Nebraska Law Review

Volume 59 | Issue 3 Article 4

1980

Federal Rule of Civil Procedure 14 and Ancillary Jurisdiction

Howard W. Brill
University of Arkansas School of Law, hbrill@uark.edu

By Howard W. Brill*

Federal Rule Of Civil Procedure 14 and Ancillary Jurisdiction

I. INTRODUCTION

The federal courts have long struggled with the conflict between the limits of their constitutional and statutory jurisdiction and their desire to provide complete relief to petitioning parties. Because of problems associated with this tension, the federal courts adopted the doctrine of ancillary jurisdiction. Ancillary jurisdiction enables a court adjudicating a matter properly before it to decide other related matters even though it would lack jurisdiction to decide the related matters if they were presented independently.

The doctrine was originally created to allow a federal court to adjudicate all claims affecting a controversy properly brought before it, but was soon expanded to permit the hearing of compulsory counterclaims and cross-claims as well. With the adoption of the Federal Rules of Civil Procedure in 1938[1] ancillary jurisdiction was further expanded into third-party practice. Much of this growth was without the direct approval of the Supreme Court. While the Court set forth new tests for pendent jurisdiction, it refused to clarify differences between ancillary and pendent jurisdiction or to indicate the scope of ancillary jurisdiction under the Federal Rules. The Court has now acted, however, by apparently calling a halt to any further expansion of ancillary jurisdiction with the 1978 decision of *Owen Equipment & Erection Company v. Kroger*.[2]

This article will first examine the development of ancillary jurisdiction in the federal courts. Second, the impact of *Kroger*, the first Supreme Court decision in more than fifty years to analyze ancillary jurisdiction, on the exercise of ancillary jurisdiction in third-party practice will be discussed. Finally, the article will ex-

* Associate Professor of Law, University of Arkansas.

1. 302 U.S. 783 (1937) (Order by Supreme Court). *See* C. WRIGHT, FEDERAL COURTS 291-92 (3d ed. 1976).
2. 437 U.S. 365 (1978).

amine several instances in which the probable implications of *Kroger* should, and perhaps can, be avoided.

II. BACKGROUND

A. The Doctrine's Traditional Uses

Ancillary jurisdiction was first invoked in cases involving a court's exercise of jurisdiction over property interests. In the leading case of *Freeman v. Howe*,[3] a United States marshall acting pursuant to a writ of attachment issued by a federal court seized some railroad cars. Subsequently, several mortgagees of the cars, who were not parties to the federal suit, brought a replevin action in a state court to recover the cars.[4] The Court held that where a federal court had control over property, it had the power to decide every question arising in the action with respect to that property.[5] The mortgagees argued that if they could not bring the replevin action in state court, the lack of diversity between themselves and the marshall would bar the replevin action in federal court. The Court, however, rejected that argument and stated that a replevin action could have been heard as a part of the original federal action. "The principle is that a bill . . . . is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."[6]

The use of ancillary jurisdiction over matters related to property within the control of a court was soon adopted by other federal courts and today continues to apply in numerous situations. For example, when receivers appointed to preserve the assets of an insolvent savings association sought to have a federal court impose a constructive trust on several tracts of real estate, the court regarded the new claim as ancillary.[7] Since the new matter was related to the property under the court's control, no independent jurisdictional basis was required.[8]

A second category of ancillary jurisdiction allows a federal court to hear matters that are subordinate or related to the principal claim and enhance the court's existing jurisdiction. For in-

3. 65 U.S. (24 How.) 450 (1860). *See generally* Note, *The Ancillary Concept and the Federal Rules*, 64 HARV. L. REV. 968 (1951); Note, *Ancillary Jurisdiction of the Federal Courts*, 48 IOWA L. REV. 383 (1963).
4. 65 U.S. at 453.
5. *Id.* at 456.
6. *Id.* at 460.
7. Tcherepnin v. Franz, 485 F.2d 1251 (7th Cir. 1973).
8. Within its considerable discretion as to the form of proceeding, the trial court could allow a separate suit, compel the parties to join under Rule 13(g) or consolidate the actions under Rule 42. *Id.* at 1256 n.8.

stance, the court may bar a state court from relitigating issues already decided in a federal court, or it may issue a writ to ensure the efficacy of its judgment.[9] Under this second approach the federal courts have protected their jurisdiction by granting writs of mandamus and prohibition, temporary injunctions, and writs of *ne exeat*.[10]

A third type of ancillary jurisdiction, also unsupported by statutes or rules, developed in the federal system to enhance a court's ability to independently ajudicate the case before it. For example, before a federal trial court in a civil action seeking a refund of corporate income taxes, a plaintiff and his attorney became dissatisfied with each other. Although the attorney withdrew from the case, he refused to relinquish his files, claiming a retaining lien for unpaid fees. Accepting a broad definition of ancillary jurisdiction, the court concluded that it had ancillary jurisdiction to interpret the fee arrangement between the New Jersey corporation and the New Jersey attorney even though it would not have been able to independently adjudicate the dispute.[11] Thus, the court exercised its ancillary jurisdiction to determine the controversy before it, completely and fairly.[12]

B. The Doctrine's Expansion

If the three categories described were the extent of ancillary jurisdiction, the doctrine would be of limited use. The Supreme Court, however, vastly expanded the doctrine in 1926 when it decided *Moore v. New York Cotton Exchange*.[13] In that case Western Union agreed to distribute price quotations to firms and individuals which had been approved by the Cotton Exchange. The Cotton Exchange refused to allow the quotations to be telegraphed to the plaintiff because of his prior illegal practice. Alleging that trade was being restrained in violation of the Sherman Act, the plaintiff sought a decree barring Western Union and the Cotton Exchange from refusing to install the ticker which furnished the

9. C. WRIGHT, *supra* note 1, at 22. *See, e.g.*, Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 89-90 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

10. C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, JURISDICTION § 3523, at 61 (1975) [hereinafter cited as WRIGHT].

11. Jersey Land & Dev. Corp. v. United States, 342 F. Supp. 48 (D.N.J. 1972).

12. A case reaching the same conclusion as to the existence of ancillary jurisdiction is Andrews v. Central Sur. Ins. Co., 295 F. Supp. 1223 (D.S.C. 1969). *But see* Warren G. Kleban Eng'r Co. v. Caldwell, 490 F.2d 800 (5th Cir. 1974) (no ancillary jurisdiction to hear dispute involving construction contracts merely because they related to schools under a federal court desegregation order); Gounougias v. Peters, 369 F.2d 247 (7th Cir. 1966) (tort action terminated before fee dispute arose).

13. 270 U.S. 593 (1926).

continuous cotton quotations.[14] The defendants filed a counterclaim alleging that the plaintiff was improperly receiving price quotations from other sources, thereby impairing the value of the defendants' property. The trial court dismissed the complaint, but issued an injunction for the defendants on their counterclaim.[15]

Since the plaintiff and defendants were both citizens of New York and the dispute no longer involved a federal question,[16] the plaintiff argued, *inter alia*, that there was no jurisdiction supporting the counterclaim. The Supreme Court rejected this argument and upheld the ruling of the district court. Equity Rule 30 allowed a counterclaim if it was one "arising out of the transaction which is the subject matter of the suit."[17] The Court concluded that the counterclaim fell within the scope of this procedural rule and emphasized that " '[t]ransaction' is a word of flexible meaning, which may take in a series of occurrences which depend upon their logical relationship rather than upon the immediateness of their connection."[18] While the essential facts of the two claims were not identical, the Court found that enough similarity existed to conclude that they did arise out of the same transaction.[19] Although the Court did not speak of ancillary jurisdiction, its broad interpretation of "transaction" in Equity Rule 30 provided the basis for the compulsory counterclaim rule in the Federal Rules and for the modern expansion of federal ancillary jurisdiction.

Although the doctrines of pendent and ancillary jurisdiction are technically distinct,[20] the tests used to analyze the employment of

14. *Id.* at 602.
15. *Id.* at 603.
16. The Court emphasized that the dismissal by the trial court of the complaint was not because there was an absence of jurisdiction to hear the complaint. Instead the facts alleged were simply insufficient to establish a case under the Sherman Act. Since there was initial jurisdiction over the complaint, the counterclaim could not be dismissed on the preliminary basis. *Id.* at 608.
17. *Id.* at 609.
18. *Id.*
19. *Id.* at 610.
20. The usual distinction between pendent and ancillary jurisdiction has been based on the following elements: 1) pendent jurisdiction requires that the original action be based upon a federal claim, while ancillary jurisdiction need not be; 2) pendent jurisdiction requires that the additional claim be asserted by the plaintiff while any party may assert a claim under ancillary jurisdiction; 3) pendent jurisdiction involves the addition of a new claim, while ancillary jurisdiction may involve the addition of both claims and parties; 4) pendent jurisdiction has a clear discretionary aspect, while in ancillary jurisdiction and discretionary function is less distinct; 5) pendent jurisdiction rests upon the interpretation of article III, while the operation of ancillary jurisdiction is authorized by the Federal Rules; 6) pendent jurisdiction permits the issue of discretion to remain open throughout the pleading stage and perhaps to the time of trial, while the exercise of ancillary jurisdiction is usu-

the respective doctrines are similar, if not the same.[21] Indeed, the Court has commented that "there is little profit in attempting to decide . . . whether there are any principled differences between ancillary and pendent jurisdictions."[22] Thus, the cases involving the expansion of pendent jurisdiction may be applicable to ancillary jurisdiction and should be examined together with the cases that have expanded ancillary jurisdiction.

The leading case in the area of pendent jurisdiction is *UMW v. Gibbs*.[23] A coal company hired Gibbs to open a new mine using members of the Southern Labor Union and gave Gibbs a contract to haul the mine's coal. Members of the United Mine Workers forcibly prevented Gibbs from opening the mine.[24] Claiming that these efforts were the results of a concerted union plan, Gibbs sought recovery under the Taft-Hartley Act. He also alleged a state law claim that there had been an unlawful boycott and conspiracy to interfere with his contract of employment.[25] The jury awarded Gibbs $74,500 in compensatory damages and $100,000 in punitive damages on both the federal and state laws claims. After the verdict, the trial court concluded that union pressure to discharge Gibbs was not cognizable under the federal act, but did affirm a reduced award on the state law claim.[26]

The Supreme Court recognized the threshold question as whether the trial court had properly entertained jurisdiction of the state claim. The Court had previously followed the rule that if two distinct grounds in support of "a single cause of action" were alleged, the non-federal claim could be heard along with the federal claim.[27] Because the phrase "cause of action" was discarded with the adoption of the Federal Rules in 1938 it was necessary for the Court to redefine the earlier test. The Court could have redefined the test without expanding it, but decided that the earlier cases

---

ally decided when it is raised; and 7) pendent jurisdiction is a federal doctrine, while ancillary jurisdiction exists also under state procedural rules.

21. *See* Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A. L. REV. 1263 (1975).
22. Aldinger v. Howard, 427 U.S. 1, 13 (1976). The confusion over the relationship between pendent and ancillary jurisdiction is illustrated by two cases that interpret the the Court's decision in *Kroger* differently. *Compare* Ford Motor Co. v. Wallenius Lines, Etc., 476 F. Supp. 1362, 1369 n.5 (E.D. Vir. 1979) ("the Court . . . did not permit diversity jurisdiction to be a basis for pendent party jurisdiction.") *with* Roxse Homes, Inc. v. Adams, 83 F.R.D. 398, 401 n.6 (D. Mass. 1979) ("Thus ancillary rather than pendent jurisdiction was involved [in Kroger]").
23. 383 U.S. 715 (1966).
24. *Id.* at 718.
25. *Id.* at 720.
26. *Id.* at 720-21.
27. *See* Hurn v. Oursler, 289 U.S. 238 (1933).

had adopted a "limited approach [that] is unnecessarily grudging."[28] The Court noted that the correct test is much broader:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under the Constitution, the Laws of the United States and treaties" . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case.[29]

Justice Brennan outlined the scope of pendent jurisdiction: (1) The federal claim must have sufficient substance to support subject matter jurisdiction; (2) the state and federal claims must arise from "a common nucleus of operative facts;"[30] (3) the claim must be such that the plaintiff would ordinarily try them in one judicial proceeding; (4) as a matter for a court's discretion, pendent jurisdiction should only be exercised after consideration of judicial economy and convenience, and fairness to litigants; (5) federal courts should avoid unnecessary decisions of state law, both as a matter of comity and to promote justice by permitting a state court to interpret state law;[31] and (6) if the federal issues are not substantial, or if the state issues predominate in terms of proof or comprehensiveness of remedy, a state claim should be dismissed without prejudice and left to state tribunals.[32] Justice Brennan concluded that the district court had not exceeded its discretion in upholding the judgment on the state claim after it dismissed the federal labor law claim. The federal issues were not so remote or minor in significance as to conclude that in effect only the state claim had been tried.[33]

---

28. UMW v. Gibbs, 383 U.S. 715, 725 (1966). *See also* Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 418 (1976):
> Thus *Gibbs* suggests that ancillary and pendent jurisdiction did not exist fully developed and waiting to be "discovered" prior to promulagation of the Federal Rules in 1938. Rather, the tests for such jurisdiction were changed in response to procedural modifications, which had created the need for more expansive jurisdiction to match the greater reach of new joinder provisions.

29. 383 U.S. at 725.

30. *Id.*

31. Justice Brennan suggested that this may be the primary argument against the exercise of pendent jurisdiction. *Id.* at 726.

32. *Id.* at 726-27.

33. *Id.* at 728-29. On the merits, the verdict was reversed because the trial court record persuasively indicated that the union had done all that it could to prevent or curtail the violence. *Id.* at 739. A five part approach to the analysis of the discretionary factors of *Gibbs* is suggested by Roxse Homes, Inc. v. Adams, 83 F.R.D. 398 (D. Mass. 1979): (1) "Can the court exercise pendent jurisdiction effectively and fairly without also exercising jurisdiction over a pendent party?" *Id.* at 403. (2) "Would separate federal and state trials be substantially likely to produce outcomes that are in conflict?" *Id.* at 404. (3) "Would consolidation of the primary and pendent claims be likely to reduce substantially the committment of judicial and private resources to dispute resolution?" *Id.* at 404. (4) "Is the federal forum the only forum where the

The next important case in the expanding development of jurisdiction was *Moor v. County of Alameda.*[34] Plaintiffs filed actions in federal court under the Civil Rights Act[35] to recover damages for injuries suffered when a deputy sheriff discharged a shotgun in an attempt to quell a civil disturbance. In addition plaintiffs brought state claims against Alameda County under a California statute making the county vicariously liable for the wrongful acts of its deputies. Plaintiffs argued that the federal court had authority to hear their state law claims against the county under the doctrine of pendent jurisdiction.[36]

The trial court refused to entertain the state law claim and entered a final judgment with respect to the county.[37] The Supreme Court agreed that the trial court had properly refused to exercise pendent jurisdiction.[38] Although the federal and state causes of action did involve a common nucleus of operative fact, the exercise of pendent jurisdiction would have required the court to bring a new defendant into the litigation. *Gibbs* had not involved such a "pendent party." As to the county, there was no federal claim, and therefore there could be no pendent state claim, for there was nothing to which the state claim could attach.[39]

The Court recognized that exercising federal jurisdiction over parties as to whom there is no independent basis of jurisdiction is analagous to the doctrine of ancillary jurisdiction, but refused to answer the basic question of "[w]hether there existed judicial *power* to hear the state law claims."[40] The Court reasoned that

---

primary and pendent claims can be consolidated for trial? If not, is the practical importance to the parties of the primary claim at least as great as that of the pendent claim?" *Id.* at 405. (5) "Is it unlikely that in deciding the pendent claim the federal court will itself be required to answer unsettled question of state law?" *Id.* at 405.

