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RULE 14(a) AND ANCILLARY JURISDICTION: PLAINTIFF'S CLAIM AGAINST NON-DIVERSE THIRD-PARTY DEFENDANT

Rule 14(a) of the Federal Rules of Civil Procedure[1] is the provision for impleading persons not already party to an action. The rule permits a defendant, as third-party plaintiff, to assert a claim against any person not a party to the action who may be liable to him for plaintiff's claim against him.[2] In addition, the rule provides for defenses, counterclaims, and cross-claims between the impleaded third-party defendant and the third-party plaintiff,[3] and permits the third-party defendant to claim directly against the plaintiff.[4] These ancillary claims, arising from the main claim asserted by the plaintiff, generally are allowed when the federal courts have jurisdiction over the main claim.[5] This is so even when the main claim is based upon

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[1] FED. R. CIV. P. 14(a) [hereinafter cited as Rule 14(a)] provides in pertinent part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him . . . . The person served with the summons and third-party complaint, hereinafter called the 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. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. . . .

[2] *Id.*

[3] *Id. See* cases cited in 3 J. MOORE, FEDERAL PRACTICE, ¶ 14.17 (2d ed. 1974) [hereinafter cited as 3 MOORE]; C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§1454-57 (1971) [hereinafter cited as WRIGHT & MILLER].

[4] *See* 3 MOORE, *supra* note 3, ¶ 14.16[2]; WRIGHT & MILLER, *supra* note 3, §1458.

[5] 3 MOORE, *supra* note 3, ¶¶ 14.26, 14.27[2], [3]; WRIGHT & MILLER, *supra* note 3, §1444. *See generally* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759 (1972); Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1963); Note, *Ancillary Jurisdiction of the Federal Courts*, 48 IOWA L. REV. 383 (1963); Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A.L. REV. 1263 (1975); Note, *Federal Third-Party Practice — Ancillary Jurisdiction Supports Third-*

diversity jurisdiction and both the third-party defendant and plaintiff are citizens of the same state.[6] Consequently, the courts often adjudicate ancillary claims having no independent jurisdictional basis.[7]

The plaintiff may also assert a claim under Rule 14(a) against the third-party defendant if that claim is substantially related to the original claim against the defendant.[8] An unresolved issue is whether the plaintiff's claim against the third-party defendant requires a jurisdictional basis independent from the federal court's jurisdiction over the plaintiff's main claim. Where original jurisdiction has been based upon diversity of citizenship,[9] a majority of courts have demanded an independent jurisdictional basis for the plaintiff's claim against the third-party defendant, especially when both plaintiff and third-party defendant are citizens of the same state.[10] However, a growing number of courts have determined that ancillary jurisdiction may support that claim.[11] The federal district court of Kansas in

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Party Defendant's Claim Against Plaintiff, 8 UTAH L. REV. 145 (1963); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971).

[6] *See, e.g.*, Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970).

[7] 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23 (1960); 1 J. MOORE, FEDERAL PRACTICE ¶ 10.90[3], .140[8] (2d ed. 1974); 2A J. MOORE, FEDERAL PRACTICE ¶ 8.07[5] (2d ed. 1975); C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §3523,.at 56-58 (1975). Conversely, a court's refusal to exercise ancillary jurisdiction requires that the alleged ancillary claim have an independent federal jurisdictional basis.

[8] *See* 3 MOORE, *supra* note 3, ¶ 14.16[1]; WRIGHT & MILLER, *supra* note 3, §1459.

[9] Diversity jurisdiction in the federal courts exists when the controversy is between citizens of different states. 28 U.S.C. § 1332(a)(1) (1970). Generally, courts have required "complete diversity" between opposing parties. *See, e.g.*, Strawbridge v. Curtiss, 1 U.S. (3 Cranch) 575 (1806). Therefore, diversity jurisdiction would not exist if any opposing parties are from the same state. C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §3605 (1975). *See generally* Comment, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964).

[10] 3 MOORE, *supra* note 3, ¶ 14.27[1], at 14-565. *See* Parker v. W. W. Moore & Sons, 528 F.2d 764 (4th Cir. 1975); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972), *aff'g* 53 F.R.D. 491 (W.D. Va. 1971); McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960); Joseph v. Chrysler Corp., 61 F.R.D. 347 (W.D. Pa. 1973) *aff'd mem.*, 513 F.2d 626 (3d Cir. 1975); Mickelic v. United States Postal Serv., 367 F. Supp. 1036 (W.D. Pa. 1973); Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398 (W.D. Pa. 1969); Ayoub v. Helm's Express, Inc., 300 F. Supp. 473 (W.D. Pa. 1969); Palumbo v. Western Md. Ry., 271 F. Supp. 361 (D. Md. 1967).

[11] *See* CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975); Saalfrank v. O'Daniel, 390 F. Supp. 45 (N.D. Ohio 1975); Fawvor v. Texaco,

Morgan v. Serro Travel Trailer Co.,[12] in holding that such a claim did not require an independent jurisdictional basis, identified several factors for consideration in determining whether the exercise of ancillary jurisdiction over the plaintiff's Rule 14(a) claim against a nondiverse third-party defendant is proper.

The plaintiff in *Morgan*, a Kansas citizen, brought a diversity action in the Kansas federal district court against Serro Travel Trailer for injuries suffered in an explosion of a propane stove in a trailer manufactured by Serro.[13] Pursuant to Rule 14(a), the defendant impleaded Mitchell Co-op, a Kansas citizen and filler of the stove's tank, as a third-party defendant.[14] Plaintiff Morgan then moved to amend her complaint under Rule 14(a)[15] to assert a claim directly against the third-party defendant.[16] The court determined that it had jurisdiction over the plaintiff's main claim and that independent jurisdictional grounds were not necessary to support the plaintiff's claim against Mitchell Co-op.[17] By evaluating the circumstances under which the additional claim arose, the court held that it properly could assert ancillary jurisdiction over Morgan's claim against the third-party defendant.[18]

In reaching this result, the *Morgan* court relied upon *UMW v. Gibbs*,[19] in which the Supreme Court outlined the appropriate circumstances for exercising pendent and ancillary jurisdiction.[20] In

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Inc., 387 F. Supp. 626 (E.D. Tex. 1975); Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972); Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968); Olson v. United States, 38 F.R.D. 489 (D. Neb. 1965).

