of this article will explore joinder in diversity cases and suggest an alternate basis for the results which have been reached to date.

under Rule 14(a), 49 N. C. L. Rev. 503 (1971). A pendent claim is one related to another claim in the same pleading; an ancillary claim is one related to a claim which was asserted in a pleading filed at an earlier time and usually by a different party. The point is made, however, in Note, Rule 14 Claims and Ancillary Jurisdiction, 57 Va. L. Rev. 265, 282-89 (1971), that the considerations for a court in determining whether to entertain an ancillary claim under Rule 14 are the same as are involved in deciding whether to maintain a pendent claim under the Gibbs doctrine.

35. The following cases are illustrative of how far the courts have gone in extending the concept of ancillary jurisdiction: Schwarb v. Erie Lackawanna R.R., 438 F.2d 62 (3d Cir. 1971) (claim for damages by third party plaintiff against third party defendant); Revere Copper & Brass Inc., v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970) (claim by third party defendant against plaintiff); H.L. Peterson Co. v. Applewhite, 383 F.2d 430 (5th Cir. 1967) (counterclaim bringing in new party).
Pendent jurisdiction in diversity cases is a creation of the Third Circuit, which as early as 1964 introduced pendent jurisdiction into the diversity sphere. The case was *Borror v. Sharon Steel Co.* and the facts illustrate a nefarious practice in the federal district courts in Pennsylvania at that time: manufacturing diversity by the appointment of a non-resident representative. In Pennsylvania two causes of action arise from a wrongful death: an action under the Death Act on behalf of the statutory beneficiaries for their pecuniary loss as a result of death, and an action under the Survival Act on behalf of the decedent’s estate for the decedent’s pain and suffering and the earnings the decedent would have made, less the decedent’s possible cost of maintenance, reduced to present worth. These two causes of action, called “the Siamese twins of Pennsylvania law” are ordinarily brought by the administrator in one suit and result in a judgment which is apportioned between the statutory beneficiaries and the estate. In *Borror* a Pennsylvania resident was killed by the alleged negligence of a Pennsylvania corporation and was survived by Pennsylvania beneficiaries. A West Virginia administrator was appointed to create diversity for the anticipated suit against the Pennsylvania corporation.

As an alternative basis for its holding that the court had jurisdiction, notwithstanding the fact that the statutory beneficiaries under the Death Act were Pennsylvania citizens, the court relied on *Hurn v. Oursler* and the doctrine of pendent jurisdiction. Conceding arguendo that the citizenship of the parents should be looked to in the claim under the Death Act the court reasoned that the Survival Act (where concededly the citizenship of the administrator controlled) and Death Act, both statutory creations, were components of the total substantive rights arising from death; that these substantive rights should be prosecuted in one suit, as proof of liability was common and as one damage award.

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36. 327 F.2d 165 (3d Cir. 1964). On its facts Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960) was the first case to apply pendent jurisdiction in a diversity case. Plaintiff sued for $210,000 in an individual capacity for his own injuries and in a representative capacity as administrator of his wife’s estate for $7000 (the maximum recoverable under state law). The court held it had jurisdiction over the representative claim. The court did not, however, rationalize its holding in terms of pendent jurisdiction.
40. 327 F.2d at 173.
42. 327 F.2d at 172-74.
should provide total compensation without duplication of damages. The net result in Borrow was to reaffirm the legal propriety of manufactured diversity and to sanction the joining of a non-diverse claim to the manufactured claim.\textsuperscript{43}

For a time manufactured diversity was rampant in the federal district courts in Pennsylvania as out of state representatives were routinely appointed in wrongful death cases and cases involving minors.\textsuperscript{44} The reason? The average verdict in federal court was larger than in state courts: it was candidly argued to an Orphan’s Court in Philadelphia that it was the duty of that court to appoint a non-resident representative because suit could then be maintained in federal court, with the expectation of a higher recovery than could otherwise be anticipated.\textsuperscript{45} A corollary to the manufacture of diversity by the appointment of non-resident representatives was the joinder of related family claims on the authority of Borrow and Wilson v. American Chain & Cable Co.\textsuperscript{46} Typically the related claim would be a father’s claim for medical expenses joined to his child’s claim for personal injuries brought by a representative. The related claim might lack diversity of citizenship, the requisite jurisdictional amount ($10,000), or both. A conflict arose within the Eastern District of Pennsylvania over the propriety of joinder in diversity cases\textsuperscript{47} and a three judge panel was appointed to settle the question. In Oliveri v. Adams\textsuperscript{48} the three judge court held that pendent jurisdiction could not be utilized to justify the exercise of jurisdiction over a related family claim, distinguishing Borrow and Wilson on tenuous grounds. The court did not address itself to the major problem—manufactured diversity—because, in all likelihood, it felt the Third Circuit cases sanctioning the practice\textsuperscript{49} precluded re-examination by the district court. Subse-