34. 411 U.S. 693 (1973).

35. 42 U.S.C. §§ 1983, 1988 (1976). *See* Note, *Section 1988: An Alternative to Vicariously Liability Under the Civil Rights Act of 1871*, 58 NEB. L. REV. 1156 (1979).

36. 411 U.S. at 696.

37. *Id.* at 697.

38. The Court agreed that the plaintiffs had failed to establish a cause of action against the county under the federal Civil Rights statutes. However, the Court reversed the lower courts in concluding that the county was a citizen of California for purposes of federal diversity jurisdiction. Therefore the plaintiff Moor, a citizen of Illinois, would be able to proceed with his action against the county, basing jurisdiction on the diversity provisions. However it would be an abuse of discretion to tie the claim of the California plaintiff to the claim of the Illinois plaintiff. The actions had been brought separately, involved different injuries, and had been consolidated only for the purposes of appeal. *Id.* at 716 n.36.

39. *Id.* at 712-13. Justice Marshall did note the tendency of the lower federal courts to allow pendent claims and pendent parties where the entire action comprised only "one constitutional 'case.'" *Id.* at 713 (footnote omitted).

40. *Id.* at 715 (emphasis added).

even if the trial court had the power to hear the pendent party claim, it had properly exercised its discretion in declining to join the state claims with the federal claims. The federal court would have had to resolve difficult questions of state law, and the special defenses available to the county under the California Tort Claim Act[41] might have unduly complicated the case if tried before a jury.[42] These two factors enabled the trial court to exercise its discretion in refusing to join the state claim.[43]

Aldinger v. Howard[44] involved the question not answered in *Moor*: whether the doctrine of pendent jurisdiction extends to parties to whom there is no independent basis of federal jurisdiction. Aldinger was hired as a clerk by the Spokane County Treasurer. Two months later the treasurer informed her that she would be dismissed because she was living with her boyfriend. Aldinger brought an action in federal court against the treasurer, alleging a violation of the Civil Rights Act of 1871.[45] A state statute waived sovereign immunity and provided for vicarious liability against the state for the tortious conduct of its officials. Although there was no basis for diversity jurisdiction over a claim against the county since both she and the county were citizens of Washington, Aldinger argued that there was pendent jurisdiction over such a state law claim.[46]

The Supreme Court reviewed other cases involving expansion of federal jurisdiction.[47] The first line of cases involve pendent jurisdiction, which build on *Gibbs* and concern the addition of claims over which there is no independent federal power. The Court noted, however, that none of these cases involved the question of whether a non-federal claim could be the basis for joining a party over whom no independent federal jurisdiction existed. The parallel line of cases involves ancillary jurisdiction, stretching from *Freeman* to *Moore*. In these cases the Court "identified certain considerations which justified the joining of parties with respect to whom there was no independent basis of federal jurisdiction."[48]

The plaintiff built her case for federal jurisdiction on the merger of the two doctrines. She alleged a federal question claim against one defendant and a factually related state claim against another.[49]

41. CAL. GOVT. CODE § 815.2 (West 1974).
42. The Court did not mention that under the federal rules the district court could avoid undue jury confusion by ordering separate trials.
43. 411 U.S. at 716-7.
44. 427 U.S. 1 (1976).
45. *Id.* at 3-4.
46. *Id.* at 4.
47. *Id.* at 6-16.
48. *Id.* at 10.
49. *Id.* at 3-5.

Moore, although traditionally treated as an ancillary jurisdiction case, did not use the term "ancillary." It adopted a transactional test similar to that subsequently set out in *Gibbs*.[50] Therefore, Aldinger argued, there is no significant difference between the doctrines of ancillary jurisdiction, which had traditionally been used to bring in new parties, and pendent jurisdiction, which had traditionally been used to bring in new claims. Since the Federal Rules encourage joinder of claims *and* parties, Aldinger argued that she should be able to assert her nonfederal claim against the county because it shared a common nucleus of operative fact with her federal claim against the individual defendant.[51]

The Supreme Court again hedged on the basic question:

> [W]e think it quite unnecessary to formulate any general, all-emcompassing jurisdictional rule. Given the complexities of the many manifestations of federal jurisdiction, together with the countless factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any "principled" differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences. . . . We think the better approach is to determine what *Gibbs* did and did not decide and to identify what we deem are important differences between the jurisdiction sustained in *Gibbs* and that asserted here.[52]

Gibbs authorized a state law claim against a party already in federal court.[53] While recognizing the limits of federal jurisdiction and refusing to allow the claim against the county to be heard, the Court emphasized that it was deciding only the issue of pendent party jurisdiction involving a claim brought under section 1983 of the Civil Rights Act.[54] The Court refused to develop a broad theory of jurisdiction but did say that "if the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim."[55] Federal jurisdiction was left in an unsettled state.[56]

---

50. *Id.* at 12.
51. *Id.* at 12-13.
52. *Id.* at 13.
53. *Id.* at 14.
54. *Id.* at 15.
55. *Id.* at 18.
56. The three dissenters argued that the principles of *Gibbs* should apply to pendent state law claims, regardless of whether the defendant was already in federal court. Such a result prevents forum shopping and multiple actions, saves time, and reduces the cost of litigants. Now a plaintiff must seek redress in a federal court under 42 U.S.C. § 1983 (1976) and redress for the same wrongs under state law in the state court. This splitting is required "regardless of the balance of the discretionary factors enunciated in *Gibbs*, the clarity of state law, . . . the absolute identity of factual issues between the two claims . . . the monetary expense and other disadvantages of duplicate litiga-

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

Owen Equipment & Erection Co. v. Kroger[57] will dominate the area of ancillary jurisdiction for some time. In January 1972, James D. Kroger was helping to move a large steel tank at an Iowa construction site. He was walking alongside the tank to steady it as it was being transported by a large crane. When the boom on the crane came in contact with high-tension lines, Kroger was electrocuted.[58] His widow, as administratrix of his estate, filed a wrongful death action in November 1973 in Nebraska Federal District Court. She was an Iowa citizen at the commencement of the lawsuit. The defendants were the Omaha Public Power District (OPPD), a Nebraska corporation, which allegedly owned the power lines, and the Paxton & Vierling Steel Company, a Nebraska corporation that had leased the crane for the construction project.[59] The Power District had sold the lines and equipment to Paxton in the early 1960's. Thereafter OPPD sold electricity to Paxton and made necessary repairs upon the lines and equipment.

During the pretrial stage, the defendant Omaha Public Power District impleaded as a third-party defendant Owen Equipment & Erection Co., a Nebraska corporation that owned the crane. Under the doctrine of ancillary jurisdiction, the Nebraska defendant was entitled to seek indemnification from the Nebraska third-party defendant without establishing a federal jurisdictional basis.[60]

Omaha Public Power District moved for summary judgment, which the trial court granted, and which the Eighth Circuit af-

---

tion . . . the waste of judicial time . . . ." *Id.* at 35-36 (Brennan, Marshall, Blackmun J.J., dissenting).

57. 437 U.S. 365 (1978).

58. *Id.* at 367.

59. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 429 (8th Cir. 1977). Paxton had been made a party for the sole purpose of determining any rights under the Workmen's Compensation Act.

60. The third-party complaint may have been defective. Since 1946, Rule 14(a) has required that the third-party defendant be arguably liable to the defendant, not merely liable to the plaintiff. WRIGHT, *supra* note 10, § 1441, at 200-01 (1971). In this instance the third-party complaint had alleged merely that Owen's negligence caused Kroger's death. The basis of Owen's liability to Omaha was nowhere spelled out, but Omaha may have been relying upon the state common law right of contribution. Owen never challenged this possible defect, and therefore the third-party complaint and the ancillary jurisdictional basis for it remained unquestioned. 437 U.S. 365, 378 (1978) (White, J., dissenting).

Defendant Paxton and third party Owen Equipment were connected in that Paxton owned all the stock of Owen and both corporations had the same headquarters and the same officers. Paxton had formed Owen Equipment to avoid possible labor disputes. Owen Equipment leased the cranes to Paxton, and the crane operators were included in the leasing arrangements.

firmed.[61] Summary judgment was granted because Paxton owned the transmission lines, and OPPD had no duty to maintain the lines under the applicable Iowa law. Furthermore, OPPD had not been asked to disconnect electricity on the accident date, and had no notice that a crane was being operated in the vicinity of the lines. Defendant Paxton was later dismissed from the lawsuit because of an unidentified jurisdictional defect.[62]

By the time of trial the parties had been reduced to two: the plaintiff Kroger and the third-party defendant Owen Equipment. Kroger had been permitted to assert a direct claim against Owen Equipment as a party defendant after it had been added as a third-party defendant.[63] During the third day of trial the corporate secretary of Owen Equipment surprised Kroger and the court by testifying that Owen Equipment's principal place of business was in Carter Lake, Iowa. Owen Equipment immediately challenged the jurisdiction of the court, claiming lack of diversity.[64] Since section 1332(c) of the Judicial Code[65] provides that a corporation is a citizen of the state where it is incorporated and of the state where it has its principal place of business, Owen Equipment was a citizen of both Nebraska and Iowa for purposes of federal jurisdiction. Since Federal Rule 12(h)(3) requires the court to dismiss an action when it lacks jurisdiction of the subject matter whenever that defect is made apparent,[66] Owen Equipment properly moved to dismiss the action. The trial judge, however, refused to grant the motion.

The trial judge relied on several factors in ruling that the case should be heard. First, the complaint had alleged that Owen Equipment was " 'a Nebraska corporation with its principal place of business in Nebraska.' "[67] Rather than denying this allegation, Owen Equipment had used a qualified general denial. It had admitted that it was " 'a corporation organized and existing under the Laws of the State of Nebraska' " and denied every other allegation in the complaint.[68] The court found that by using such an evasive denial, Owen Equipment had violated Federal Rule 8(b) by failing to admit as much of the allegation as was true. Second, Owen

61. Kroger v. Omaha Pub. Power Dist., 523 F.2d 161 (8th Cir. 1975).
62. The nature of the dismissal does not appear in the order of the trial court. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 429 (8th Cir. 1977).
63. 437 U.S. at 368.
64. *Id.* at 369.
65. 28 U.S.C. § 1332(c) (1976).
66. In its critical questioning, the circuit court characterized the rule requiring dismissal when even a defect in subject matter jurisdiction is discovered as an American judicial "fetish." 558 F.2d at 427 n.37.
67. *Id.* at 419 (quoting plaintiff's complaint).
68. *Id.* (quoting defendant's answer).

Equipment failed at any time during the two years prior to trial to specifically challenge the jurisdiction of the court.[69] The Court reasoned that failure to challenge until trial amounted to an admission of the allegation of Owen Equipment's citizenship.

Third, by filing no challenge, Owen Equipment had lulled the plaintiff into believing that its principal place of business was in Nebraska. If the trial court had granted the defendant's motion to dismiss, the plaintiff would have been left without a cause of action in state court because the Iowa statute of limitations had run.[70]

Fourth, the trial court relied upon the minority view that no independent basis for jurisdiction is necessary for the plaintiff to assert a claim against a third-party defendant. The court found support in *Gibbs* for its conclusion that a federal court has the jurisdictional power to adjudicate the entire case before it, including both federal and state claims that derive from a common nucleus of operative facts.[71]

Since the court held that it had the power to hear the entire case, the only question that remained was whether it would exercise its power after consideration of all the relevent factors. The court decided to allow the case, and after a jury trial[72] Kroger received a verdict of $234,756.[73]

Owen Equipment appealed the trial court's decision concerning its ancillary jurisdiction in the Court of Appeals for the Eighth Circuit.[74] To the court of appeals, defendant OPPD's original im-

69. *Id.* at 419. The trial court relied on Biggs v. Public Serv. Coordinated Transf., 280 F.2d 311 (3d Cir. 1960). The Supreme Court suggested that the sudden revelation may have been a problem of geography. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 369 n.5 (1978). In general the Missouri River marks the boundary between Iowa and Nebraska. However, Carter Lake, Iowa, where the accident occurred and where Owen Equipment had its main office, lies west of the river. The town is within ten miles of the Omaha metropolitan area. Previously the river had shifted course, cutting the town of Carter Lake, Iowa off from the rest of Iowa. The opinions do not clarify whether the Owen officials and attorneys had been confused for two years as to whether the corporation was located in Iowa or Nebraska.

70. For an example of an instance in which the defendant successfully and permissibly delayed raising the issue of subject matter jurisdiction until the statute of limitations had run, see Knee v. Chemical Leaman Tank Lines, Inc. 293 F. Supp. 1094 (E.D. Pa. 1968).

71. 558 F.2d at 419.

72. The substantive theory upon which the case went to the jury was that either the crane supplied by the third party defendant Owen Equipment was unsafe for the purpose for which it was intended, or that the Owen Equipment employed the crane operator and was therefore liable for his negligent acts.

73. *Id.* at 418.

74. Kroger v. Owen Equip. & Erection Co., 558 F.2d 417 (8th Cir. 1977). The position that the Eighth Circuit adopted was the position that had been increasingly argued by the commentators. *See* 3 W. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 14.27 [1], at 14-565 to 14-574 [hereinafter cited as MOORE'S]. (2d

pleader of Owen Equipment was a classic example of ancillary jurisdiction not requiring an independent jurisdictional basis. Yet the dispute was not the defendant's addition of a third party; it was the plaintiff's assertion of a claim against the third party. While Federal Rule 14(a) allows a plaintiff to assert a claim against a third-party defendant arising out of the transaction or occurence that is the subject matter of the original claim, it does not clarify whether an independent basis of jurisdiction is required when the plaintiff proceeds against the impleaded third party. Nor should the rule answer that question. In view of the mandate of Rule 82 that the Federal Rules should not extend or restrict jurisdiction,[75] the question of jurisdictional limitations is not to be answered by the Rules but is to be answered by the Constitution, by legislative mandate, and by judicial interpretation.