[12] Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D. Kan. 1975).

[13] *Id.* at 697. Along with Serro, the two other defendants were: S/H Leggett & Co., manufacturer of the stove's propane tank, and Meynall Stove Co., manufacturer of the stove. *Id.* All three defendants were citizens of Oklahoma; the Kansas plaintiff and Oklahoma defendants establish the requisite diversity for federal court jurisdiction. Plaintiff Morgan also sued Mitchell Co-op, a Kansas citizen and filler of the propane tank. Mitchell Co-op moved for its dismissal as a party because its presence destroyed diversity. The district court declared the destruction-of-diversity issue moot, however, when it granted plaintiff's motion to drop Mitchell as a party-defendant. *Id.* at 699.

[14] *Id.*

[15] *See* text accompanying note 8 *supra*.

[16] 69 F.R.D. at 699.

[17] *Id.* at 704-05. Since the plaintiff and third-party defendant were both Kansas citizens, the requirement of complete diversity was not met. Therefore the court's jurisdiction would be destroyed unless it properly could exercise ancillary jurisdiction.

[18] *Id.*

[19] 383 U.S. 715 (1966).

[20] Pendent jurisdiction, a form of ancillary jurisdiction, exists when a federal court already having jurisdiction over a claim based upon federal statutory law determines to resolve related state law claims in the same action. Sipe v. Local 191, United Bhd.

Gibbs, the plaintiff sought recovery in federal district court for damages under both federal labor law[21] and Tennessee tort law.[22] After determining that the district court had jurisdiction over the federal claim,[23] the Supreme Court considered whether the lower court had properly exercised pendent jurisdiction over the claim based upon Tennessee law.[24] The Court initially determined that a district court's power to exercise pendent jurisdiction exists when there is a state claim so related to an Article III federal claim[25] that both comprise "but one constitutional 'case.' "[26] Three requirements of the existence of this power are: first, the federal claim must be sufficient to give the court subject matter jurisdiction;[27] second, the state and federal

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of Carpenters, 393 F. Supp. 865, 870 (M.D. Pa. 1975). *See also* Teamsters Local 20 v. Morton, 377 U.S. 252, 257 (1964); Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1193-94 (5th Cir. 1975); Kerby v. Commodity Resources, Inc., 395 F. Supp. 786, 789 (D. Colo. 1975).

Ancillary jurisdiction, a broader concept, is jurisdiction over " 'certain peripheral aspects of a controversy that by themselves would not be cognizable in federal court.' " Sipe v. Local 191, United Bhd. of Carpenters, 393 F. Supp. 865, 870 (M.D. Pa. 1975), *quoting* Bay Guardian Co. v. Chronicle Publishing Co., 340 F. Supp. 76, 79 (N.D. Cal. 1972). *See generally* Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A.L. Rev. 1263 (1975).

[21] The plaintiff alleged that mine workers' interference with his duties at a Tennessee mine violated §303 of the Labor Management Relations Act of 1947, 29 U.S.C. § 187 (1970). 383 U.S. at 717-20.

[22] The state claim alleged malicious interference with performance of a contract. 383 U.S. at 720. Both the federal and state claims were based upon an incident involving rival unions at a Tennessee mine. Respondent Gibbs had been appointed superintendent of the mine, which employed members of the non-UMW union. In conjunction with that position, he was also given a coal haulage contract. The UMW members picketed the mine, prevented its opening, and threatened Gibbs. Thereafter, Gibbs lost his superintendent's job and the haulage contract. In addition, he allegedly lost other haulage contracts in the vicinity. Gibbs sued the international union on both the federal claim and the state claim. He based jurisdiction over the state claim upon the doctrine of pendent jurisdiction. *Id.* at 718-20.

[23] *Id.* at 720.

[24] *Id.* at 721. Stated another way, the issue was whether the district court properly exercised pendent jurisdiction over the state claim, which otherwise had no independent federal jurisdictional basis.

[25] U.S. CONST. art. III, § 2 provides in pertinent part:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

The federal claim in *Gibbs* arose under "the Laws of the United States." *See* note 21 *supra*.

[26] 383 U.S. at 725. For a discussion of *Gibbs*, *see* Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968).

[27] 383 U.S. at 725. In *Gibbs*, the federal claim was based upon § 303 of the Labor

claims must arise from "a common nucleus of operative fact";[28] and, third, if the plaintiff's claims are such that, disregarding their federal and state nature, the plaintiff would "ordinarily be expected to try them all in one judicial proceeding,"[29] the district court has the power to adjudicate those claims together.[30]

Once the Court ascertained that the district court had the power to hear the pendent state claim, it addressed the question of whether that court had exercised its discretion in allowing pendent jurisdiction. The *Gibbs* Court held that such discretion depended upon "considerations of judicial economy, convenience and fairness to litigants."[31] It pointed to several factors bearing upon those considerations: avoidance of "needless" decisions of state law,[32] pre-trial dismissal of the federal claim,[33] domination of the state claim,[34] the

Management Relations Act of 1947, which conferred subject matter jurisdiction. *See* note 21 *supra*.

[28] 383 U.S. at 725. The "common nucleus of operative fact" was UMW interference with Gibbs' work, allegedly resulting in violations of both federal and Tennessee law. That interference gave rise to both claims. *Id.* at 728.

[29] *Id.* at 725.

[30] *Id.* The Court held that the federal and state claims were "alternative remedies" for wrongs arising from "a common nucleus of operative fact." *Id.* at 728. Implicit within this holding was a determination that those claims for alternative remedies would "ordinarily" be tried in one proceeding.