\textsuperscript{43} For an excellent review of the history of the inception of pendent diversity jurisdiction in the Third Circuit, see Comment, Pendent Jurisdiction in Diversity Cases, 30 U. Pitt. L. Rev. 607 (1969).

\textsuperscript{44} Note, Manufactured Diversity, 117 U. Pa. L. Rev. 751, 756 (1969) (footnotes omitted): An American Law Institute study showed that more than twenty per cent of the sample cases in the Eastern District of Pennsylvania in 1958-59 involved foreign representative plaintiffs. At the same time in the Western District of Pennsylvania, thirty-three cases were brought by the same administrator. In 1968 one foreign citizen was the guardian in sixty-one pending suits in the Eastern District.


\textsuperscript{46} 364 F.2d 558 (3d Cir. 1966) (father had a pendent claim for medical expenses of less than the jurisdictional amount).


quently, however, the Third Circuit on appeal from one of the cases which had created the conflict within the Eastern District of Pennsyl-

vania58 attacked the major problem and held that the practice of ap-
pointing a non-resident representative primarily to gain access to the
diversity jurisdiction of the federal courts was "collusive" within the
meaning of 28 U.S.C. Section 135959 and that the district court should
dismiss on jurisdictional grounds any suit where the plaintiff was so
appointed.60 In a later case61 the Third Circuit formulated factors to be
applied by district courts in determining whether the appointment of
the non-resident was primarily to create diversity and was therefore "collu-
sive."

At the same time, however, the Third Circuit explicitly approved
the practice of joining related family claims in diversity cases.62 The vast
majority of these cases will involve a claim where diversity exists but
jurisdictional amount does not. Only if a non-resident representative is
appointed and the dominant motive is other than to create diversity can
the possibility arise of a related family claim which lacks diversity.

Joining related family claims for less than the jurisdictional amount
generally yields a good result in terms of judicial economy and fairness
to litigants.63 It requires little extra judicial effort to try the related
claim, for example a husband's claim for loss of consortium, with the
principal claim. The plaintiffs are ordinarily represented by the same
lawyer who usually would prefer to litigate both claims in the same
action. The defendant will usually prefer the trial of both claims in the
same suit, to settle the entire controversy and to prevent double recov-
ery.64 The American Law Institute has long acknowledged the beneficial

action in which a party, by assignment or otherwise, has been improperly or collusively made or
joined to invoke the jurisdiction of the court."
52. McSparren v. Weist, 402 F.2d 867 (3d Cir. 1968).
53. Groh v. Brooks, 421 F.2d 589 (3d Cir. 1970) sets out six factors for the court to examine,
notably: the relationship of the representative to the decedent or minor; the scope of the representa-
ve's duties; and the existence of non-diverse persons whose appointment might be expected. In a
still later case, Butler v. Colfelt, 439 F.2d 882 (3d Cir. 1971), the Third Circuit apparently required
the district courts to use the Groh factors to ascertain the primary motive for the appointment.
56. The possibility of double recovery if separate suits were maintained under the Pennsyl-
"vania Death and Survival Acts was alluded to in Borror v. Sharon Steel Co., 327 F.2d at 173; this
aspect of Borror was favorably commented on in Shakman, supra note 1, at 283-84. An additional
reason why the defendant will ordinarily not object to the joinder of a related claim is the possibility

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result reached by the pendent family claim cases and has included a codification of the principle in its proposed revamping of the Judicial Code, which is embodied in Senate Bill 1876 now before the Senate Judiciary Committee. Proposed Section 1301(e) provides that a claim by a family member living in the same household as the holder of the principal claim, arising out of the transaction which gave rise to the principal claim, can be considered within the pendent jurisdiction of the court. Another subsection, 1301(b)(4), is intended to eliminate the creation or destruction of diversity by the appointment of a representative. That section simply provides that the residency of the deceased or person under disability is to be looked to in determining diversity. Sections 1301(e) and 1301(b)(4), if SB 1876 is passed, will fully sanction the joinder of family claims but will, as a practical matter, eliminate situations in which a non-diverse family claim is sought to be joined to a diverse claim.