The court of appeals noted that the vast majority of cases have held that if the plaintiff brings a claim against a third-party defendant, there must be an independent ground of jurisdiction.[76] Yet the underlying reasons for the restrictive rule[77] requiring an independent basis for jurisdiction disappeared with the Court's decision in *Gibbs*. The *Gibbs* Court emphasized that the federal court has jurisdictional power to adjudicate all of the facts before it if the additional claim arises out of the core of operative facts that gave rise to the primary claim.[78] The critical question is whether the court should exercise that power. The court of appeals noted that to allow an Iowa third-party defendant to sue an Iowa plaintiff but not to allow an Iowa plaintiff to sue an Iowa third-party defendant

---

ed. 1978); WRIGHT, *supra* note 10, § 1444, at 234-38, § 1459, at 311-14 (1971); Fraser, *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims*, 76 F.R.D. 525, 538-543 (1978).

For analysis of the decision of the Eighth Circuit, see 11 CREIGHTON L. REV. 631 (1977); 8 CUMB. L. REV. 965 (1978); 46 GEO. WASH. L. REV. 416 (1978); 26 KAN. L. REV. 493 (1978); 62 MINN. L. REV. 251 (1978); 43 MO. L. REV. 310 (1978); 54 N.D. L. REV. 314 (1977); 38 OHIO ST. L.J. 939 (1977); 9 ST. MARY'S L.J. 599 (1978); 23 S.D. L. REV. 499 (1978). Reaching the same conclusion as the Eighth Circuit was Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D. Kan. 1975), noted in 8 RUT.-CAM. L.J. 164 (1976).

75. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein . . . ." FED. R. CIV. P. 82.

76. 558 F.2d at 422.

77. The rule prevents a plaintiff from suing a citizen of the same state, eliminates possible collusion between the plaintiff and the defendant to obtain federal jurisdiction over a third party, and protects the federal courts from being overcrowded with state claims. 558 F.2d at 423, n. 25, (relying on Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893-94 (4th Cir. 1975).

78. 558 F.2d at 423.

would be reverting to a discarded system of procedure.[79] In contrast with *Aldinger*, the plaintiff was not attempting to add a new party; Owen Equipment was already before the court on the third-party claim for indemnity.

The court of appeals reasoned that judicial economy and convenience would be served by having this case heard in federal court after the completion of pre-trial pleading and discovery. To dismiss the case after the statute of limitations had expired would be unfair to the plaintiff, who relied upon the evasive answer of the third-party defendant.[80] This deceit may have justified the court's retention of jurisdiction. In addition, once jurisdiction was determined at the commencement of the action, the court's resources were committed to the claim. Thus, the court concluded that the trial court had correctly entertained Kroger's claim against Owen Equipment.[81]

Owen Equipment sought and obtained a writ of certiorari to the Supreme Court.[82] The Court took the position that *Gibbs* and *Kroger* were two examples of the same generic problem: when may a federal court hear a state claim arising between citizens of the same state? The Court stated that the Eighth Circuit had failed to understand the scope of *Gibbs*:

> The *Gibbs* case differed from this one in that it involved pendent jurisdiction, which concerns the resolution of a plaintiff's federal and state law

79. *Id.* at 423-24 (relying on 3 MOORE'S, *supra* note 74, ¶ 14.27 [1], at 14-570 to -572, which is a reversal of the opinion held in an earlier edition).

80. *Id.* at 427.

81. The dissenting judge first concluded that *Gibbs* did not apply because in that case there had clearly been jurisdiction over a federal claim and therefore a state claim could be added. But in *Kroger* the question was whether the only remaining claim, which was a state claim, could be heard under ancillary jurisdiction. Second, the Supreme Court decision in *Aldinger* required dismissal for lack of jurisdiction, even though the same facts might be involved in all three claims. *Id.* at 430 (Bright, J., dissenting). If Kroger had wished to sue all the parties together, she could have done so in a state court. Third, *Gibbs* interpreted article III of the Constitution because Congress had not spoken. Here Congress had defined diversity jurisdiction in 28 U.S.C. § 1332 (1976). Fourth, the majority rule is that an independent basis of jurisdiction is required. Fifth, while Owens was certainly acting improperly in concealing this defense until the trial, a party cannot by his conduct be barred under a doctrine of estoppel from raising the question of federal subject matter jurisdiction. *Id.* at 431-32 (Bright, J., dissenting). The court should take appropriate steps to sanction the attorneys but should not expand federal jurisdiction. Sanctions against the attorney might include costs, expenses and a reasonable sum for opposing attorneys' fees. This drastic remedy would deter other litigants from concealing or failing to present known jurisdictional facts to the court. Finally, a saving provision in the Iowa statute of limitations might still allow the plaintiff to bring an action against Owen Equipment in Iowa state court. *Id.* at 432 (Bright, J., dissenting).

82. 437 U.S. 367.

> claims against a single defendant in one action. By contrast, in this case there was no claim based upon federal law, but rather state-law tort claims against two different defendants.[83]

While *Gibbs* establishes the outer limits of federal judicial power under Article III of the Constitution, the Court must also look to the acts of Congress for guidance. The Court stated that section 1332 and "its predecessors have consistently . . . require[d] complete diversity of citizenship,[84] and mentioned its previous holding that each member in the class must satisfy the statutory jurisdictional amount of $10,000, rejecting the view that the smaller claims were ancillary.[85] If a conflict exists between the policies of complete diversity and a single resolution of an entire case arising out of a common nucleus of operative facts, the Court reasoned that the former must govern because that policy of limitation, within the outer limits of constitutional authorization, is congressionally mandated.[86] Hence, the Court held that plaintiff could not sue Owen Equipment directly because citizens of Iowa would have been on both sides of the lawsuit.[87]

The Court concluded that if ancillary judisdiction were allowed in such cases, a plaintiff could avoid the requirement of complete diversity simply by suing only diverse defendants and then waiting for them to file third-party actions against non-diverse defendants.[88] Even though the plaintiff might find it more advantageous to sue all of the defendants at once, he could conclude that it would be preferable to sue only selected defendants and thus assure himself access to the federal system. If the only requirement for ancillary jurisdiction were the constitutional requirement of a common nucleus of operative fact, it follows that the plaintiff could have sued Owen Equipment directly without waiting for the institution of the third-party claim. Such a result would clearly have evaded the statutory requirement of complete diversity.

The Court recognized that "ancillary jurisdiction over non-federal claims has often been upheld in cases involving impleader, cross-claims, or counterclaims."[89] A claim by a plaintiff against a

83. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978).
84. 437 U.S. at 373 (footnote omitted).
85. Zahn v. International Paper Co., 414 U.S. 291 (1970).
86. *Id.* at 374.
87. *Id.*
88. *Id.* at 374. Although this might be viewed as a possible abuse of the third-party action, there is nothing necessarily fraudulent or collusive about a plaintiff selectively suing only tortfeasors of diverse citizenship in federal court. Section 1359 of the Judicial Code, barring collusive attempts to create federal jurisdiction, would not cover such a selection of defendants. *Id.* at 374 n.17. *See also* Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969); 3A MOORE'S, *supra* note 14, ¶ 17.05, at 17-39 to -57.
89. 437 U.S. at 375.

third-party defendant presents quite a different situation. First, the Court stated that when a defendant impleads a third-party defendant, the resolution of that claim is usually contingent to some degree on the resolution of the main claim.[90] The relation of the impleader to the primary claim is not "mere factual similarity but logical dependence."[91] Kroger's claim against Owen Equipment, however, was altogether separate from the primary claim against the defendant OPPD because Owen Equipment's liability to Kroger was not contingent on OPPD's liability to Kroger. The separateness of her claim was particularly apparent because the defendant OPPD had already been dismissed from the action. "Far from being an ancillary and dependent claim, it was a new and independent claim."[92]

Second, the Court noted that when Kroger elected to bring her state-law claim in federal court rather than state court, she voluntarily accepted the limitations of federal jurisdiction, and was estopped from later complaining that jurisdiction was not broad enough to encompass the additional claim against Owen.[93] Kroger's attempt to sue Owen directly is in stark contrast to the normal use of ancillary jurisdiction which "typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in federal court."[94] Mere considerations of convenience or judicial economy cannot justify nondiverse parties in direct trangression of the mandate of federal statutory law.

Justices White and Brennan dissented. Justice White found no support for the majority's holding in either article III or in statutory law.[95] He argued that since the claim by Kroger against Owen Equipment arose out of the same transaction and from a common nucleus of operative fact, the claim satisfied both Rule 14(a) and article III as interpreted in *Gibbs*. Justice White stated that the Court's holding that the trial court lacked ancillary jurisdiction would expand the scope of complete diversity and limit the doctrine of ancillary jurisdiction.[96]

The majority recognized that exceptions to the complete diversity requirement existed for cross-claims, counterclaims, and impleader. Since the Court approved ancillary jurisdiction in those

90. *Id.* at 376.
91. *Id.* (citing Moore v. New York Cotton Exch., 270 U.S. 593, 610 (1926)).
92. *Id.*
93. *Id.* at 376.
94. *Id.*
95. *Id.* at 378 (White, J. dissenting).
96. *Id.* at 380.

cases despite the doctrine of complete diversity, Justice White saw no reason why it should not allow ancillary jurisdiction when a plaintiff proceeds against a third-party defendant.[97]

Justice White acknowledged that generally pre-trial dismissal of a federal claim as occurred in *Kroger* would require dismissing the non-federal claim. But in light of the unusual facts of the case, especially the timing of the revelation of Owen Equipment's citizenship, Justice White concluded that the trial court did not abuse its discretion by refusing to dismiss Kroger's claim against Owen Equipment.[98] The plaintiff did not bring the third-party defendant into the lawsuit. Indeed, at the time of trial Kroger believed that Owen Equipment was a Nebraska citizen. If she had wished to sue Owen Equipment, Kroger would have done so directly under this mistaken factual assumption. It was only subsequently that the Iowa citizenship of Owen Equipment was revealed. Clearly there was no collusion or fraud on the part of the plaintiff in originally failing to bring an action against Owen Equipment. In the ordinary situation a plaintiff has no assurance that a defendant will attempt or be able to implead any particular third-party defendant. Thus, Justice White argued that since the plaintiff has no control over whether the defendant will implead another party, the fact that plaintiff could not have brought an original action against the third-party defendant in federal court should be irrelevant to the determination of whether ancillary jurisdiction over the plaintiff's claim against the third-party defendant exists.[99]

Justice White did not understand his position to mean that a federal court would be compelled to hear a non-federal claim form a plaintiff against a third-party defendant. The court should still examine each situation on a case-by-case basis in light of the interests of judicial economy, convenience, and fairness as it did in *Gibbs*.[100]

III. DEFENDANT v. THIRD PARTY

The classic third-party claim arises where a plaintiff sues a defendant and the defendant seeks indemnification from a third-party defendant. Ancillary jurisdiction reaches this situation and an independent basis of jurisdiction is not required.[101] Ancillary

97. *Id.* at 381.
98. *Id.* at 382 n.4.
99. *Id.* at 383.
100. *Id.* at 383 n.7.
101. *See* WRIGHT, *supra* note 10, § 1444, at 217-19. For a comprehensive summary of the jurisdictional rules regarding third parties before the upheaval of the past decade and a half, see Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 38-43 (1964). For the updated anal-

jurisdiction exists not because of Rule 14,[102] but because of the traditional desire of courts to dispose of all the related parts of a case in one action.[103]

If the primary claim is based on diversity, ancillary jurisdiction supports the impleader regardless of whether the defendant and third-party defendant are from the same state,[104] whether the plaintiff and the third-party defendant are from the same state,[105] or whether the claim between the defendant and the third-party defendant is less than the jurisdictional amount.[106] There is ancillary jurisdiction over the third-party claims irrespective of whether the primary claim that gives the court jurisdiction is based upon an exclusive grant of jurisdiction under a federal statute[107] or whether it is based upon a concurrent grant of jurisdiction.[108] Ancillary jurisdiction over the third-party claim continues even though the primary claim is settled[109] or dismissed.[110] *Kroger* does not affect this type of ancillary jurisdiction—the majority specifi-

---

ysis, see Fraser, *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims*, 76 F.R.D. 525, 535-45 (1978). Ancillary jurisdiction covers subject matter jurisdiction, but not personal jurisdiction. The third party plaintiff must still acquire personal jurisdiction over the third party defendant pursuant to the provisions of Federal Rule 4 and the due process requirements of International Shoe v. State of Washington, 326 U.S. 310 (1945). *See, e.g.*, Sunn Classic Pictures, Inc. v. Budco, Inc., 481 F. Supp. 382 (E.D. Pa. 1979).

102. *See* FED. R. CIV. P. 82. For an examination of the effect of Rule 82 on jurisdiction, see Goldberg, *supra* note 28, at 443. The author argues that Federal Rule 14 is one example of the manner in which a change in the procedural rules caused a change in the jurisdictional test. *Id.* at 418-21.

103. Moore v. New York Cotton Exch., 270 U.S. 593 (1926); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959). Rule 14 operates only when the defendant attempts to invoke the secondary liability of a third party in the event that the defendant is held liable. Rule 14 does not apply if the defendant is attempting to cast the sole blame upon the third-party defendant. Cass v. Brown, 41 F.R.D. 283, 284 (D. Colo. 1966). *See also* note 66 *supra*. Nor does Rule 14 apply if the third-party complaint brings up an entirely new issue that has no relationship to the claim of the plaintiff. Lincoln Gateway Realty Co. v. Carri Craft Inc., 53 F.R.D. 303 (W.D. Mo. 1971). Even if there is a valid third party complaint, the court retains discretion not to hear the claim. Cass v. Brown, 41 F.R.D. 284 (D. Colo. 1966).

104. Huggins v. Graves, 337 F.2d 486 (6th Cir. 1964); Gebhardt v. Edgar, 251 F. Supp. 678 (W.D. Pa. 1966).

105. Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Semler v. Psychiatric Inst. of Wash., D.C., 538 F.2d 121 (4th Cir.), *cert. denied*, 429 U.S. 827 (1976).