[31] *Id.* at 726. The Court held that if the considerations of judicial economy, convenience, and fairness were not present, then the federal court "should hesitate to exercise jurisdiction over state claims" absent independent jurisdictional basis. *Id.*

[32] *Id.* The "needless" decisions to which the Court referred are those in which the state law is unsettled, the rationale being that resolution of state law is more appropriately left to state courts. Thus, a court may dismiss a pendent state claim brought under a recently enacted state statute. *See* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 991-92 (2d ed. 1973). This factor of avoiding decisions involving unsettled state law is particularly important when considering plaintiff's claim against a non-diverse third-party defendant in a diversity action. *See* text accompanying notes 81-83 *infra*. The Court in *Gibbs* held that the state law was sufficiently settled to permit its consideration by a federal court. 383 U.S. at 728-29. *Compare* Moor v. County of Alameda, 411 U.S. 693, 715-16 (1973), *with* Roberts v. Way, 398 F. Supp. 856, 861 (D. Vt. 1975).

[33] 383 U.S. at 726. The rationale behind dismissing a pendent state claim after the federal claim has been dismissed prior to trial is that there is no longer an independent jurisdictional basis over the federal claim to support pendent jurisdiction. The Court, however, noted that pre-trial disposition of the federal claim was merely a factor of discretion. In *Gibbs*, the Supreme Court upheld the exercise of pendent jurisdiction even though the plaintiff ultimately recovered only on the state claim. *Id.* at 728. *See* Rosado v. Wyman, 397 U.S. 397, 403 (1970); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843, 845-46 (3d Cir. 1962); Dery v. Wyer, 265 F.2d 804, 807-08 (2d Cir. 1959).

[34] 383 U.S. at 726. The Supreme Court stated that the dominance of the state

closeness of the relationship between the federal and state claim,[35] and the possibility of jury confusion.[36] The Supreme Court's development of the "power-discretion" test in *Gibbs* has resulted not only in an expansion of pendent jurisdiction (a form of ancillary jurisdiction) but also in an expansion of ancillary jurisdiction.

Indeed, the *Gibbs* power-discretion test has been particularly influential in expanding ancillary jurisdiction in diversity actions.[37] For example, using *Gibbs* analysis, courts have permitted plaintiff's joinder of non-diverse defendants[38] and joinder of claims failing to meet the required jurisdictional amount.[39] Moreover, one circuit court has implicitly used *Gibbs* to uphold the exercise of ancillary jurisdiction over a non-diverse third-party defendant's Rule 14(a) claim against the original plaintiff.[40] Other courts, in cases like *Morgan*, have ap-

claim may be measured by the nature of the required proof, the scope of the claim's issues, or the "comprehensiveness of the remedy sought. . . ." *Id.* The Court held that although the state remedy was more comprehensive than the federal remedy, the federal claim was nevertheless predominant and played a major role in the trial. *Id.* at 728.

[35] *Id.* at 727. The *Gibbs* Court held that because the doctrine of pre-emption was implicated, the federal courts were "particularly appropriate bodies for the application of pre-emption principles." *Id.* at 729. The judicially developed doctrine of pre-emption permits federal courts to hold that congressional enactments control when in conflict with or burdened by state laws. P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING, CASES AND MATERIALS 255-57 (1975). Thus, the resolution of each claim depended upon resolution of the other.

[36] 383 U.S. at 727. The Court considered that jury confusion might occur from the treatment of "divergent legal theories of relief," resulting in different natures and degrees of proof or the application of different legal standards. In *Gibbs*, the Court determined that the district court avoided possible jury confusion by employing a special verdict form, separating the federal and state claims. *Id.* at 729. *See* Moor v. County of Alameda, 411 U.S. 693, 715-16 (1973). *But see* Mitchell v. Hendricks, 68 F.R.D. 569, 571 (E.D. Pa. 1975).

[37] *See, e.g.*, Mitchell v. Hendricks, 68 F.R.D. 569 (E.D. Pa. 1975); Roberts v. Way, 398 F. Supp. 856 (D. Vt. 1975).

[38] *See, e.g.*, Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971); Jacobs v. United States, 367 F. Supp. 1275 (D. Ariz. 1973). *Cf.* Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971).

[39] *See. e.g.*, F.C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917 (6th Cir. 1970); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968).

[40] Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970) ("same aggregate of operative facts serves as the basis of both claims"). Commentators have argued persuasively that the Fifth Circuit's test in *Revere Copper* is the same as the *Gibbs* power-discretion test. Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 784 (1972); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971). Notwithstanding the *Revere* court's express limitation of its holding to the facts, 426 F.2d at 716, other

plied the *Gibbs* power-discretion test to find that no independent jurisdictional basis is necessary for a plaintiff's claim against a non-diverse third-party defendant.[41]

In a situation like *Morgan*, fulfilling the three *Gibbs* requirements presents no insuperable difficulties. The requirement that the main claim between the plaintiff and defendant be substantial[42] is inherent in diversity jurisdiction, since it is that claim which invokes federal diversity jurisdiction.[43] In *Morgan*, the plaintiff's claim for damages against all possible defendants invoked the federal court's jurisdiction. Likewise, diversity jurisdiction requires a very close relation between the main and ancillary claims.[44] The only issue in *Morgan*

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commentators have suggested that the Fifth Circuit's rationale may be extended to allow plaintiff's claims against third-party defendants without any independent jurisdictional basis. Comment, *Federal Procedure — Rule 14(a) — Independent Grounds for Federal Jurisdiction Held Unnecessary to Support Counterclaim by Third-Party Defendant Against Original Plaintiff*, 45 N.Y.U.L. REV. 1303, 1312-15 (1970); Note, *A Third-Party Defendant's Claim Against Plaintiff Upheld Despite Absence of Independent Jurisdictional Grounds*, 1970 WASH. U. L. Q. 511, 514-15.