The commentary to section 1301(e), however, makes it clear that the Institute is not attempting to impede the judicial development of pendent diversity jurisdiction in non-family cases. And here is where there is danger of serious displacement of federal judicial energy and encroachment on state interests. As early as 1966 a federal district court applied pendent jurisdiction in a non-family diversity case where the claim of one of the plaintiffs was less than $10,000, reasoning that the policy underlying pendent jurisdiction was judicial economy, an interest which was clearly served by entertaining the co-plaintiff's related claim

that, if two suits are brought, an adverse decision in one suit will be used offensively to estop the defendant from denying liability in the second suit. Although it is not yet generally accepted that a judgment can be used to estop a party in the absence of mutuality [see Reardon v. Allen, 88 N.J. Super. 560, 213 A.2d 26 (1965) for the reasons why this should not be permitted] a number of cases have reached this result. Gledeman v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962); modified on other grounds sub nom., United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964), cert. denied, 379 U.S. 951 (1964).

57. Notwithstanding any other provision of this title, if an action brought by or on behalf of any person is within the jurisdiction of the district courts under subsection (a) of this section, jurisdiction in that action shall also extend to any claim against the same defendant if such claim (1) is brought by such person on his own behalf or by or on behalf of any member of his family living in the household or such person and (2) arises out of the transaction or occurrence that is the subject matter of the action.

58. An executor, or an administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action because of the death of a decedent shall be deemed to be a citizen only of the same state as the decedent; and a guardian, committee or other like representative of an infant or incompetent shall be deemed to be a citizen only of the same state as the person represented.

59. STUDY 122-23.
in federal court rather than relegating it to state court.\textsuperscript{60} Since then the Third,\textsuperscript{61} Fourth\textsuperscript{62} and Sixth Circuits\textsuperscript{63} have been willing to rationalize the exercise of jurisdiction over a plaintiff's claim against a defendant for less than $10,000 as being pendent to the plaintiff's claim against a co-defendant for more than $10,000. Without question time and expense were saved by hearing the related claims.\textsuperscript{64} None of the pendent diversity cases, however, family or non-family, seem to recognize a qualitative difference between a claim which lacks an independent jurisdictional base because it is for less than $10,000 and a claim where there is no diversity. Thus it is not surprising that the Eastern District of Pennsylvania took the final step and applied pendent jurisdiction to a case in which a Pennsylvania citizen sued two Maryland citizens and a Pennsylvania citizen.\textsuperscript{65} If this case is a harbinger of the position the Third Circuit will take, the statutory requirement of complete diversity is in danger of judicial nullification. Such a change would greatly increase the number of cases which can be filed in federal court and would run counter to legislative attempts to limit diversity jurisdiction.\textsuperscript{66} 

There is every reason why courts should re-examine the doctrine of pendent jurisdiction and flatly refuse to apply it to diversity cases. The precedents relied on in \textit{Hurn} and \textit{Gibbs} are inappropriate to the