106. King v. State Farm Mut. Ins. Co., 274 F. Supp. 824 (W.D. Ark. 1967).

107. Lyons v. Marrud, Inc., 46 F.R.D. 451 (S.D.N.Y. 1968).

108. Pennsylvania R.R. Co. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962).

109. Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959), pointed out that the trial judge had discretion as to whether to retain a third-party claim when the original claim granting jurisdiction had been settled. *Id.* at 807. Since that case the Supreme Court's decision in United Mine Workers v. Gibbs suggests that the federal judge exercise caution in continuing to hear a non-federal claim when the federal claim has been terminated. However, some factors may justify

cally approved it—despite similar arguments concerning the limited nature of federal jurisdiction that conceivably could be made against this long-standing expansion of jurisdiction.[111]

A more questionable variation of the basic third-party action occurs when a defendant attempts to bring an additional claim against a third-party defendant with the claim for indemnity.

With a few exceptions, lower federal courts have held that no ancillary jurisdiction attaches to an additional claim by a defendant against a third-party defendant.[112] This section will first examine a sampling of cases in which this approach was followed by the courts. It will then examine the exceptional cases where the courts have allowed the additional claim to be brought in, and, finally, consider whether *Kroger* has cast any doubt upon the allowance of the claim in the "exceptional" case.

A. The General Rule

In *United States v. Scott*,[113] the Federal Housing Authority (FHA) brought an action against individuals who had failed to make a federally insured payment on a home improvement loan. The defendants' third-party complaint sought indemnity, alleged fraud on the part of the salesman who procured the note, and additionally alleged that the premises had been improperly repaired, with resulting damages of $3,000.[114] Although the court recognized the validity of the impleader claim under Rule 14(a), it rejected the other claim: "[T]o allow impleader for the recovery of damages would not serve the purposes of impleader, for it would introduce a completely separate and distinct cause of action involving the issue of whether or not [the third party defendant] made the repairs improperly."[115] The court reasoned that even

---

retaining non-federal third party claims. WRIGHT, *supra* note 10, § 1444, at 236-37.

110. If the primary claim is dismissed for failure to state a cause of action or for some other reason that reaches the merits, the judge has discretion to continue to hear the third-party claim. If on the other hand it has been dismissed because there is no subject matter jurisdiction over the primary claim, then the third-party claim must also be dismissed if it is based on ancillary jurisdiction, unless it can be supported by independent jurisdictional grounds. *See* WRIGHT, *supra* note 10, § 1444, at 237. *See also* Note, *Ancillary Jurisdiction—Rule 14—Disposition of Third Party Claim When the Primary Claim Has Been Dismissed*, 23 S.C. L. REV. 261 (1971).

111. 437 U.S. 375. "The ancillary jurisdiction of the federal courts . . . has been said to include cases that involve multiparty practice, such as . . . impleader . . . ." *Id.* at 375 n.18.

112. *See* § III of text *infra*.

113. 18 F.R.D. 324 (S.D.N.Y. 1955).

114. *Id.* at 325.

115. *Id.* at 326.

though the impleader and the main claim arise out of a single factual setting, the defendant cannot assert a claim against the third party under Rule 14 which attempts to do more than pass on liability.[116]

A similar result was reached where the plaintiff alleged that the defendant corporation had wrongfully interfered with a contractual right of the plaintiff because of the defendant's use of a testimonial in a national trade magazine.[117] The defendant filed a third-party complaint against the advertising agency that had prepared the advertising which contained the disputed testimonial. The court found that the third-party complaint's first count was proper because it asked that the advertiser be held liable to the defendant for any sum that the court found the defendant owed the plaintiff.[118] However, the court found the second count improper because the defendant had requested consequential damages incurred because of the loss of the plaintiff's business. That claim was entirely separate from the plaintiff's claim against the defendant, even though it arose out of the same general facts,[119] and therefore could not be allowed under Rule 14.[120]

B. Allowing the Extra Claim

The cases allowing the extra claim begin with *Noland v. Graver Tank & Manufacturing Co.*[121] The plaintiff corporation brought an action for breach of contract against Noland because Noland had contracted to supply a 500,000 gallon water tank, but later failed to perform when it realized that it had mistakenly submitted an estimate for a 300,000 gallon tank. The plaintiff sued for $13,065—the increased cost incurred in obtaining the tank from a different source. Noland filed a third-party action against Graver Tank alleging that the bidding mistake had actually been made by the third-

116. *Id.*
117. C.W. Humphrey Co. v. Security Alum. Co., 31 F.R.D. 41 (E.D. Mich. 1962).
118. *Id.* at 44.
119. In neither case was there any discussion of the possible existence of an independent basis of jurisdiction over the additional claim.
120. *See also* Gebhardt v. Edgar, 251 F. Supp. 678, 680-81 (W.D. Pa. 1966) (in a wrongful death action, the defendant filed a third party action; the claim for indemnity was allowed, but the claim for the defendant's own damages was disallowed).
121. 301 F.2d 43 (4th Cir. 1962). *See also* Ruckman & Hansen, Inc. v. Contracting & Material Co., 328 F.2d 744 (7th Cir. 1964) (indemnity claim for $19,000; additional claim by the defendant against the third party for $10,000 allowed under Rule 14(a) as arising from a single group of operative facts). *Cf.* Nortown Steel Supply Co., v. Northern Ind. Steel Supply Co., 315 F.2d 789 (8th Cir. 1963) (extra claim for profits by defendant against third party allowed without discussion of the jurisdictional issue; remanded for determination of jurisdiction).

party defendant. Noland sought to recover not only any amount that it would have to pay to the plaintiff, but also the $4,000 profit that it would have made on the original transaction with the plaintiff.[122] The trial court awarded the plaintiff $13,065 and indemnified the defendant by the same amount. The trial court refused, however, to grant the defendant the additional $4,000 from the third-party defendant.[123]

On appeal, the third-party defendant conceded that the additional claim for the profit was not complicated, it would not have been particularly burdensome for the court to determine the issue, hearing that claim would not have prolonged the litigation, and the facts were basically the same as those presented in the impleader claim.[124] The court recognized that there might be situations where independent claims between a defendant and a third party, even though growing out of the same transaction and involving the right to an indemnity claim, could not easily be litigated without serious complications. Nevertheless, the Fourth Circuit's conclusion was that Rule 14 should be construed broadly and flexibly so as to permit the court to exercise its discretion to hear the claim.[125] The significant aspects of this case are: (1) the court relied on Rule 14 only;[126] (2) the court emphasized that the third-party defendant had already been made a party to the action;[127] (3) the court held that the trial court had discretion;[128] (4) the court noted that the additional claim was appropriate because of the simplicity of handling it;[129] (5) in cases where it would not be particularly easy to handle the additional claim, a court should be reluctant to accept the claim;[130] and (6) since there was recovery on the basic indemnity claim, the Fourth Circuit did not have to consider whether a defendant could recover on the additional claim if recovery on the basic indemnity claim was denied.[131]

The other leading case allowing additional recovery on a third-party claim is *Schwab v. Erie Lackawanna Railroad Co.*[132] As a result of a train-truck collision in Pennsylvania, an injured railroad

122. 301 F.2d at 46.
123. *Id.*
124. *Id.* at 49-50.
125. *Id.* at 50.
126. *Id.* at 49.
127. *Id.*
128. *Id.* at 50.
129. *Id.*
130. *Id.*
131. *Id.*
132. 438 F.2d 62 (3d Cir. 1971). *See also* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 773-75 (1972); 46 N.Y.U. L. REV. 634 (1971); 50 TEX. L. REV. 537 (1972). *See* Annot., 12 A.L.R. Fed. 877 (1972).

employee sued his employer under the Federal Employers Liability Act (FELA). The railroad named the trucking company that owned the truck as a third-party defendant, seeking indemnification under Rule 14. The railroad also made a separate claim for damages to the train in the amount of $5,041.[133] The third-party defendant moved to dismiss the claim for train damage, arguing that there was no diverse citizenship or federal question. The trial court treated the claim as one involving pendent jurisdiction and exercised its discretion to dismiss the claim.[134]

The trial court suggested that the railroad was trying to attach a pendent claim for the railroad damage to its claim for indemnity, which was ancillary to the original FELA claim of the plaintiff.[135] The court concluded that fairness to the parties would not be served by allowing the additional claim. It particularly feared that in view of the different standards of proof of the FELA and the common law, allowing the extra claim for liability could damage the plaintiff's claim.

On an interlocutory appeal, the Third Circuit reviewed *Noland*, but was unable to find any other decision in which a court had squarely accepted the proposition that Rule 14 applied to claims for anything other than indemnity:

> Although we are sympathetic with much of the rationale in *Noland* and find the result therein desirable, we too must reject the view that Rule 14 [in and of itself] permits recovery of damages in excess of or different from that sought by the original plaintiff in his main claim.[136]

Although the Third Circuit rejected the reasoning of *Noland*, it did not reject the *Noland* result. The court was convinced that "both as a matter of policy and of logic, Erie should be permitted to assert its separate claim . . . . assuming that the interests of judicial economy, convenience, and fairness to the parties would be served."[137] The court found a basis for its conclusion in Rule 18(a), as amended in 1966.[138] That amendment allows a party asserting a third-party claim to join "as many claims . . . as he has against an opposing party." The Third Circuit reasoned that this amendment was intended to permit the inclusion of claims like Erie's. Yet the court recognized that there must still be a jurisdictional basis for the additional claim.[139] If a claim is totally unrelated to the indem-

133. 438 F.2d at 64.
134. *Id.* at 63.
135. Schwab v. Erie Lackawanna R.R. Co., 48 F.R.D. 442 (W.D. Pa. 1970). The court pungently suggested: "Once the camel gets its nose under the tent, we would have to make room for the entire animal, including its pendent fleas." *Id.* at 444.
136. 438 F.2d 62, 68 (3d Cir. 1971).
137. *Id.* at 68.
138. *Id.*
139. *Id.*

nity claim, there must be an independent jurisdictional basis; otherwise the claim would be improperly brought in federal court. If, however, the factual relationship between the additional claim and the basic third-party claim is close, the court argued that the additional claim should come within the ancillary jurisdiction of the court in the same fashion as a compulsory counterclaim.[140] The Third Circuit concluded that the railroad's separate claim survived, whether it was treated as ancillary to the main claim or as ancillary to the third-party claim.[141] The Court concluded that Rule 14(a) read in conjunction with Rule 18(a) gave the defendant a proper procedural route for asserting its affirmative claim for damages. Since the claims were related, no independent basis of jurisdiction was required to hear the additional $5,041 claim. While the court would have preferred express language in an amended Rule allowing this additional claim under the same circumstances as a compulsory counderclaim,[142] it believed the same goal had been accomplished by the amendment to Rule 18(a).

Even if ancillary jurisdiction supports the additional claim, a number of questions remain. First, if there is jurisdiction, must the court hear the additional claim, or does it have the inherent discretion not to accept the claim? Second, if it does accept the claim, either mandatorily or voluntarily, may it order a separate trial under Rule 42 to guard against jury prejudice or confusion? Third, if the additional claim does fit within ancillary jurisdiction by its relation to the other claims, does the failure of the defendant to raise that claim constitute splitting a cause of action, just as the failure to raise a compulsory counterclaim would? *Schwab* indicated that the trial court had no discretion and had to hear the additional claim.[143] Such a decision ties the hands of the trial court and unreasonable restricts its flexibility. The *Noland* court, on the other hand, recognized the discretionary power of the courts.[144] The *Schwab* court, however, did emphasize the court's power to order separate trials,[145] thus eliminating the concern over the likelihood of jury concusion in treating divergent legal theories of relief.

140. *Id.* at 68-71, relying principally on the comments of Professor Wright at the 1966 Judicial Conference of the Third Circuit. *See* 42 F.R.D. 437, 560 (1968). *See also* Wright, *Proposed Changes in Federal Civil Procedure*, 35 F.R.D. 317, 335 (1964).

141. *Id.* at 70. For a case emphasizing the requirement of a valid third-party complaint for indemnity to support an additional third-party claim, see Donaldson v. United States Steel, 53 F.R.D. 228 (W.D. Pa. 1971).

142. For another supporter of an amendment in the rule to permit such an additional claim, see Fraser, 33 F.R.D. 27, *supra* note 101, at 39.

143. 438 F.2d at 71-72.

144. 301 F.2d at 51.

145. Schwab v. Erie Lackawanna R.R. Co., 438 F.2d 62, 72 (1971).

Should the court's analysis differ if the original claim is based on an exclusive federal statute and not on diversity? That situation was presented to the Ninth Circuit in *United States v. United Pacific Insurance Co.*[146] The plaintiff had furnished equipment to the Discount Company for work performed under a contract with the United States Department of Agriculture. During construction, Discount failed to carry out its obligations and its surety, United Pacific Insurance, was forced to assume control of the project. Pursuant to federal statute the United States brought an action for the benefit of the plaintiff Payne against United Pacific.[147] When the defendant learned that the Discount Company and its principal officers were transferring assets, United Pacific brought a third-party action against them, requesting specific performance of the indemnity agreement, an injunction against the transfer of any assets, and judgment against the third-party defendants for any amounts found owed by the defendant to the plaintiff.[148]

Prior to trial the defendant United Pacific settled with the plaintiff for $2,162 and completed the construction project at a cost of $145,000. Thus United Pacific had liquidated its claims against the third parties, and its suit for specific performance of the indemnity agreement became a suit for damages. The trial court held that the indemnity agreement was valid and awarded United Pacific $145,777 and attorney's fees.[149] The Ninth Circuit reversed.[150]

The Ninth Circuit found that the plaintiff's original claim was properly in federal court by virtue of the federal statute, while the third-party indemnification claim for $2162 was based strictly on ancillary jurisdiction since both the main claim and the impleader involved the same facts and arose out of the same transaction.[151]

No decision, however, had expanded the concept of ancillary jurisdiction broadly enough to cover the additional claims. The *Noland* court had emphasized that the addition of the $4,000 claim would involve substantially the same facts, would not complicate or prolong the action, and would have a close nexus to the principal claim.[152] But in *United Pacific* the claim for $145,000 would involve different facts from those in the $2,000 claim, prolong the litigation, and complicate the proceedings. Even though the claim arose from the same background as the construction contracts, it

146. 472 F.2d 792 (9th Cir.), *cert. denied*, 411 U.S. 982 (1973).
147. *Id.* at 792-93.
148. *Id.* at 793.
149. *Id.*
150. *Id.*
151. The court recognized that the settlement of the original claim prior to trial did not terminate the power of the trial court to decide the ancillary third-party claims. *Id.* at 794 n.4. *See* Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).
152. 301 F.2d at 50.

did not bear a close connection to the primary claim. In *Schwab*, the court had relied on Rule 18(a), since the claims were factually and logically related and there was a strong nexus between the principal and the disputed claim. Without close ties between the additional claim and the original suit,[153] the claim for specific performance of the indemnity agreement, which had become essentially a suit for $145,000 in damages, "can hardly be considered to have arisen out of the same transaction as the original $2,000 suit,"[154] nor could it be described as auxiliary or subordinate. The mere fact that it came from the same operative core of facts was not a satisfactory connection. The Ninth Circuit rejected "the suggestion that a federal court can assume jurisdiction over the claim for total indemnification merely because it is ancillary to a proper ancillary claim for liability-over."[155] Although the original claim in United Pacific rested on a federal statute, that difference did not demand a different result.[156] It was the ancillary claim, not the ju-

153. The Ninth Circuit emphasized that, in contrast to the decision of the Third Circuit in Schwab, the additional claim should be allowed only if it was ancillary to the principal claim, and not if it was merely ancillary to the ancillary third-party claim. *Id.* at 795 n.9.