[41] Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 701, 704-05 (D. Kan. 1975). *See also* Florida E. Coast Ry. v. United States, 519 F.2d 1184 (5th Cir. 1975); CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975); Saalfrank v. O'Daniel, 390 F. Supp. 45 (N.D. Ohio 1975); Fawvor v. Texaco, Inc., 387 F. Supp. 626 (E.D. Tex. 1975); Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972).

[42] *See* text accompanying note 27 *supra*.

[43] Conversely, the court's power to hear the plaintiff's ancillary claim against the non-diverse third-party defendant must be denied if the plaintiff's original claim appears to be a cover for asserting that third-party claim. In addition, the status of that main claim throughout the proceeding is a factor to be considered in the court's discretionary exercise of ancillary jurisdiction. *See* text accompanying notes 84-86 *infra*.

[44] *See, e.g.*, Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 712-15 (5th Cir. 1970). *See also* FED. R. CIV. P. 13(a), (g), 20(a), each of which requires the "same transaction or occurrence." The *Gibbs* Court required that both claims arise from a "common nucleus of operative fact." UMW v. Gibbs, 383 U.S. 715, 725 (1966). *See* text accompanying note 28 *supra*. Similarly, Rule 14(a) requires that the plaintiff's claim against the third-party defendant arise "out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff [defendant] . . . ." FED R. CIV. P. 14(a). This "common nucleus" requirement must be more strictly scrutinized because the federal court's diversity jurisdiction is less compelling than its federal question jurisdiction. Comment, *Pendent Jurisdiction and Minimal Diversity*, 59 IOWA L. REV. 179, 188-89 (1973). The Ninth Circuit, however, recently took a different approach:

> [D]iversity cases have generally presented more attractive opportunities for the exercise of pendent jurisdiction over additional parties asserting state law claims than have analogous cases arising in the context of federal actions based on federal question jurisdiction. In part, this is due to the fact that since all the claims arising in the

was causation of the explosion, thereby fulfilling the "common nucleus" requirement.[45] Finally, extending *Gibbs* to diversity actions requires that the plaintiff have an expectation of trying his main and ancillary claims in one judicial proceeding, disregarding the diverse and non-diverse character of the parties.[46] If plaintiff Morgan had brought her action in the state court, she could have expected a disposition of all her claims. Although the three *Gibbs* requirements are easily fulfilled, they provide only a prima facie demonstration of the court's power to exercise ancillary jurisdiction. Therefore, the court must further examine the propriety of exercising ancillary jurisdiction over plaintiff's claim against a non-diverse third-party defendant.

The *Morgan* court analyzed the arguments against asserting ancillary jurisdiction in its approach to the power aspect of the *Gibbs* test.[47] One argument is that the plaintiff in a diversity action should not be permitted to assert a claim against a non-diverse party merely

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> diversity context are based on state law, they are for that reason more easily tried together than cases where the two sets of claims are based on substantially different theories of law.

Aldinger v. Howard, 513 F.2d 1257, 1261 (9th Cir. 1975) (dicta). *See* text accompanying notes 67-71 *infra*.

[45] 69 F.R.D. at 704. *Compare* CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975); Saalfrank v. O'Daniel, 390 F. Supp. 45 (N.D. Ohio 1975), *with* Mickelic v. United States Postal Serv., 367 F. Supp. 1036 (W.D. Pa. 1973); Jordan v. Montgomery Ward & Co., 317 F. Supp. 948 (D. Minn. 1970).

[46] *See* text accompanying notes 29-30 *supra*. Because a federal court in a diversity action applies state law, the plaintiff's expectation for settlement in one judicial proceeding would be automatic: if all the parties were citizens of the same state, that state's courts could adjudicate all the claims in one proceeding.

[47] The district court also noted other factors dictating reconsideration of the complete diversity requirement. First, it held that the "anomalous" situation where both the plaintiff and the third-party defendant were in the same courtroom but the plaintiff could not sue the third-party defendant required that it not "blindly" follow the complete diversity position. 69 F.R.D. at 700. The court criticized that position for relying on old and not unanimous precedent. This criticism is unwarranted because there are recent cases requiring complete diversity. *See* Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972), *aff'g* 53 F.R.D. 491 (W.D. Va. 1971); Travis Mills Corp. v. Square D. Co., 67 F.R.D. 22 (E.D. Pa. 1975); Joseph v. Chrysler Corp., 61 F.R.D. 347 (W.D. Pa. 1973), *aff'd mem.*, 513 F.2d 626 (3d Cir. 1975); Mickelic v. United States Postal Serv., 367 F. Supp. 1036 (W.D. Pa. 1973). The court then noted that Rule 14 did not require diversity between plaintiff and the third-party defendant. 69 F.R.D. at 700. This argument is suspect, however, because none of the Federal Rules confers jurisdiction. The district court also held that requiring complete diversity would defeat Rule 14's purpose of judicial economy. *Id.* Furthermore, because Rule 14 had been broadly used to permit other ancillary claims, the court held that a narrow application to the facts in *Morgan* would be inconsistent with those other uses. *Id.*

because he is a third-party defendant, when he could not assert a claim directly against him as a defendant.[48] This indirect-direct argument[49] ignores the fact that the defendant, not the plaintiff, must implead the third-party. The *Morgan* court rejected the assertion that the extension of ancillary jurisdiction to plaintiff's claim would encourage a plaintiff to sue defendants in the hope of reaching the third party whom he could not sue directly in federal court.[50] In addition, the argument results in the anomalous situation of having the third-party defendant properly before the court but not reachable by the plaintiff.[51]

The indirect-direct argument also implies that the plaintiff would be violating Rule 82 which prohibits the interpretation of the Federal Rules to expand a district court's jurisdiction.[52] If ancillary jurisdiction is permitted over the plaintiff's claim against a non-diverse

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[48] *See* Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 703 (D. Kan. 1975); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893 (4th Cir. 1972).