\textsuperscript{60} Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966), favorably commented on in 81 HARV. L. REV. 480 (1967).
\textsuperscript{61} Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968).
\textsuperscript{62} Stone v. Stone, 405 F.2d 94 (4th Cir. 1968).
\textsuperscript{63} Beautytuff, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1970).
\textsuperscript{64} In \textit{Beautytuff}, for example, claims were filed against 58 insurance companies for losses incurred in a fire. The claims against 24 of the defendants were for less than $10,000. The Court held that the district court properly exercised pendent jurisdiction over the claims below the minimum jurisdictional amount "in the interest of avoiding sheer waste of court time." 431 F.2d at 1128.
\textsuperscript{65} Campbell v. Triangle Corp., 336 F. Supp. 1002 (E.D. Pa. 1972). The non-diverse defendant was a subsidiary of one of the diverse defendants and the two were "closely associated in the venture which caused the alleged harm to the plaintiff, and most of the operative facts are common to the claims against both defendants." 336 F. Supp. at 1006. It is difficult to see how the quoted language could serve to limit the joinder of a non-diverse party. Joiner of parties under Rule 20 requires, after all, a common transaction or series of transactions. Another case in which a claim against a non-diverse defendant was joined in a non-family case is Federal Nat'l Mtg. Ass'n v. Sande Const. Co., Civil Action #2-447 (S.D. Iowa 1962) severely criticized in Note, Pendent Jurisdiction: An Expanding Concept in Federal Jurisdiction, 51 IOWA L. REV. 151 (1965).
\textsuperscript{66} \textsuperscript{66} Study § 1302. The ALI proposal essentially would prohibit any person from invoking diversity jurisdiction in the state of his residence. Corporations would be forbidden to invoke diversity jurisdiction in any state in which a place of business had been maintained for two years or more. This proposal would perpetuate the historic rationale for diversity jurisdiction—fear that state courts will be prejudiced against non-residents—but would eliminate the invoking of diversity jurisdiction by residents. See Friendly, The Historic Basis of Diversity Jurisdiction, 41 HARV. L. REV. 483 (1927).
extension of the doctrine to diversity cases. The policy considerations in *Hurn* and *Gibbs* were in part concerns of federalism inapplicable in diversity cases. The guidelines laid down in *Gibbs* for the application of pendent jurisdiction clearly contemplated the existence of a federal claim in cases in which the doctrine would be applied. More importantly the introduction of the concept of pendent jurisdiction into the diversity sphere is serving to increase, perhaps greatly, the scope of diversity jurisdiction at a time when scholars are suggesting that diversity jurisdiction should be eliminated or severely curtailed.

The results in the family cases could have been achieved in many instances by viewing the related and principal claims as facets of an "integrated right" where the amount in controversy could be viewed as the total of both claims. This approach would have caused the family related claims to be dealt with as questions of "amount in controversy" rather than pendent jurisdiction. This approach might have resulted in

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67. Moore v. New York Cotton Exch., 270 U.S. 593 (1926) and Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909), were the authorities relied on in *Hurn*. In both cases the basis for jurisdiction was a federal claim. Those cases, particularly *Siler*, were rooted in Osborn v. Bank of United States, where clearly the principle enunciated by Chief Justice Marshall was that a federal court might be required to decide a matter of state law so that it could effectively resolve a question of federal law. See note 4 *supra*.

68. In both *Hurn* and *Gibbs* the federal courts had exclusive jurisdiction over the federal claims. If jurisdiction were not exercised over the state claims division of the case would necessarily occur. Furthermore both cases involved the delineation of permissible state regulation in an area of primary federal regulation. *Hurn* could have raised this question if state unfair competition law had provided greater protection than federal copyright law. Cf. Sears, Roebuck & Co. v. Stiffel Co. 376 U.S. 225 (1964).

69. 383 U.S. at 726-27. A few courts have treated pendent jurisdiction as a doctrine conceptually reserved to federal question cases. "[T]he discretionary doctrine of pendent jurisdiction should be reserved for cases presenting a substantial federal question along with a non-federal question. . . ." Robison v. Castello, 331 F. Supp. 667 (E.D. La. 1971).


71. 1 J. Moore, Federal Practice [hereinafter cited as Moore] ¶ 0.97[3], 891 (1964). Moore suggests, for example, that Wilson v. American Chain & Cable Co. could have been treated easily within the existing case law as a case of two individuals—child with claim for injuries and parent with derivative claim for medical expenses—having an "integrated right." 3A Moore ¶ 18.07, 1930 (1970). Moore cites Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960), Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966) and Wiggs v. City of Tullahoma, 261 F. Supp. 821 (E.D. Tenn. 1966) as cases in which two plaintiffs were held to have an integrated right. 1 Moore ¶ 0.97[2], 80 (1971 supp.). It is clear, however, that those cases instead were rationalized under the doctrine of pendent jurisdiction.
an early liberalization of the rules\textsuperscript{72} governing the measurement of amount in controversy. The only purpose, after all, behind requiring that a certain amount be "in controversy" is to keep small cases out of the federal courts. This interest is fully served by an inquiry into what is actually involved in the case, a common sense approach which would permit aggregation of claims and permit the viewing of a controversy from the viewpoint of either plaintiff or defendant. The Supreme Court, after an unfortunate retreat to conceptualism in \textit{Snyder v. Harris},\textsuperscript{73} seems ready to adopt this position.\textsuperscript{74} If the family related cases had been dealt with as amount in controversy problems, a clear line would have been drawn between cases in which the related claim was for less than $10,000 and claims where there was no diversity.