154. *Id.* at 795-96. *Accord*, United States Fidelity & Guar. Co. v. American State Bank, 372 F.2d 449 (10th Cir. 1967) (primary claim involving a payment bond was based on the Miller Act; third-party complaint rested on a separate performance bond from the same background).

155. *Id.* at 796.

156. The federal tax statutes provide the context for an intervesting problem when the defendant asserts an additional claim against the third-party. For example, in Stiber v. United States, 60 F.R.D. 668 (E.D. Pa. 1973), the plaintiff brought an action to recover $80.95 from the Internal Revenue Service, alleging it had been improperly assessed a penalty of $26,748.37 for failure to collect and pay Social Security withholding taxes due from a corporation. The Government filed a counterclaim for $26,667.42, the balance of the assessment. The Government also filed a third-party complaint, joining two other individuals as third-party defendants on the grounds that they might be liable to the Government for all or part of the plaintiff's claim since they had served as the general manager and treasurer of the corporation. In other words, if the plaintiff prevails, the third-party may be liable to the Government for part of the $80 claim. The court agreed that if the plaintiff did not recover the $80.95 from the defendant, the defendant could not recover either the $80.95 or the additional amount from the third-party. *Id.* at 670. *See* note 110 *supra*. However, the difficult question was whether the government could proceed against the third-party defendant to collect the $26,667 if it were allowed to proceed to collect the $80.

The *Stiber* court's analysis paralleled that of *Schwab*. Rule 14 did not permit recovery of damages in excess of those sought by the original claim. However, Rule 14 must be read in the light of Rule 18. The claim, if treated as ancillary, need not have any independent basis of jurisdiction. The court emphasized that it was "not permitting an entirely separate and independent claim to be maintained against a third party defendant under Rule 14." *Id.* at 676. *But see* United States v. Joe Grasso & Son, Inc. 380 F. 2d 749 (5th Cir.

risdiction granting claim, that failed the test of limited federal jurisdiction.

C. Summary

Before an additional claim by a defendant against a third party can be considered by a federal court, there must be a valid third-party claim under Rule 14(a). The impleader must initally seek recovery from the third party on an indemnity, contribution, or related theory. Rule 14 itself does not address the question of when additional claims may be considered. With the exception of *Noland*, courts have adopted the view that Rule 14 by itself is not broad enough to allow the additional claim. Unless an expansive view is taken of Rule 14 and of a federal court's flexibility in determining ancillary jurisdiction, the *Noland* approach is not justified. The draftsmen of the Federal Rules, during one of their periodic reforms, could easily have incorporated the *Noland* approach in Rule 14, as some courts have suggested. But even if such a provision were included, jurisdiction over the additional claim would still have to satisfy the mandates of article III. As pointed out in *Kroger*, a provision in the Federal Rules granting jurisdiction is only as broad as article III allows. Therefore, adding the additional phrase would not necessarily solve the problem.

Rule 18(a) permits a defendant with a valid third-party claim to join with it as many other claims as he has. Rule 18(a), however, does not answer the constitutional question of jurisdiction. Both commentators and courts have suggested that the additional claim should be allowed under Rule 18(a) only if it qualifies under a test

---

1967). The plaintiff's claim for $80 was identical to the government's claim for $80 and was a proper third-party claim under Rule 14.

The court focused on three factors in deciding that the third-party claim for $26,667 should be allowed under Rule 18(a). Note the advisory note to FED. R. CIV. P. 18(a) at 39 F.R.D. 86-87 (1966). First, Rule 14 is "remedial and should be liberally construed" to avoid multiple actions as far as possible. The alternative, if the third parties were not joined and the plaintiff prevailed, would be for the government to bring a separate lawsuit against these other individuals. Second, the claims derived from a single group of operative facts, and the evidence for the additional third-party complaint would be the same as for plaintiff's complaint. Third, since the plaintiff was the comptroller of the corporation and the third-party defendants were the general manager and treasurer, the court should allow third party actions against these responsible officers.

See also McGee v. United States, 62 F.R.D. 205 (E.D. Pa. 1973); Abrams v. United States, 52 F.R.D. 578 (S.D. W.Va. 1972); Crompton-Richmond Co., Factors v United States, 273 F. Supp. 219 (S.D.N.Y. 1967). *Cf.* S.E. Mortgage Co. v. Mullens, 514 F.2d 747 (5th Cir. 1975) (an entirely separate and independent claim cannot be maintained against a third party under rule 14 even though it may arise out of the same general facts as the primary jurisdiction-granting complaint). *See also* 3 MOORE'S, *supra* note 76, ¶ 14.07[1], at 208-09.

analogous to the one employed for counterclaims.[157] If the additional claim can satisfy the standard for a compulsory counterclaim, it should be allowed under ancillary jurisdiction. If, however, it is more like a permissive counterclaim under Rule 13(b), then, like a permissive counterclaim, it must be supported by an independent basis of jurisdiction. *Schwab* is the best example of the "compulsory" additional claim: the claim involved the same facts and the same witnesses, it would not greatly complicate the work of the court, and a different approach could result in split-

157. *See* note 140 & accompanying text *supra*. Another recent case drawing an analogy to compulsory and permissive counterclaims is Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F. 2d 1200 (5th Cir. 1975). Nishimatsu had subcontracted the engineering studies on a railroad project. Payments to Nishimatsu were to be made by means of a letter of credit obtained from the Houston National Bank by the contractor and issued in favor of Nishimatsu. Nishimatsu brought this action against the bank because of its refusal to honor drafts submitted periodically against the letter of credit. The bank brought a third-party action against the corporation and the individual who had arranged the entire construction contract, alleging that under an agreement executed in connection with the letter of credit the corporation and the individual were obligated to reimburse the bank for any sums paid to Nishimatsu pursuant to the letter of credit. The bank also joined a claim against the corporation and the individual on the promissory note. The third-party defendants did not file any responsive pleadings. Subsequently, the plaintiff and the defendant settled the controversy for $17,5000. After several continuances, the bank's motion for a default judgment against the third parties was granted. *Id.* at 1204. The court held a hearing on damages and entered judgment for $82,000.

The Fifth Circuit first agreed that there was ancillary jurisdiction over the impleader action with respect to the contract executed in connection with the letter of credit. However, the claim against the third parties on the promissory note had to be treated differently. The court noted that although Rule 18(a) permits these claims to be joined, a federal jurisdictional basis must exist. Although it apparently would have been possible to establish diversity of citizenship between the defendant and the third-parties (unlike *Noland* and *Schwab*), nothing in the record expressly indicated diversity.

The *Nishimatsu* court stated that the other means of establishing jurisdiction is for the claim to fall within the ancillary jurisdiction of the court. "A claim is ancillary 'when it bears a logical relationship to the aggregate core of operative facts which make up the main claim.' " *Id.* at 1205. The additional claim did not bear a logical relationship to the main claim or to the impleader claim. Without using the terminology, the court drew an analogy to compulsory and permissive counterclaims. Since the bank's claim on the promissory note was closer to a permissive counterclaim, there must be an independent jurisdictional basis, whereas in *Schwab* and *Noland* the additional claim was closer to a compulsory counterclaim and therefore was subject to the ancillary jurisdiction of the court. *But see* North Am. Corp. v. Halliburton Co., 71 F.R.D. 521 (W.D. Okla. 1976) (following a counterclaim by the defendant, the plaintiff filed a Rule 14(a) claim for indemnification and a separate contractual claim against a party brought in by the plaintiff under rule 14(b) as a third party; the claim was allowed under Rule 18(a) with little attention given to the compulsory nature of it).

ting a cause of action. On the other hand, *United Pacific* had additional claims that went far beyond the request for indemnity: the claims raised additional issues, had limited connection with each other, and would have aggravated the work of the court.[158]

Once a court determines it has the jurisdiction to hear an additional third-party claim, it may then question whether it has the discretion not to hear the claim.[159] Both the *Schwab* and *Noland* decisions suggest that a court has no such discretion. This rule fails to allow a court to use its power to break off an issue that technically falls within the rules, but serves only to complicate the federal proceedings. In exercising its discretion, a court should consider whether there is an alternative forum, whether the defense of res judicata might be appropriate, and whether other problems would result from dismissing the lawsuit. Even if the court retains the additional claim, it may wish to conduct separate trials and sever the additional claim under Rule 42, either because the facts are not that closely related or, as the trial court suggested in *Schwab*, because there are different theories involved.[160]

The Supreme Court's emphasis in *Kroger* that the mere fact that a joinder procedure is permitted under a procedural rule does not make it constitutional suggests that *Schwab* and *Noland* went too far in allowing an additional third-party claim and particularly in denying a trial court its discretion to hear *vel non* additional third-party claims. On the other hand, nothing in the language of the Court suggests that an additional "compulsory" claim is not permitted by article III. This situation is similar to the compulsory counterclaim, except that it involves a closely related claim by the defendant going against the third-party, instead of back against the plaintiff. The dangers the *Kroger* court saw in allowing one party to proceed against a party it could not have sued directly are not present in the additional third-party claim situation because the third party is already in the lawsuit on a valid claim. Yet the Court did speak of an ancillary and dependent claim versus a new and independent claim. This distinction may suggest that the additional claim would not be allowed even though it comes from the same core of operative facts, because it is a new and independent claim. However, this argument could be made as to the basic indemnity claim under Rule 14, and the Court authorized that procedure. Therefore, although opposing arguments are available,

158. 472 F.2d at 795.

159. A case emphasizing the discretionary aspect of a court's decision to hear an additional claim by a defendant against a third-party defendant is Keister v. Laurel Mt. Dev. Corp. 70 F.R.D. 10, 13 (W.D. Pa. 1976).

160. Supporting the use under Rule 42(b) of separate trials in third-party actions is United States v. Yellow Cab Co., 340 U.S. 543, 556 (1951). *See generally* WRIGHT, *supra* note 10, §§ 2388-89.

Kroger does not automatically compel the reversal of cases such as *Schwab*. It simply makes their extension less likely.[161]

V. THIRD-PARTY DEFENDANT v. THIRD-PARTY PLAINTIFF

In contrast to the preceding section in which the Federal Rule was silent, the fourth sentence of Rule 14(a) allows,[162] and indeed requires, a third-party defendant to assert his counterclaims against the third-party plaintiff "as provided in Rule 13." By tying into Rule 13, this provision adopts the compulsory/permissive distinction made in that rule. The large body of case law interpreting Rule 13 allows a court to hear a compulsory counterclaim under its ancillary jurisdiction, but requires an independent basis of jurisdiction before a court can hear a permissive counterclaim under Rule 13(b).[163] Thus, this approach applies when a third-party defendant files a counterclaim against the defendant and third-party defendant.

This distinction is demonstrated by the case of *Weber v. Weber*[164] where, following a fatal automobile accident in Philadelphia, a diversity action was brought by the executor of the decedent. The defendant brought a third-party action against another participant in the collision. The third-party defendant filed a counterclaim against the third-party plaintiff, seeking damages for his own personal injuries, for expenses incurred in caring for his injured wife, and for loss of consortium.[165] In refusing to dismiss the counterclaim against the defendant, the court rejected the view that the Rule 13(a) provision for compulsory counterclaims had to be interpreted so narrowly that the "same transaction" would be limited to the third-party complaint for contribution.[166] Instead, the court adopted the broader and preferred interpretation of Rule 13(a) that a counterclaim is compulsory if it bears a logical relationship to an opposing claim and arises out of the same basic con-

161. *See, e.g.*, Skinner v. American Oil Co., 470 F. Supp. 229, 231 (S.D. Iowa 1978): "recent Supreme Court pronouncements dictate a conservative approach discouraging the exercise of pendent jurisdiction despite the loss in judicial economy.. . . ." *Id.*

162. "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 counter-claims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13." FED. R. CIV. P. 14(a).

163. *See* WRIGHT, *supra* note 10, § 1414, at 69-81; *id.* § 1423, at 119-23. Even though Rule 14(a) is drafted in mandatory language, courts retain the power to sever a compulsory counterclaim brought by a third-party defendant. *Id.* § 1456, at 302-03.

164. 44 F.R.D. 227 (E.D. Pa. 1968).

165. *Id.* at 228.

166. *Id.* at 230.

troversy between the parties.[167] Here the counterclaim, which was independent because it was for the third party's own damages, did contain many of the same basic factual issues; it was an offshoot of the basic controversy between the parties; and prosecution of the entire matter would aid in fairness, convenience, and judicial economy.[168] Additionally, the counterclaim should be deemed compulsory because if it were not allowed, subsequent consideration of the claim in another court conceivably would be barred by principles of collateral estoppel. Finally, and perhaps inconsistently, the court emphasized that although Rule 13(a) does not require the filing of a counterclaim when there is an existing suit pending in another court, that exception is only an option available to the counterclaimant.[169] In this case, the counterclaimant had elected to bring the claim into federal court, rather than to have it heard in state court where an action was pending. Therefore, although the claim by the third party against the defendant ostensibly satisfied the test of a compulsory counterclaim, it was not truly compulsory because the third party retained the option.

This settled interpretation of the fourth sentence of Rule 14(a) will not be affected by the Court's decision in *Kroger*. Both the majority and the dissent in *Kroger* emphasized that compulsory counterclaims are one instance in which ancillary jurisdiction undoubtedly applies. Even Rule 82 does not interfere with this conclusion since compulsory counterclaims under ancillary jurisdiction have a basis dating back to the *Moore* decision in 1926.