[49] *See* Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972); McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960); Pearce v. Pennsylvania R.R., 162 F.2d 524 (3d Cir. 1947); Travis Mills Corp. v. Square D. Co., 67 F.R.D. 22 (E.D. Pa. 1975); Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398 (W.D. Pa. 1969); Palumbo v. Western Md. Ry., 271 F. Supp. 361 (D. Md. 1967); Welder v. Washington Temperance Ass'n, 16 F.R.D. 18 (D. Minn. 1954); Hoskie v. Prudential Ins. Co., 39 F. Supp. 305 (E.D.N.Y. 1941).

[50] 69 F.R.D. at 703. Commentators likewise doubt that plaintiffs will sue defendants in the hope of reaching a potentially impleaded third-party. WRIGHT & MILLER, *supra* note 3, §1444, at 231. However, a defendant would be foolish not to implead someone who might be liable to him for all or part of plaintiff's claim against him. Therefore, plaintiffs essentially can force the impleader of a third party, raising the spectres of collusion and increased litigation. *See* text accompanying notes 56-65 *infra*.

[51] *See, e.g.*, Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 700, 703 (D. Kan. 1975); Saalfrank v. O'Daniel, 390 F. Supp. 45, 52-53 (N.D. Ohio 1975). One reason that the *Saalfrank* court exercised ancillary jurisdiction was that the plaintiff could find no single courthouse in which to bring all claims arising out of an accident. Therefore, the court stated, parties, witnesses, and tangible evidence would be shuffled between state and federal courthouses, resulting in the plaintiff "incurring expenses solely attributable to duplicated effort and at each end being forced to serve up only half a loaf to the court." *Id.* at 52. The district court concluded that the best interests of justice — based on *Gibbs* considerations of judicial economy, convenience and fairness to litigants — would be served by exercising its discretion in favor of ancillary jurisdiction over the plaintiff's claim against the third-party defendant. *See also* CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975); Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972); Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968); Olson v. United States, 38 F.R.D. 489 (D. Neb. 1965).

[52] FED. R. CIV. P. 82 provides in pertinent part:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

third-party defendant, the plaintiff arguably is using Rule 14 to expand the district court's jurisdiction.[53] However, once the court has jurisdiction over the main claim and all the parties, the exercise of ancillary jurisdiction over claims arising from the "same transaction or occurrence" as the original claim would not be an extension of federal court jurisdiction.[54] Rather, allowing the court to hear the "entire case" is consonant with the purpose of Rule 14 to avoid multiple litigation and circuity of action.[55]

The possibility of collusion between the plaintiff and the defendant is another reason frequently given for not exercising ancillary jurisdiction over plaintiff's claim against a non-diverse third-party defendant.[56] This reason is based upon the assumption that a plaintiff might seek a friendly defendant to implead a party liable to the plaintiff but not reachable under federal jurisdiction. The argument,

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[53] The Rule 82 argument is related to the indirect-direct argument: if the plaintiff may reach the non-diverse person through a third-party claim but not through a direct claim, he is using Rule 14 to assert a claim in federal court which he otherwise would be unable to assert for lack of diversity. Arguably, such an action is an extension of federal court jurisdiction by construction of the Rules, which is forbidden by Rule 82.

[54] Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 703 (D. Kan. 1975). *Accord,* Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1195 (5th Cir. 1975); Malkin v. Arundel Corp., 36 F. Supp. 948, 950 (D. Md. 1941). *Cf.* Sheppard v. Atlantic States Gas Co., 167 F.2d 841, 845 (3d Cir. 1948); Lesnik v. Public Indus. Corp., 144 F.2d 968, 973-74 (2d Cir. 1944). Commentators support the exercise of ancillary jurisdiction over plaintiff's claim against a non-diverse third-party defendant as a valid exercise of the court's power once it properly has jurisdiction over the main claim between plaintiff and defendant. *See* 3 MOORE, *supra* note 3, ¶ 14.27[1], at 14-572; Holtzoff, *Entry of Additional Parties in a Civil Action; Intervention and Third-Party Practice,* 31 F.R.D. 101, 110 (1963); Note, *Federal Third-Party Practice — Ancillary Jurisdiction Supports Third-Party Defendant's Claim Against Plaintiff,* 8 UTAH L. REV. 145, 148 (1963); Comment, *Five Years of Federal Third-Party Practice,* 29 VA. L. REV. 981, 998 (1943).

[55] *See, e.g.,* Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697,700 (D. Kan. 1975); Davis v. United States, 350 F. Supp. 206, 208 (E.D. Mich. 1972). *Accord,* CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975); Saalfrank v. O'Daniel, 390 F. Supp. 45 (N.D. Ohio 1975). *Contra,* Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893-94 (4th Cir. 1972); *cf.* Rosado v. Wyman, 397 U.S. 397 (1970); F.C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917 (6th Cir. 1970); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); *See also* Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts,* 33 F.R.D. 27, 42 (1963); Holtzoff, *Entry of Additional Parties in a Civil Action; Intervention and Third-Party Practice,* 31 F.R.D. 101, 105, 110, 112 (1963); 3 MOORE, *supra* note 3, ¶ 14.27[1], at 14-570 through 571; Note, *Civil Procedure — Ancillary Jurisdiction — The Third-Party Defendant's Claim Under Federal Rule 14(a),* 49 N.C.L. REV. 503, 504, 507 (1971).

[56] 69 F.R.D. at 702. *See, e.g.,* Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893-94 (4th Cir. 1972); Heintz & Co. v. Provident Tradesmens Bank & Trust Co., 30 F.R.D. 171, 174 (E.D. Pa. 1962).

however, lost much vitality when Rule 14 was amended in 1946[57] to require that the impleaded party be liable to the defendant for all or part of plaintiff's claim.[58] Thus, any third-party claim filed by the defendant will be one from which he may recover. If that claim is valid, the defendant's other motives for asserting the claim should be irrelevant.[59] In addition, the mere *possibility* of collusion between the plaintiff and defendant should not operate as an absolute bar to the exercise of ancillary jurisdiction. Section 1359[60] permits the district court to dismiss any action in which any party has been collusively joined to invoke the court's jurisdiction. The preferable test, followed by the *Morgan* court, is that the existence of collusion should be determined on a case-by-case basis, with dismissal resulting when Rule 14 is used solely to allow the plaintiff to reach the third-party in federal court.[61]

Another basis for prohibiting ancillary jurisdiction over plaintiff's claim against a non-diverse third-party defendant is the fear of in-

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[57] FED. R. CIV. P. 14, as amended Dec. 27, 1946, eff. Mar. 19, 1948. *See* FED. R. CIV. P. 86(b).