Amount in controversy is hardly a tenet of federalism; complete diversity is. In a recent decision a federal district judge in effect fined a plaintiff who attempted to bring a case lacking complete diversity in his court.\textsuperscript{75} The fine, labeled as "costs," was not sought by the defendant; it was levied to punish what the judge considered to be a cavalier attitude toward the jurisdiction of the court. In a notable Supreme Court case, Justice Frankfurter once said that

\begin{quote}
the dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of "business that intrinsically belongs to the state courts". . . .\textsuperscript{76}
\end{quote}

\begin{itemize}
\item\textsuperscript{72} The rules traditionally have been stated to forbid aggregation of claims by plaintiffs or against defendants and to require that the claim be evaluated from the viewpoint of the plaintiff. \textit{1 Moore} ¶ 0.97[3], 0.91[1] (1964).
\item\textsuperscript{73} 394 U.S. 332 (1969). The Court refused to permit aggregation of the claims of a class in an action brought under Rule 23(e)(3) as amended in 1966. The result reinstated, in the class action context, concepts of "joint" (or integrated) claims, where aggregation is permitted, and "separate and distinct" claims where it is not. 394 U.S. at 336. \textit{Snyder} has greatly restricted the employment of the class action device in federal courts.
\item\textsuperscript{74} In Illinois v. City of Milwaukee, --- U.S. ----, 92 S. Ct. 1385 (1972) the Supreme Court dismissed an original action in the Supreme Court (on forum non conveniens grounds) but held that the case would satisfy the jurisdictional requirements (federal question and amount in controversy) for an original proceeding in district court. Douglas, writing an opinion for the whole Court, cited two authorities and one case calling for adoption of a rule which would measure jurisdictional amount from the point of view of either plaintiff or defendant. --- U.S. at ----. 92 S. Ct. at 1390: Ronzio v. Denver & R.G.W.R.R., 116 F.2d 604, 606 (10th Cir. 1940); C. Wright, \textit{LAW OF FEDERAL COURTS}, § 118 (1970 ed.); Note, \textit{Federal Jurisdictional Amount: Determination of the Matter in Controversy}, 73 \textit{Harv. L. Rev.} 1369 (1960). This case effectively abolishes the plaintiff-only viewpoint rule. Letting down the barriers against aggregation of claims follows naturally from adoption of the plaintiff-or-defendant viewpoint rule. The test would then simply be "Does this case involve $10,000?"
\item\textsuperscript{75} Sherrell v. Mitchell Aero, Inc., 340 F. Supp. 219 (E.D. Wis. 1971).
\item\textsuperscript{76} Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941).
\end{itemize}
Will federal courts put that compass aside and entertain cases of incomplete diversity under the theory of pendent jurisdiction?

**Summary**

In conclusion, a court should not hesitate to entertain a state claim against one defendant as pendent to a federal claim against a co-defendant. The case should be treated just as if the claims were filed against the same defendant. The court should require a substantial federal claim and a common factual background between the two claims, and should dismiss the state claim if it becomes clear that the state claim predominates or if the federal claim is dismissed at an early stage in the proceedings. But the court should not concern itself with the fact that the state and federal claims are against separate defendants, remembering that pendent jurisdiction is a concept of subject matter jurisdiction, not jurisdiction over the person.\(^{77}\)

Pending adoption of the ALI codification of pendent jurisdiction for the related family case\(^{78}\) a court should not apply the doctrine of pendent jurisdiction to diversity cases. Introduction of pendent jurisdiction into the diversity sphere, in any way, establishes precedent, not easily distinguished, for entertaining cases of incomplete diversity. Where judicial economy and fairness to litigants would be achieved by hearing a small claim related to the principal claim a court should deem the problem one of ascertaining the total “amount in controversy” rather than borrowing the doctrine of pendent jurisdiction from the federal question cases. This would maintain complete diversity as a jurisdictional principle (albeit statutory) pending complete reevaluation of diversity jurisdiction by Congress.

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77. The ALI codification of pendent jurisdiction in federal question cases, although not explicitly stating that claims against different parties can be joined, clearly indicates that what is involved is subject matter jurisdiction, not jurisdiction over the person. *Study* § 1315(c), commentary at 208-12.

78. *Study* § 1301(c). Of course this ALI proposal may be modified prior to passage or even rejected altogether.