If the counterclaimant is the third-party defendant rather than the defendant, the action may be somewhat further removed from the primary claim, *i.e.*, the counterclaim by the third party may relate more to the third-party claim than to the original complaint filed by the plaintiff. However, underlying it all must be the same basic transaction. If the claim is too unrelated to the main claim, the court does retain the power—in examining judicial economy, convenience, and fairness—to rule that a particular counterclaim by the third party is not compulsory but under those elusive standards is actually permissive. If treated as permissive, the counterclaim may still be based on an independent basis of jurisdiction and thus in theory can be heard as an element of the original action. This potential confusion is unlikely to be an actual problem, for the trial court retains the power under Rule 42(b) to sever claims to avoid prejudice or to achieve judicial convenience or economy. Finally, even if the claim by the third-party defendant

167. *See* Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631 (3d Cir. 1961).
168. 44 F.R.D. at 229-30.
169. *Id.* at 237.

against the defendant is compulsory, the court has the same power to handle that claim separately.[170]

VI. THIRD-PARTY DEFENDANT v. PLAINTIFF

The sixth sentence of Rule 14(a) permits the third-party defendant to 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."[171] This language closely parallels the compulsory counterclaim language of Rule 13(a). However, despite that similarity, the rule is not compulsory—it is specifically cast in permissive terms, allowing the third-party defendant to assert it if he wishes. The important question is whether such a claim by the third-party defendant back against the plaintiff[172] arises under ancillary jurisdiction or whether an independent basis of jurisdiction is required. A third-party claim which would be permissive if it arose under Rule 13 is authorized under Rule 18(a) since it is a claim by the third party against an opposing party. In that case Rule 82 clearly requires that there be an independent basis of jurisdiction. However, it is not as clear whether ancillary jurisdiction covers a claim by a third party back against the plaintiff that falls within the language of the sixth sentence of Rule 14(a), and thus within the Rule 13 definition of a compulsory counterclaim.

The early cases refused to allow a claim by the third-party back against the plaintiff.[173] The concern was that where both the third party and the plaintiff were citizens of the same state, permitting this type of claim could promote collusion. For instance, an original defendant could enter into collusive agreement with a third party and bring in that third party who could then claim back against the original plaintiff in a forum where the third party could not have initiated suit for lack of diversity. Since the plaintiff could not go directly against the third party, the third party was not permitted to bring this claim back against the plaintiff under the doctrine of ancillary jurisdiction.

A 1948 amendment to Rule 14 made a significant change in the

170. *See* note 99 & accompanying text *supra*.

171. "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." FED. R. CIV. P. 14(a).

172. The courts have not been consistent in the terminology applied to such a claim, for it is neither a cross-claim nor a counterclaim. *See* WRIGHT, *supra* note 10, § 1444, at 234; *id.* § 1458 at 310. *See, e.g.*, United States v. Raefsky, 19 F.R.D. 355 (E.D. Pa. 1956). Regardless of the language used by the court, in this article the claim will be described as "a claim by the third-party back against the plaintiff."

173. *See* Morris, Wheeler & Co., v. Rust Eng'r Co., 4 F.R.D. 307 (D. Del. 1945).

right of a third party to file a claim back against a plaintiff. As the first case interpreting the new rule indicated,[174] the initial question to be asked is whether the requirements of the sixth sentence are satisfied. That is, does the claim by the third party against the plaintiff arise out of "the transaction or occurrence that is the subject matter of the plaintiff's claim against the [defendant]?"[175] Frequently attempts to use the sixth sentence have failed on this threshold question. For example, in *Brown v. First National Bank*,[176] the claim by the plaintiff against the defendant bank was for certain sums paid out of an escrow account. The bank impleaded the third party to whom the sums had been paid. The third party filed a claim against the plaintiff asking for a complete accounting of a well-drilling partnership formerly existing between the plaintiff and the third party. According to the third party, the underlying cause of the litigation was not the escrow agreement at the bank, but rather the breakup of the partnership of which the escrow agreement was only a part.[177]

The court, however, concluded that the plaintiff's claim against a defendant bank was not based on the partnership, but was based on an escrow agreement between the partnership and the bank.[178] Thus, the original claim was limited to the escrow agreement. Although the court recognized that the rules were meant to expedite the handling of claims, the language in the sixth sentence of Rule 14 had been included to facilitate the joining of claims that had similar or identical questions of fact. The rule was not designed to enable two lawsuits to be converted into one, which would have occurred if the claim back against the plaintiff for the accounting had been allowed. The mere identity of parties in the lawsuit did not constitute a sufficient basis for allowing such a claim.

Another case illustrative of the scope of the sixth sentence is *Finkel v. United States*,[179] a federal tax case in which the plaintiff sued for cancellation of a penalty tax assessment. The Government entered a third-party complaint against an individual for payment of essentially the same assessment, asserting that the individual was sufficiently in control of a corporation to be found liable to the Government for tax status. The third party filed an action back against the plaintiff, alleging an indemnity agreement covering any taxes he might pay. Although the court would have been willing to adopt the principle of ancillary jurisdiction in this

174. Bernstein v. N. V. Nederlandsche-Amerikaansche Sttomvaart-Maatschappij, 9 F.R.D. 557 (S.D.N.Y. 1949).
175. *Id.* at 558.
176. 14 F.R.D. 339 (E.D. Okla. 1953).
177. *Id.* at 340.
178. *Id.* at 340-41.
179. 385 F. Supp. 333 (S.D.N.Y. 1974).

instance,[180] it found that the sixth sentence, the threshold barrier, was not satisfied.[181] The court required a logical relationship between claims, though not an absolute identity of factual background.[182] The logical relationship did not exist because the claims of the third party poses issues irrelevant to the one presented in the original claim. The main dispute concerned who was in sufficient control of the corporation so as to be liable to the government, whereas the third-party claims centered on the alleged fraud. The third-party claims centered on the alleged fraud and misrepresentation when the indemnification agreement was signed.[183] Additionally, the court mentioned that there would be no prejudice to the third party since a state action on these claims was already pending. This latter reason by itself would justify the exercise of discretion in refusing to take the case even if the sixth sentence of Rule 114(a) were satisfied.

In contrast with these cases, some courts have concluded that the claim back by the third party is appropriate under the rule.[184] The leading case interpreting the sixth sentence of Rule 14(a) to allow the claim back by the third-party is *Heintz & Co. v. Provident Tradesmens Bank & Trust Co.*[185] Kerr, the office manager of a branch of the plaintiff corporation, had opened a bank account in the plaintiff's name. The plaintiff sued the bank, alleging the bank had negligently permitted the account to be opened in the company's name and had permitted Kerr to withdraw checks without the plaintiff's authorization. The bank sought liability over against Kerr. Kerr then filed a claim for $5,199 back against the plaintiff under the sixth sentence of rule 14(a) for services and materials furnished to the plaintiff in connection with the establishment of the branch office.[186]

The Pennsylvania federal court recognized that it had two questions to resolve: (1) whether the claim came within the sixth sentence of Rule 14(a) and (2) whether an independent jurisdictional basis was needed for a claim that did come within the sixth sentence. The court relied upon the Supreme Court's opinion in *Moore* which emphasized that "transaction" is a word of flexible

180. The indemnity agreement did not involve a federal question, and since both the plaintiff and the third party were citizens of New York, there was no diversity jurisdiction. *Id.* at 335.
181. *Id.* at 336.
182. *Id.*
183. For another case where the sixth sentence was not satisfied, see United States v. P. J. Walker Constr. Co., 24 F.R.D. 136 (S.D. Cal. 1959).
184. *E.g.*, Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486 (D. Neb. 1965).
185. 30 F.R.D. 171 (E.D. Pa. 1962).
186. *Id.* at 172.

meaning which required that the claims of the parties have a logical relationship and required that the court look to the factual issues, the nature of the controversy and considerations of fairness, convenience, and justice.[187] In contrast to the *Brown* decision, the Pennsylvania court here concluded that the Kerr claims arose out of the transaction from which the plaintiff's claim originated.[188] Rather than limit the subject matter of the plaintiff's claim to the checking account in the plaintiff's name, which would have been similar to the escrow account in *Brown*, the court concluded that the crucial transaction was the establishment of a branch office and Kerr's appointment and conduct as manager of that branch office.[189] Properly viewed, the transaction was the entire relationship between the plaintiff and Kerr, specifically the services rendered by Kerr and the payment received by him. Therefore, the answer to the first question was yes, the claim back did come within the sixth sentence of Rule 14(a).[190]

Even though a particular claim back by the third party against the plaintiff does fall within the sixth sentence of Rule 14, the courts have recognized their discretionary power to dismiss the claim under appropriate circumstances.[191] Moreoever, a court is still empowered by Rule 42 to hold a separte hearing for a particu-

187. *Id.* at 172-73. *See* text accompanying notes 27-33 *supra.*

188. 30 F.R.D. at 172.

189. *Id.*

190. For material on jurisdiction, see the material accompanying notes 193-208 *infra.*

191. For example, in Stahl v. Ohio River Co., 424 F.2d 52 (3d Cir. 1970) plaintiffs brought an action based on diversity for personal injuries suffered in a collision between their outboard motor boat and a barge owned by defendant. The defendant impleaded the company that operated the barge. Towing company filed a claim against the plaintiff, seeking contribution from the plaintiff for any sum adjudged in favor of the defendant and against the third-party. The court refused to allow such a claim against the plaintiff for contribution because the claim was not mature under relevant state law or Rule 13(e). It also refused to allow the claim under Rule 14; the definition of the claim had to be treated the same under Rule 13 and 14 because the language of Rule 13(a) and 14(a)(6) is almost identical. However, there is a difference the court did not point out: Rule 13(a) ties into Rule 14(e) which refers to a matured claim, while there is no such "mature" language in Rule 14. On the other hand, the basic Rule 14(a) provision refers to a person "who is or may be liable to the defendant." In the same fashion where the third party brings in a fourth party, the language is a party "who is or may be liable;" instead, the sixth sentence refers to "any claim against the plaintiff."

Therefore the difference in the language allowed the court to hold that the sixth sentence of Rule 14(a) can refer only to a matured claim; in this instance there was not yet a matured claim since nothing had been paid by the third party. Obviously this rather forced reading is contrary to convenience, efficiency, and judicial economy. Apparently there was no question concerning subject matter jurisdiction since the amount in controversy was more than $10,000 and it appears that the plaintiff and the third party were of di-

lar claim to promote efficiency or to prevent prejudice, even if the court concludes that the claim falls within the ambit of the rule and exercises its discretion to accept the claim.[192]

The second question that must be answered is that of jurisdiction.[193] Even if the requirements of Rule 14(a) are met, the court must have jurisdiction over the claim by the third party back against the plaintiff. If there is no independent subject matter jurisdiction,[194] the question is whether a claim that is proper under

---

verse states. The court may simply have been using its inherent discretion not to accept the claim even though subject matter jurisdiction did exist.

192. *See* note 160 & accompanying text *supra*. An interesting example of the discretionary aspect of claims back against the plaintiff is found in the admiralty area. In Cavalerri v. Isthmian Lines, Inc., 189 F. Supp. 525 (S.D.N.Y. 1960), *rehearing denied*, 190 F. Supp. 801 (1961), a longshoreman brought an action against a ship owner for injuries, and the ship owner impleaded the stevedoring company that had employed the longshoreman for indemnity in the event that it was held liable to the defendant, arguing that this liability would have been caused by the negligence of the plaintiff himself. The trial court rejected the claim because there were no conceivable facts upon which the third party defendant could recover. In addition, the doctrine of comparative negligence in admiralty cases persuaded the court that the third party should not be able to assert the claims back against the plaintiff. The claim obviously came within the sixth sentence of Rule 14(a) and there was federal jurisdiction as an admiralty claim, but the court exercised its discretion.

However, the identical issue was decided differently the following year in the same court. Malfitano v. King Line Ltd., 198 F. Supp. 399 (S.D.N.Y. 1961). Again the third party stevedoring company brought a claim against the plaintiff longshoreman alleging that the plaintiff in his capacity as a hatch boss was under a duty to perform his work not to cast liability upon his employer; that if the third party were judged liable, the liability would have been due to the plaintiff's negligence. The court emphasized the goal of modern pleading to try all claims in one action and to avoid separate piecemeal trials. Since all interested parties were before the court, earlier court, the judge was unwilling to be a "bold prophet" and predict with certainty the future law in the field of maritime negligence.

The dispute was resolved by the Second Circuit which dismissed the claim by the stevedoring company back against the plaintiff longshoreman. Nicroli v. Den Norske Afrika-OG Australieninie Wilhelmsens Dampskibs-Aktieselskab, 332 F.2d 651 (2d Cir. 1964). Permitting this burden to be passed back to the plaintiff would improperly place the occupational risks on the longshoreman and undermine the admiralty rule of comparative negligence. For this public policy reason the claim would not be allowed. Subsequent decisions have followed this determination in not allowing these particular claims. Arico v. Cie. De Navegacion Transoceanique, 409 F.2d 1002 (2d Cir. 1969); McLaughlin v. Trelleborgs Angfaryges A/B, 408 F.2d 1134 (2d Cir. 1969), *cert. denied*, 395 U.S. 946 (1969). Neither the law nor public policy authorizes recovery by the stevedoring company against the longshoreman.

193. On the question of jurisdiction over this claim back against the plaintiff, see 3 MOORE'S, *supra* note 74, § 14.27[2], at 14-574 to -577 (supporting ancillary jurisdiction and reversing his earlier position); WRIGHT, *supra* note 10, § 1444, at 232-34; *id.* § 1458, at 309-11 (supporting ancillary jurisdiction).

194. *E.g.*, Borden Co. v. Sylk, 42 F.R.D. 429 (E.D. Pa. 1967) (federal jurisdiction

Rule 14(a) falls within the ambit of ancillary jurisdiction. The courts are sharply divided,[195] and *Kroger* gives no guidance. Those opinions rest on two reasons: first, the mutuality argument that because the plaintiff needs an independent basis of jurisdiction to proceed against the third party, the third party needs an independent basis to file a claim back against the plaintiff,[196] and second, Federal Rule 82 bars an interpretation of the procedural rules that would result in an expansion of jurisdiction.[197]

The leading case allowing the third-party claim back against the plaintiff as falling within ancillary jurisdiction is *Revere Copper & Brass, Inc. v. Aetna Casualty & Surety Co.*[198] Fuller was to supply materials for the construction of a manufacturing plant to be operated by Revere. Fuller and Aetna executed performance bonds of $14,000,000, obligating them to pay Revere any damages that would result if Fuller failed to perform the contract. Revere brought an action against Aetna on the surety bond in federal court alleging that Fuller had breached warranties, been negligent, made false representation, and failed to maintain a competent staff resulting in a loss to Revere of over $2,000,000.[199] Aetna filed a third-party complaint against Fuller, alleging that Fuller had agreed to idemnify Aetna for all losses sustained as a result of Aetna's suretyship. Fuller brought a claim back against Revere under rule 14(a) alleging that Revere had breached warranties, been negligent, made false representations, and been unjustly enriched by the amount of $1,328,000.[200] Since both the plaintiff and the third party were incorporated in Maryland, there was no diversity of citizenship.