[58] Prior to the amendment, a defendant could implead a third-party who was or could have been liable to him or the plaintiff for all or part of the plaintiff's claim against him. Subsequent to the amendment, he no longer may implead a person liable directly to the plaintiff; the third-party must be liable to the defendant. *Notes of Advisory Committee on 1941 Amendment to Rules*, FED. R. CIV. P. 14.

[59] WRIGHT & MILLER, *supra* note 3, §1444, at 231-32.

[60] 28 U.S.C. § 1359 (1970) provides:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

[61] 69 F.R.D. at 702. *See* Saalfrank v. O'Daniel, 390 F. Supp. 45, 55 (N.D. Ohio 1975). The *Saalfrank* case is particularly interesting because there was evidence indicating collusion. The Indiana plaintiff was injured in an automobile accident and subsequently injured at the hospital where he was treated for the auto accident injuries. He corresponded with the Ohio defendant, the driver, successfully urging him to implead the Indiana hospital. The plaintiff then sought to assert a claim directly against the third-party defendant. The court permitted ancillary jurisdiction and held that no collusion existed "where a party with a bona fide legal interest to assert solicits another party with a similar bona fide legal interest to assert to bring suit and aids in so doing." 390 F. Supp. at 54. It held that any such acts were "nothing more than sound litigation strategy and enlightened assistance of counsel." *Id.* at 56. *Accord*, Olson v. United States, 38 F.R.D. 489, 491 (D. Neb. 1965) ("the fact that there may be collusion between the original parties in *some* cases should not prevent plaintiffs from asserting claims against third-party defendants in all cases.") (emphasis in original). *See also* 3 MOORE, *supra* note 3, ¶ 14.21[1], at 14-571; Fraser, *Ancillary Jurisdiction and the Joinder of Claim in the Federal Courts*, 33 F.R.D. 27, 42 (1963). Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265, 274-75, 279 n.96 (1971).

creased federal litigation of state law claims.[62] Whether this argument refers to an increased number of original diversity claims or an increased amount of litigation within the already pending action is unclear. The Rules provide for summary disposition of claims not deemed worthy of trial.[63] Therefore, any frivolous claims filed with the hope of impleading a third-party defendant that the plaintiff could not attack directly would be futile. Moreover, the fear that such litigation will increase in scope should not operate as a bar to the exercise of ancillary jurisdiction. Rather, the increased scope of the litigation should become a discretionary factor in deciding whether the court should exercise such jurisdiction.[64] Arguably, the exercise of ancillary jurisdiction over the plaintiff's claim against the third-party defendant would decrease overall litigation by allowing two closely related lawsuits to be heard in one judicial proceeding.[65] Thus,

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[62] Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1196-97 (5th Cir. 1975); Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 704 (D. Kan. 1975); Saalfrank v. O'Daniel, 390 F. Supp. 45, 52-53 (N.D. Ohio 1975); Olson v. United States, 38 F.R.D. 489, 492 (D. Neb. 1965); Ayoub v. Helm's Express, Inc., 300 F. Supp. 473, 474 (W.D. Pa. 1969); Olivieri v. Adams, 280 F. Supp. 428, 433 (E.D. Pa. 1968).

[63] *See*, FED. R. CIV. P. 12(b)(6), which permits a defendant to move for dismissal if a valid claim has not been presented. Similarly, Rule 56(b), the summary judgment provision, permits the defendant to challenge a seemingly valid claim without going through an entire trial. FED. R. CIV. P. 56(b). Finally, 28 U.S.C. § 1359 (1970) permits the court to dismiss any third-party claims created collusively, the spectre of which arises if the plaintiff asserts a claim against a defendant hoping he will implead a third-party defendant. Thus, it seems unreasonable to fear that plaintiffs will initiate more diversity actions with the hope that they will ultimately be able to assert a claim against a non-diverse third-party defendant impleaded by the defendant.

[64] *See* text accompanying notes 72-80 *infra*.

[65] Conversely, denying ancillary jurisdiction would result in the judicial inefficiency and inconvenience of forcing the parties to try essentially the same facts in the state and federal courthouses. Saalfrank v. O'Daniel, 390 F. Supp. 45, 52-53 (N.D. Ohio 1975). *See* 3 MOORE, *supra* note 3, ¶ 14.27[1], at 14-572; Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 780 (1972). *Accord*, Holtzoff, *Entry of Additional Parties in a Civil Action; Intervention and Third-Party Practice*, 31 F.R.D. 101, 105, 112 (1963).

Whether plaintiffs could sue both the defendants and third-parties in state court is a consideration that goes more toward the discretion of the district court than toward its power to exercise ancillary jurisdiction. In *Morgan*, the Kansas long-arm statute probably would have permitted Kansas state courts to obtain jurisdiction over both the diverse and non-diverse parties. KAN. STAT. ANN. § 60-308(b)(7)(ii) (Cum. Supp. 1975). Nevertheless, the plaintiff chose to bring a diversity action in federal court. His ability to bring the action in state court should not affect the power of the federal court to hear all the claims arising in the one action. Rather, such ability should be a factor for consideration in determining whether to exercise ancillary jurisdiction over plaintiff's claim against the third-party defendant.

the fear of increased litigation should not operate as a complete bar to the exercise of ancillary jurisdiction, but should be handled on a case-by-case basis, with dismissal resulting when judicial economy would not be achieved.

Analogy to the three *Gibbs* requirements and consideration of the arguments against the exercise of ancillary jurisdiction provide a basis for determining whether a court has the power to exercise ancillary jurisdiction. However, the use of that power may not be justified in all cases. A court must determine whether it should, in its discretion, exercise ancillary jurisdiction over plaintiff's claim against the non-diverse third-party defendant. Overlying this examination is the less compelling nature of diversity jurisdiction compared with federal question jurisdiction.

Federal question jurisdiction[66] confers exclusive jurisdiction over claims arising under federal statutory law on a federal court.[67] In the interest of judicial economy, the court may generally hear any other claims arising from the "common nucleus of operative fact" of the federal claim.[68] Thus, the compelling nature of federal question jurisdiction weighs in favor of exercising pendent or ancillary jurisdiction over state law claims. In contrast, diversity jurisdiction merely provides a federal forum for settlement of state law questions.[69] Because the plaintiff in a diversity action is not forced to assert his state claim in federal court, diversity jurisdiction provides less compulsion for federal courts to exercise ancillary jurisdiction in cases like *Morgan* than does federal question jurisdiction.[70] This less compelling nature

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[66] U.S. CONST. art. III, § 1; 28 U.S.C. § 1331(a) (1970).

[67] *See, e.g.*, Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1196 (5th Cir. 1975).

[68] Conversely, if the federal court could not adjudicate all the claims, the plaintiff would be faced with the possibility of having to duplicate the entire process in state court. Such a result is not consistent with the goal of judicial economy. *See* Bowers v. Moreno, 520 F.2d 843, 848 (1st Cir. 1975); B.F. Goodrich Co. v. A.T.I. Caribe, Inc., 366 F. Supp. 464, 473-74 (D. Del. 1973); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262, 282-83 (1968).

[69] *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and its progeny, H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 705-55 (2d ed. 1973).

[70] Ayoub v. Helm's Express, Inc., 300 F. Supp. 473, 474 (W.D. Pa. 1969); Comment, *Pendent Jurisdiction and Minimal Diversity*, 59 IOWA L. REV. 179, 188-89 (1973). With the advent of almost limitless state long-arm statutes, *e.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945); Marston v. Gant, 351 F. Supp. 1122 (E.D. Va. 1972), the plaintiff, in a suit against an out-of-state defendant, may choose either his state forum or the federal forum. In a suit based upon federal statutory law, the plaintiff is restricted to a federal forum. In either situation, the federal court may exercise ancillary jurisdiction over related claims or parties. *See* text accompanying

of diversity jurisdiction requires a balancing test in which very strict consideration must be given to all the factors entering into a court's determination to exercise ancillary jurisdiction.[71]

Under the broad considerations of "judicial economy, convenience and fairness to the litigants,"[72] courts have considered several specific factors determinative of their discretion to exercise ancillary jurisdiction over plaintiff's claim against a non-diverse third-party defendant. The degree of complexity of the main and ancillary claims is one such factor.[73] Courts have denied ancillary jurisdiction when the ancillary claim would have increased the overall complexity of the case[74] and when the ancillary claim was more complex than the main claim.[75] Conversely, ancillary jurisdiction has been permitted where legal standards have differed only in degree.[76] In addition, greater expense,[77] increased length of trial,[78] and possible jury confusion[79]

note 20 *supra*. In the case of federal question jurisdiction, since plaintiff's main claim cannot be adjudicated in a state court, the exercise of jurisdiction over an ancillary claim is rather compelling. In contrast, because an action based upon diversity jurisdiction could be brought in a state court, the federal court should be less compelled to adjudicate ancillary questions of state law.

[71] Conversely, because the exercise of ancillary jurisdiction in federal question actions is more compelling, *see* note 70 *supra*, the court should be less strict in its consideration of the discretionary factors determinative of asserting ancillary jurisdiction.

[72] UMW v. Gibbs, 383 U.S. 715, 726 (1966).

[73] Joseph v. Chrysler Corp., 61 F.R.D. 347, 349 (W.D. Pa. 1973); Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398, 1399 (W.D. Pa. 1969). *Cf.* Moor v. County of Alameda, 411 U.S. 693, 715-16 (1973); Jacobson v. Atlantic City Hosp., 392 F.2d 149, 154 (3d Cir. 1968); Mitchell v. Hendricks, 68 F.R.D. 569, 571 (E.D. Pa. 1975); B.F. Goodrich Co. v. A.T.I. Caribe, Inc., 366 F. Supp. 464, 474 (D. Del. 1973); Scovill Mfg. Co. v. Dateline Elec. Co., 319 F. Supp. 772, 777 (N.D. Ill. 1970).

[74] Joseph v. Chrysler Corp., 61 F.R.D. 347, 349 (W.D. Pa. 1973) (ancillary claim would burden "an already complex case"). *Cf.* Moor v. County of Alameda, 411 U.S. 693, 715-16 (1973) (introduction of state tort claim into jury trial of civil rights claim would render the case unduly complicated). *But cf.* B.F. Goodrich Co. v. A.T.I. Caribe, Inc., 366 F. Supp. 464, 474 (D. Del. 1973) (no jury confusion because central issue was construction of one contract).

[75] *Cf.* Scovill Mfg. Co. v. Dateline Elec. Co., 319 F. Supp. 772, 777 (N.D. Ill. 1970) (ancillary breach-of-contract claim deemed "substantially more complex").

[76] *Cf.* Mitchell v. Hendricks, 68 F.R.D. 569, 571 (E.D. Pa. 1975). *But see* Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398, 1399 (W.D. Pa. 1969).

[77] *See, e.g.*, Saalfrank v. O'Daniel, 390 F. Supp. 45, 52 (N.D. Ohio 1975) (denial of ancillary jurisdiction would result in "incurring of expenses solely attributable to duplicated effort" in state and federal courts).

[78] *See, e.g.*, Florida E. Coast Ry v. United States, 519 F.2d 1184, 1197 (5th Cir. 1975); CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259, 1262 (E.D. Pa. 1975).