Although the theoretical basis for ancillary jurisdiction is well settled, it is difficult to determine the exact criteria to detect the presence of ancillary jurisdiction.[201]

---

based upon the Clayton Act; the issue was whether the sixth sentence of Rule 14(a) was satisfied).

195. *See* WRIGHT, *supra* note 10, § 1458 (1971). *Compare* James King & Son, Inc. v. Indemnity Ins. Co. of N. Am., 178 F. Supp. 146 (D.C.N.Y. 1959) *with* James Talcott, Inc. v. Allahabod Bank Ltd., 444 F.2d 451 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971) *and* Testa v. Winquist, 451 F. Supp. 388 (D.C. 1978).

196. *E.g.*, Shverha v. Maryland Cas., 110 F. Supp. 173 (E.D. Pa. 1953). *See also* text accompanying note 210 *infra*.

197. *E.g.*, James King & Sons, Inc. v. Indemnity Ins. Co., 178 F. Supp. 146 (S.D.N.Y. 1959).

198. 426 F.2d 709 (5th Cir. 1970). *See* Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265, 276-82 (1971). *See also* Comment, 59 KY. L.J. 506 (1970); Note, 49 N.C. L. REV. 503 (1971); Comment, 45 N.Y.U. L. REV. 1303 (1970); Comment, 1970 WASH. U. L.Q. 511. *See* Annot., 12 A.L.R. Fed. 402 (1972).

199. 426 F.2d at 710.

200. *Id.* at 711.

201. *See* Moore v. New York Cotton Exch., 270 U.S. 593 (1926); Great Lakes Rubber

> "[A] claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate [is] the basis of both claims; or (2) that [the claim and the original aggregate of facts] activates additional legal rights in a party defendant that would otherwise remain dormant."[202]

One of the concerns of the Supreme Court in *Moore* was the Court's "need to provide complete relief to the counterclaiming defendant."[203] That need is equally important when the third party is involuntarily brought into federal court.

Fuller's claim arose out of the aggregate of operative facts forming the basis of plaintiff Revere's claims; the relationship between the main claim and Fuller's claim was beyond doubt. The construction contract was not completed on schedule. If Revere was not responsible for the delay, Fuller was at least guilty of breach of contract. An alternative for Fuller would have been to take the initiative in intervening and asserted its counterclaim against Revere free of any jurisdictional impediment.[204] Since Fuller was brought in involuntarily, he should still be able to bring his claim against the plaintiff. The court concluded that its interpretation of Rule 14(a) was not expanding ancillary jurisdiction but was simply providing opportunities involving the doctrine, which was established long before the adoption of the rule in 1938.[205]

Another frequently cited case holding that Rule 14(a) claims falls within ancillary jurisdiction is *Heintz & Co. v. Provident Tradesmen's Bank & Trust Co.*.[206] The court treated the third-party claim the same as a compulsory counterclaim: identical requirements as to the same transaction, the same evidence, the same factors of convenience and fairness.[207] The only difference is that a compulsory counterclaim must be pleaded, whereas the claim by the third party may be pleaded. To the court, this was a distinction without a difference, since both were valid ancillary claims. The Federal Rules have simply required one claim to be pleaded, while the other claim may be pleaded at the discretion of the party. Federal Rules do not make the claim ancillary—the case law does.

Corp. v. Herbert Cooper Co., 286 F.2d 631 (3d Cir. 1961). *See also* notes 27-55 *supra*.

202. 426 F.2d at 715.

203. *Id.*

204. FED. R. CIV. P. 24(a). *See* WRIGHT, *supra* note 10, § 75, at 373. *See also* Fraser, *Ancillary Jurisdiction of Federal Courts of Persons Whose Interest May Be Impared if Not Joined*, 62 F.R.D. 483 (1974); Goldberg, *supra* note 28, at 421-24. The impact of *Kroger* on ancillary jurisdiction over an intervening party under Rule 24 is examined in Omni Dev., Inc. v. Porter, 459 F. Supp. 930 (S.D. Fla. 1978).

205. 426 F.2d at 717.

206. 30 F.R.D. 171 (E.D. Pa. 1962). *See* notes 115-17 *supra*.

207. *Id.* at 174.

The court had no particular fear about collusion. Collusion is a possibility if a plaintiff tries to bring a claim against a third party—a plaintiff would need only to seek an original defendant who would cooperate. However, when the claim is brought by the third party, the third party cannot collude with the defendant since the plaintiff chooses the defendant. The third party has no means of assuring cooperation by the plaintiff in suing the correct defendant, and therefore collusion between the defendant and the third party is, if not impossible, very unlikely. The conclusion of the court is consistent with the basic aims of the Federal Rules, for it disposed of the entire controversy without violating Rule 82. The mere broadening of the content of a single federal action is not the same as the extension of federal power. The court was simply making possible a more complete adjudication of the issues in a single case through new procedural devices.[208]

It is in the area of a claim by the third-party back against the plaintiff that the impact of *Kroger* is most uncertain. This type of claim, like the claim in *Kroger*, is supported by a specific provision in Rule 14(a). That provision is limited to a claim whose requirements are similar in nature to those of a compulsory counterclaim. The courts must determine whether the third-party claim back against the plaintiff is closer to a compulsory counterclaim under Rule 13(a) and therefore within the ambit of ancillary jurisdiction, or closer to the plaintiff's claim against the third party as involved in *Kroger*, which does require an independent basis or jurisdiction.

One reason given for requiring independent subject matter jurisdiction in this situation is the risk of collusion. Yet the majority in *Kroger* by its discussion of collusion strongly suggests that it would not arise in a claim back against the plaintiff by the third party.[209] The claim in *Kroger* presents a greater risk of collusion because the plaintiff selects the defendant. In contrast, the risk of collusion is much less significant in the instance of a third-party claim back against the plaintiff because the third party, hoping to avoid the limits of federal jurisdiction, does not instruct a plaintiff to sue a particular defendant, who will implead a third party, who then files a claim under ancillary jurisdiction back against the plaintiff. For this reason, *Kroger* may not have a great deal of sig-

208. Another case accepting ancillary jurisdiction in this instance is Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) (dictum). *See also* L & E Co. v. United States, 351 F.2d 880 (9th Cir. 1965); Finkel v. United States, 385 F. Supp. 333 (S.D.N.Y. 1974); Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486 (D. Neb. 1965); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 9 F.R.D. 557 (S.D.N.Y. 1949).

209. *See* text accompanying notes 88 *supra*.

nificance in the area of third-party claims back against the plaintiff. The older cases required independent subject matter jurisdiction for such claims, reasoning that if it was required for claims by the plaintiff against the third party, it should also be required for third-party claims back against the plaintiff. This mutuality requirement was generally discarded previously to *Kroger*[210] and the opinion of the Court, which ignored the requirement, should result in the elimination of it, at least in this context.

If the reasoning of *Kroger* were to persuade a court in these situations, ancillary jurisdiction would be slowly narrowed. Such a development would be undesirable, particularly since the court retains the discretion to handle such claims separately or to refuse to hear them at all. The risk to the litigants is not great and the risk to the federal system, considered in the context of the federal policy of handling all claims in one action, is very small.

VII. PLAINTIFF v. THIRD-PARTY DEFENDANT

Assuming that there is a valid claim by the plaintiff against the defendant in federal court and that the defendant has correctly impleaded the third party, is the plaintiff then free to bring an action against the third party? The seventh sentence of Rule 14(a) clearly says yes, at least when the claim by the plaintiff against the third party arises out of the same transaction. It is in this area that the courts have had the greatest difficulty. Most of the courts before 1978 determined that, despite the language of the seventh sentence of Rule 14(a),[211] an independent basis for jurisdiction was required in addition to a claim arising out of the same transaction.[212] A handful of cases, principally those arising in the Eight Circuit, concluded that an independent basis of jurisdiction was not required because by being limited to the same transaction as required by the seventh sentence of Rule 14(a), the claim of the plaintiff against the third party by definition fell within the ambit of ancillary jurisdiction.[213] It was this dispute that the Supreme

210. *See* 3 MOORE'S, *supra* note 74, § 14.27[2], at 14-574 to -577.

211. "The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claim and cross-claims as provided in Rule 13." FED. R. CIV. P. 14(a).

212. *E.g.*, Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Johnson v. Better Materials Corp., 556 F.2d 131 (3d Cir. 1976); Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976); Kenrose Mfg. Co. v. Fred Whitaker Co. 512 F.2d 890 (4th Cir. 1972).

213. *E.g.*, Kroger v. Owen Equip. & Erection Co., 558 F. 2d 417 (8th Cir. 1977); Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D. Kan. 1975); Olson v. United States, 38 F.R.D. 489 (D. Neb. 1965). *See also* note 218 *infra*.

Court resolved in *Kroger*.

The Court concluded that such a claim by the plaintiff did not fall within the scope of ancillary jurisdiction.[214] To read the seventh sentence of Rule 14(a) in this way would be to violate the admonition of Rule 82 that the rules not be used as a means of expanding jurisdiction—fraud and collusion were present dangers, the federal courts have only limited jurisdiction, and there was a alternative forum in which the plaintiff could have brought all of the claims originally.

The question after *Kroger* is whether there are instances in which the plaintiff may proceed against the third party without any independent basis of jurisdiction. That possibility was suggested by the majority opinion.[215] For instance, the Court emphasized in its opinion that defendant Omaha had been dismissed from the lawsuit, and therefore, the claim by the plaintiff against the third party was no longer an ancillary claim. Suppose, however, that the defendent Omaha had remained in the lawsuit, with the plaintiff asserting a claim against the defendant and against a third party. Would the presence of the defendant in the ultimate lawsuit have made a difference to the Court?[216] The majority also emphasized that the original claim by the plaintiff was a non-federal claim and that she elected to bring her state-law claim in a federal court.[217] In electing federal court rather than state court, the plaintiff Kroger had to accept the limitations of federal jurisdiction. *Kroger* does not reach the question of a claim which the plaintiff is compelled to assert in federal court because of exclusive federal jurisdiction. Would the Court in such a case allow the plaintiff to bring a claim against the third party directly if it arose out of the same transaction as the main claim?

A. Absence of a Single State Forum

Although *Kroger* resolved the question of whether ancillary jurisdiction will support a claim by the plaintiff against a third-party defendant when plaintiff could have consolidated all its non-federal claims in state court,[218] it did not specifically resolve the ques-

214. 437 U.S. at 376.

215. 437 U.S. at 377.

216. *See* text accompanying notes 91-92 *supra*. *See also* 3 MOORE'S, *supra* note 74, § 14.27 [1], at 14-572 to -574 (1978).

217. 437 U.S. at 376.

218. For example in Hood v. Fireman's Fund Ins. Co., 412 F. Supp. 846 (S.D. Miss. 1976), plaintiff's 61 head of cattle drowned when a bayou flooded. The plaintiff sought recovery for the value of the cattle under an insurance policy with the defendant. The insurance company filed a third party complaint against the local insurance agent for failing to give notice as required. The plaintiff then filed a claim directly against the insurance agent based upon the same

tion of whether ancillary jurisdiction will support such a claim when plaintiff could *not* consolidate all of its non-federal claims in a single state court. In *Saalfrank v. O'Daniel*,[219] an Indiana resident brought an action for personal injuries arising out of an automobile accident with an Ohio citizen. After the Ohio citizen filed a third party complaint against an Indiana hospital, the Indiana plaintiff sought to bring a claim directly against the Indiana hospital. This claim, which was based on plaintiff's fall from a hospital bed which aggravated his injuries, alleged that the hospital was negligent in failing to provide proper restraints.[220] The plaintiff was forced to sue the other driver in Ohio because the accident was in Ohio, the defendant was from Ohio and it was unlikely that the plaintiff could acquire personal jurisdiction in Indiana. The plaintiff was forced to sue the hospital in Indiana because the hospital was located there and the lack of diversity would bar original federal jurisdiction. Emphasizing that there was no single court in which plaintiff could bring all of its claims, the district court allowed the third-party claim despite the lack of diversity.[221] Since all the claims derived from a common nucleus of operative fact, the trial court treated the claim as falling within its pendent jurisdiction.[222]

---

facts. The court allowed the claim against the non-diverse third party on a state law issue under ancillary jurisdiction. Of course the answer to this case is now easy. The plaintiff could have brought all the claims against the defendants originally in state court. If the plaintiff brings one of the claims in federal court, the plaintiff will have to divide the lawsuit if he subsequently wishes to bring a separate claim against the third party when there is no independent basis of jurisdiction because of the lack of diversity between the plaintiff and the third party. *See also* Hadinger v. Bently Lab., Inc., 427 F. Supp. 994 (E.D. Pa. 1977); C.C.F. Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975). *But see* Burleson v. Costal Recreation, Inc., 595 F.2d 332 (5th Cir. 1978).

219. 390 F. Supp. 45 (N.D. Ohio 1975).

220. *Id.* at 48.

221. *Id.* at 52.

222. This case is novel in that it is one of the few to deal directly with the issue of collusion. On a motion to reconsider, the hospital first raised the question of whether there was collusion between the plaintiff and the defendant to provide the plaintiff assistance in recovering from the hospital. The plaintiff's attorney did write the defense attorney and request that he file a third party complaint against the hospital: "Our purpose is to make it possible to make the hospital the defendant of the plaintiff in the same proceeding." The plaintiff's attorney prepared the motion papers, the third-party complaint, the summons and other documents that were then delivered to the defense attorney. However the court concluded that under Section 1359, collusion does not exist when "a party with a bona fide legal interest solicits another party with a similar bona fide legal interest to assert that legal interest and aids in doing so." *Id.* at 54. There were good faith and legally supportable reasons for both the plaintiff and the defendant to encourage the defendant to bring in the third party.

The trial court decision in *Saalfrank* was reversed by the Sixth Circuit which concluded that the trial court incorrectly relied on *Gibbs*.[223] *Gibbs* was based on a federal question, whereas jurisdiction was based only on diversity in *Saalfrank*. Second, in *Gibbs* the state claim asserted by the plaintiff was asserted against the same defendant as the federal claim. Here the additional claim was against the third party, not against the defendant. The Sixth Circuit did not adopt an inflexible rule of general application, but had no difficulty in finding that the trial court had abused its discretion in allowing the plaintiff to recover, particularly because a prior trial in state court indicated that the state of Indiana retained a significant interest in the action. Even if there had been judicial power, it was an abuse of discretion for the court to hear the claim. After *Kroger*, the portion of the opinion concluding there was no power is sufficient to resolve the issue.