[79] Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398, 1399 (W.D. Pa. 1969). *Cf.*

have been other factors with potential for adding complexity to the case. In *Morgan*, the cause of the explosion was the sole issue in the case. The court decided that tracing the cause to four parties instead of three would not render the case significantly more complex.[80] Thus, because the degree of complexity would not result in increased trial time and expense, inconvenience, or unfairness to the litigants, asserting ancillary jurisdiction over plaintiff's claim against the non-diverse third-party defendant was within the court's discretion.

Two other factors upon which the courts have focused are the "commonness" of the "nucleus of operative fact"[81] and the status of the state law upon which the ancillary claim is based. Because the nature of diversity jurisdiction is less compelling than that of federal question jurisdiction,[82] the nucleus of operative fact in a *Morgan* situation perhaps should be tighter than that required for the exercise of pendent jurisdiction in a federal question case. Likewise, because state courts are the proper forum for resolving questions of state law, federal courts have steadfastly refused to exercise ancillary jurisdiction over a claim based upon unsettled state law.[83] Therefore, federal courts exercising only diversity jurisdiction might defer to the state courts if the hoped-for judicial economy resulting from an exercise of ancillary jurisdiction would not be significant.

An additional factor considered by the courts is any disposition of either the main claim or the defendant's third-party claim prior to final judgment. Courts have held that any prejudgment disposition of plaintiff's main claim or defendant's third-party claim relieves the

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B.F. Goodrich Co. v. A.T.I. Caribe, Inc., 366 F. Supp. 464, 474 (D. Del. 1973).

[80] Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 705 (D. Kan. 1975). The court determined that hearing the plaintiff's claim against the non-diverse third-party defendant would not significantly lengthen the trial.

[81] *See, e.g.*, Florida E. Çoast Ry. v. United States, 519 F.2d 1184 (5th Cir. 1975) (plaintiff's claim against defendant, United States, and third-party defendant, Troup, arose from a washout of railroad tracks due to alleged negligent design, in which both the United States and Troup were involved); CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975) (plaintiff's claim against defendant/manufacturer-seller and additional claim against the third-party defendant/installer arose out of injuries suffered from an explosion of a heating system). *Compare* B.F. Goodrich Co. v. A.T.I. Caribe, Inc., 366 F. Supp. 464 (D. Del. 1973), *with* Scoville Mfg. Co. v. Dateline Elec. Co., 319 F. Supp. 772 (N.D. Ill. 1970).

[82] *See* text accompanying notes 66-71 *supra*.

[83] *See, e.g.*, UMW v. Gibbs, 383 U.S. 715, 726 (1966). *Compare* Moor v. County of Alameda, 411 U.S. 693, 715-16 (1973), *with* Roberts v. Way, 398 F. Supp. 856, 861 (D. Vt. 1975). *See* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT L. REV. 759, 779 (1972); Comment, *Pendent Jurisdiction and Minimal Diversity*, 59 IOWA L. REV. 179, 190 (1973).

compulsion for exercising ancillary jurisdiction, resulting in dismissal of the ancillary claim.[84] In light of the less compelling nature of diversity jurisdiction in the federal courts,[85] the exercise of ancillary jurisdiction over plaintiff's claim against the non-diverse third-party defendant perhaps should be conditioned upon the continued vitality at trial of both the plaintiff's original claim and the defendant's third-party claim. Furthermore, in a diversity action, if the plaintiff's claim against the non-diverse third-party defendant has been permitted, but then assumes a predominant posture in the trial,[86] or the issues significantly increase the cost and time burdens upon the court, the court in its discretion may dismiss the claim. Each case must be examined carefully to determine whether the exercise of ancillary jurisdiction is proper, thereby avoiding increased litigation through spurious claims brought only to invoke the federal court's jurisdiction.

Analysis of *Gibbs* and examination of the arguments against permitting ancillary jurisdiction provided specific grounds for the *Morgan* court's determination that the complete diversity requirement was inapplicable to plaintiff's claim against a non-diverse third-party defendant. The court concluded that it had the power to exercise ancillary jurisdiction over such a claim. Cases dealing with situations similar to *Morgan* define factual guidelines by which courts may make a determination whether to use their power to exercise ancillary jurisdiction. In *Morgan*, the court determined that lack of collusion, avoidance of two trials without increased complexity, and a common core of operative facts weighed in favor of exercising

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[84] Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 896 (4th Cir. 1972). *But see* Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959). *Cf.* Rosado v. Wyman, 397 U.S. 397, 403 (1970).

[85] *See* text accompanying notes 67-71 *supra*.

[86] *See, e.g.*, Parker v. W.W. Moore & Sons, 528 F.2d 764-65 (4th Cir. 1975). While purporting to rely on its previous holding in Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972), the Fourth Circuit in *Parker* limited its reliance to the facts, which showed that the plaintiff's predominant claim was against the non-diverse third-party defendant, not against the original defendant. Parker v. W.W. Moore & Sons, 528 F.2d 764, 765 (4th Cir. 1975). The *Parker* court also noted the criticism of *Kenrose* in WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, and MOORE'S FEDERAL PRACTICE. 528 F.2d at 766. *See also* Fourth Circuit Review, *Extension of Ancillary Jurisdiction to Plaintiffs' Claims Against Nondiverse Third-Party Defendants*, 30 WASH. & LEE L. REV. 295 (1973). Thus, the only circuit to deal expressly with a plaintiff's claim against a non-diverse third-party defendant may, by its limiting language in *Parker*, be retreating from an absolute bar against the exercise of ancillary jurisdiction over such a claim.

ancillary jurisdiction.[87] In addition, courts have focused upon other discretionary factors, including the status of the state law upon which the ancillary claim is based and the pretrial disposition of either the main claim or the defendant's third-party claim. Although broad considerations of judicial economy, convenience and fairness to the litigants suggest the liberal exercise of ancillary jurisdiction, these discretionary factors compel a close, case-by-case examination in diversity actions to determine whether the exercise of ancillary jurisdiction is proper.

SAMUEL J. WEBSTER

[87] 69 F.R.D. at 704-05.