Notwithstanding the question of discretion, this case is not as easy as *Kroger*, where all claims of the plaintiff could have been brought in a single state court.[224] In this case, the plaintiff could only sue the hospital in an Indiana state court, but could not sue the other driver in any Indiana court because of the lack of personal jurisdiction. Lacking a definitive Supreme Court opinion, the Sixth Circuit was not convinced that the federal policies of judicial economy and resolution of an entire case as enunciated in *Gibbs* were sufficient to justify the hearing of the claim by the plaintiff against the third party.[225] Although the Supreme Court

223. 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976).

224. Two cases that had adopted the majority rule and therefore continue to be good law after the decision of the Supreme Court are Fawvor v. Texaco, 546 F.2d 636 (5th Cir. 1977) (all claims could have been brought in state court), and Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972) (basic third-party complaint had been dismissed). *See also* Northern Contracting Co. v. C.J. Lagenfelder & Son, Inc., 439 F. Supp. 621 (E.D. Pa. 1977). For a discussion of *Kenrose*, see *Fourth Circuit Review*, 30 WASH. & LEE L. REV. 295 (1973).

A unique factual situation is presented by Home Ins. Co. v. Ballenger Corp., 74 F.R.D. 93 (N.D. Ga. 1977). Following a compulsory counterclaim by the defendant, the plaintiff filed a third-party complaint for indemnity pursuant to Rule 14(b). The difficulty arose because the Georgia defendant then sought to file a claim for breach of a subcontract agreement against the Georgia third party. Although recognizing that this claim was not contemplated by Rule 14, the court concluded that it was analogous to a claim by the third party back against the plaintiff since the party asserting the claim had been brought into the forum involuntarily, and therefore an independent basis of jurisdiction was not required. *See* Fraser, *supra* note 101, at 544-45.

If the original action is brought in state courts and the defendant removes to federal court, the objection that the plaintiff is attempting to circumvent federal jurisdictional limits in asserting a claim against a third party disappears. *See* Ayer v. General Dynamics Corp. 82 F.R.D. 115, 122 (S.D.N.Y. 1979).

225. 533 F.2d at 329-30.

would agree with the Sixth Circuit's emphasis upon the limits of federal jurisdiction, the absence of a single state forum is a significant factor that should not be overlooked.

B. Exclusive Federal Jurisdiction

The other extreme occurs where the primary claim is not based on diversity but is based on a federal statute creating exclusive federal jurisdiction. If exclusive federal jurisdiction exists and if the claim by the plaintiff against the third party is a state-law claim based on diversity, would the Court reach a result different than that reached in *Kroger*, assuming the state law claim arose out of the same transaction and satisfied the seventh sentence?

This situation is best illustrated by cases arising under the Federal Tort Claims Act (FTCA). Although some courts have refused to allow a plaintiff to add a non-federal claim against a third party that has been brought into a FTCA suit,[226] the possibility that the court might reach a different result is supported by *Davis v. United States*.[227] The administrator of the decedent's estate sued in state court the owner of the airplane, based upon the state Wrongful Death Act. The suit brought in federal court under the FTCA charged that the U.S. Government failed to properly supervise the pre-flight planning of the pilot, failed to give the pilot a weather briefing, and improperly gave clearance and direction to the pilot.[228] The government filed a third-party complaint against the airplane owner, alleging that it was responsible for the accident because its pre-flight planning was inadequate and it conducted a flight in sub-standard weather conditions. The plaintiff filed an action against the third party, asserting the same claims as in the state court. Thus, there was one accident and one injury but two lawsuits, one against the U.S. Government in federal court and one

226. Corbi v. United States, 298 F. Supp. 521 (W.D. Pa. 1969) (there was diversity between the plaintiff and the third party, but the jurisdictional amount was not satisfied).

Another case involving an exclusive federal statute is L & E Co. v. United States, 351 F.2d 880 (9th Cir. 1965). The case was based on a construction project at a military installation in California, with the primary claim resting on the Miller Act, 40 U.S.C. § 270(d)(b)(1976). There was a third-party complaint, then a claim by the plaintiff against the third party. The court, without any explanation or detail, simply said that there was original jurisdiction of the plaintiff's claim against a defendant and "[w]e think that it also had ancillary jurisdiction over the claim of [the plaintiff] against the [third party] . . . All of these claims arose out of the same 'transaction or occurence.'" 351 F.2d at 882. There was no discussion of ancillary jurisdiction in this particular context at all, nor was there any specific acknowledgement of the role of the federal statute.

227. 350 F. Supp. 206 (E.D. Mich. 1972).

228. *Id.* at 207.

against the owner in state court.[229]

The federal trial court emphasized that it was difficult to imagine any two cases more interrelated than these.[230] There was a common nucleus of operative fact; the federal claim against the government was substantial; and no part of the lawsuit in federal court could be brought in state court.[231] Therefore, it reasoned that *Gibbs* should apply to permit the complaint to be amended so as to bring the non-diverse state claim into federal court. An additional objection was made that the proposed amendment would require a jury trial, which is not allowed under the FTCA.[232] Under Rule 42, however, procedures could be developed so that the role of the jury and the judge would be properly served. The court did require a formal statement by the plaintiff that the state court claims would be not actively prosecuted, and that discovery already completed would be transfered to the federal court.[233]

The question is whether this case is valid authority after *Kroger*. Unlike *Kroger*, the main claim was based on an exclusive federal statute. It would be impossible to bring all the claims in one action because the federal government cannot be sued in state court. If the claim by the Michigan plaintiff against the Michigan third party is not allowed, multiple actions will necessarily result. On the other hand there was already a pending action in state court in which the plaintiff had asserted her claims, while now she is attempting to bring those claims into federal court. No language in the Court's opinion carves out an exception when there is exclusive federal jurisdiction, but policy reasons would support such an exception where the actual connection between the two claims is this close.[234]

229. *Id.*
230. *Id.*
231. *Id.*
232. 28 U.S.C. § 2402 (1976).
233. 350 F. Supp. at 208.
234. One of the first appellate cases decided since *Kroger* supports this conclusion. In Ortiz v. United States, 595 F.2d 65 (1st Cir. 1979), the plaintiff asserted Federal Tort Claims Act charges against the Government, which impleaded a private hospital. The plaintiff's motion to amend the complaint to assert claims directly against the hospital was granted, provided the trial court found it satisfied the *Gibbs* criteria. Emphasizing that the diversity statute relied on in *Kroger* has been interpreted restrictively, while the FTCA has been liberally construed, *id.* at 73, the court allowed this "pendent" claim because the alternative would force the plaintiffs to pursue their claims against the Government and the hospital in separate federal and state forums. *Id.* at 72.

The court manufactured another distinction with *Kroger*, by pointing out that the Government's identification complaint, "although it failed to make mention of the fact, was bottomed on an independent federal jurisdictional basis, 28 U.S.C. § 1345." *Id.* at 67. Since a separate jurisdictional basis has

A further distinction suggested by the FTCA cases is that to bring the plaintiff's claim against the third party within ancillary jurisdiction, the original jurisdiction-creating claim must not be merely federal in nature, but must rest on a substantial federal interest.[235] In rejecting a proposed complaint by an injured post office patron against the third-party owners of the post office property that had been leased to the Government, the district court reluctantly concluded that an independent basis of jurisdiction was necessary, requiring the plaintiff to split his claim between federal and state court.[236] The court suggested that since the court applies state law in redressing claims under the FTCA[237] the mere use of this statute does not imply a substantial federal question. On the other hand, if the primary claims were based upon a statute, such as the anti-trust statute, which does constitute a substantial claim, then the exercise of federal jurisdiction over the plaintiff's later claim against the third party would be more easily justified.[238]

C. Concurrent Jurisdiction

In contrast with this situation where the original claim is based upon an exclusively federal jurisdictional statute is the situation that arises from a statute creating subject matter jurisdiction concurrently in the federal and state courts. Suppose a railroad worker is being transported in a railroad truck to a job site, when the truck is involved in a collision with an automobile. The railroad worker elects to sue the railroad in federal court under the Federal Employer's Liability Act. The railroad files a third-party claim for indemnity against the driver of the automobile. May the railroad employee then file a Rule 14(a) claim directly against the third-party driver even if both are citizens of the same state and there is no independent jurisdiction?[239] The immediate answer after *Kroger* might be that since the railroad worker has a statutory option of suing under the Act in either federal or state court, by electing federal court he has also accepted the limitations of

---

never been required for the third-party indemnification complaint, the statute has no significance.

If the plaintiff asserting a claim directly against the third party wishes to rely on the FTCA as an independent jurisdictional basis the availability of that federal statute may be lost if a timely administrative claim has not been filed. *See* West v. United States, 592 F.2d 487 (8th Cir. 1979).

235. Mickelic v. United States Postal Serv., 367 F. Supp. 1036 (W.D. Pa. 1973). *But see* UMW v. Gibbs, 383 U.S. 715, 726-27 (1966).

236. 367 F. Supp. at 1038.

237. For the law under the Federal Tort Claims Act, see 28 U.S.C. § 1346(b) (1976).

238. 367 F. Supp. at 1039.

239. The facts are suggested by McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960).

federal jurisdiction and the resulting inability to simultaneously sue the other driver. However, although FELA does not grant exclusive federal jurisdiction, the grant of concurrent jurisdiction illustrates the Congressional concern that the worker be treated fairly.[240] Requiring the worker to choose between the two lawsuits, with the party defendant blaming the absentee defendant, or one lawsuit in state protection for the worker, may not provide the assurance of an adequate remedy desired by Congress. The existence of the federal statute and its procedural protections demonstrates a strong federal concern with the plight of the railroad worker. On the other hand, the railroad worker has an option to bring his claim against the railroad in state court, where the driver could also be sued. Therefore, unlike an exclusive statute, such a concurrent statute does not provide a strong basis for the argument that the claim of the plaintiff against the third party should be heard within ancillary jurisdiction.

D. Admiralty Jurisdiction

Another area of federal law that might deserve different treatment is maritime law. In *Lopez v. Oldendorf*,[241] a boom injured the leg of the plaintiff longshoreman. The action was brought against Oldendorf, the owner of the ship, alleging the unseaworthiness of the vessel. The owner filed a third party action against the stevedoring company and the operator of the boom, seeking indemnity from both.[242] Subsequently, Lopez amended his complaint to file a claim directly against the owner of the boom for negligence. On appeal, the third party challenged the jurisdiction of the court to hear the Rule 14(a) claim because of lack of diversity between itself and Lopez. However, the complaint clearly indicated that "the basis of jurisdiction [was] the admiralty and maritime nature of the claim,"[243] and the court retained the claim. Does this mean that even though the substantive allegation is negligence, the fact that the complaint refers to Rule 9(h) establishes an independent basis of jurisdiction, namely the exclusive admiralty jurisdiction of the federal courts. Such an exception, which is not raised in *Kro-*

240. *See* Saalfrank v. O'Daniel, 533 F.2d 325, 329 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976). ("[I]f a case similar to McPherson were presented today it would be necessary to determine whether an FELA case affords a sufficiently substantial federal question basis of jurisdiction to support a pendent state law claim."). *See generally* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 775-76 (1972).

241. 545 F.2d 836 (2d Cir. 1976).

242. *Id.* at 838.

243. *Id.* at 839. *See* FED. R. CIV. P. 9(h); 28 U.S.C. § 1333 (1976). *See also* Rosario v. American-Export Isbrandsen Lines, Inc., 395 F.Supp. 1192 (E.D. Pa. 1975).

ger, would rest not merely on a federal statute, but directly upon the provisions of article III.

In addition to the cases in which there has been independent jurisdiction over the claim by the plaintiff against the third party because of admiralty claims are those cases in which diversity allowed the court to hear the plaintiff's claim.[244] Those cases continue to be valid even after *Kroger*. On the other hand, just as a court has discretion as to any valid claim under Rule 14, the court will still have discretion as to these direct claims of the plaintiff even though the mandates of both Rule 14 and article III are satisfied.[245]

VIII. CONCLUSION

There are several possible legal theories that a plaintiff may utilize when bringing suit against a third party under the seventh sentence of Rule 14(a): 1) the primary claim is based on an exclusive federal statute expressing a paramount federal interest; (2) the primary claim is based upon an exclusive federal statute that relies on state substantive law; 3) the primary claim is based on a federal statute that provides jurisdiction concurrent with the state; 4) the primary claim is based on maritime law; 5) all the claims are based on state law, and there is diversity between the plaintiff and the third party, but the amount is less than $10,000; 6) diversity does not exist between the plaintiff and third party, and the plaintiff could not have sued the defendant and the third party in one state; 7) there is no diversity between the plaintiff and the third party, but the plaintiff could have sued the defendant and the third party in one state; 8) there is diversity between the plaintiff and the third party and the amount in controversy is greater than $10,000 but there are discretionary reasons why the court should not take the claim.

Which of these claims may now be heard by the federal court under its ancillary jurisdictions? The seventh claim, present in *Kroger*, will not be allowed. Likewise, *Kroger* provides a strong answer to the eighth claim because of the discretionary nature of Rule 14. As to the others we can only speculate. The lower courts have concluded in most instances that it will not be allowed, but should that be the answer? Should distinctions be drawn when there is a strong federal interest in the primary claim to ensure

244. *See, e.g.*, D'Alberto v. Greyhound Lines, Inc., 45 F.R.D. 33 (S.D.N.Y. 1968); Bonath v. Aetna Freight Lines, Inc., 33 F.R.D. 260 (W.D. Pa. 1963).

245. *E.g.*, Joseph v. Chrysler Corp., 61 F.R.D. 347 (W.D. Pa. 1973). (The court concluded that a case, already complex, would be burdened by a separate claim for damages based upon facts arising from a time period subsequent to those of the primary claim).

that it is not weakened or undermined? Should the additional claim be heard in federal court if there is no alternate forum where all the claims can be heard? Should ancillary jurisdiction cover the additional claim when the primary claim is exclusively federal?

Kroger, although it answers the question of ancillary jurisdiction in one area, certainly does not resolve all the questions that have arisen under Rule 14. The problem of an additional claim by the defendant against the third party has not been addressed by the Court, nor by the rule, which deserves further amendment. The issue of a Rule 14(a) claim under the fourth sentence by the third party back against the defendant really should not be much of a question because it ties in so closely to Rule 13 compulsory and permissive counterclaims. The major problem is the third party claim back against the plaintiff as authorized by the sixth sentence. Are there persuasive reasons in the majority opinion in *Kroger* that suggest that such a Rule 14(a) claim now requires an independent basis of jurisdiction? Finally, with the plaintiff asserting a Rule 14(a) claim against the third party, are there any instances in which the federal claim is so strong that the case should be heard despite the absence of an independent jurisdictional base? The scope and dimensions of ancillary jurisdiction under Federal Rule 14 are far from determined.