

## Colloquy

### WOULD THE *KROGER* RULE SURVIVE THE ALI'S PROPOSED REVISION OF § 1367?

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Supplemental jurisdiction has been a treacherous area over the past decade. Previously, supplemental jurisdiction—then generally called pendent or ancillary jurisdiction—had been left nearly entirely to judicial development, but in 1989 the Supreme Court criticized several of its own prior cases for failing to make a “specific examination of jurisdictional statutes” to determine whether Congress had authorized the exercise of jurisdiction.<sup>1</sup> Although the Court stated that it had “no intent to limit or impair” these already established cases, it declared that it would not extend them.<sup>2</sup> It acknowledged that “the scope of jurisdiction conferred by a particular statute can of course be changed by Congress,” but in an effort to enable Congress “to legislate against a background of clear interpretive rules,” the Court declared “that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.”<sup>3</sup>

The next year, Congress acted quickly to fill the gap in federal jurisdiction that the Supreme Court had just revealed (or created).

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1. *Finley v. United States*, 490 U.S. 545, 548–49 (1989) (criticizing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Hurn v. Oursler*, 289 U.S. 238 (1933); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909)); *see also id.* at 556 (stating that the “*Gibbs* line of cases was a departure from prior practice”); *cf.* 28 U.S.C. § 1338(b) (1948) (giving federal district courts jurisdiction over “any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, or trademark laws”).

2. *Finley*, 490 U.S. at 556.

3. *Id.*

Congress enacted the supplemental jurisdiction statute, 28 U.S.C. § 1367, which provides (subject to various exceptions) broad statutory authority for the exercise of supplemental jurisdiction, including over claims that involve the joinder or intervention of additional parties.<sup>4</sup>

The judicial response to the statute already has produced a circuit split concerning jurisdiction in class actions that the Supreme Court unsuccessfully attempted to resolve.<sup>5</sup> The scholarly response to the statute has ranged from intemperately harsh criticism to textually creative calls for reading it sympathetically.<sup>6</sup> Significantly, the American Law Institute (ALI), as part of its Federal Judicial Code Revision

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4. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113 (codified at 28 U.S.C. § 1367 (1994)). The full text of the statute is reproduced in Appendix A to this Essay.

5. Some circuits have concluded that the statute, by failing to explicitly exclude supplemental jurisdiction over claims by represented members of a class action, now permits the exercise of such jurisdiction. *Rosmer v. Pfizer Inc.*, 263 F.3d 110 (4th Cir. 2001), *rehearing en banc denied*, 272 F.3d 243 (4th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001), *petition for cert. filed*, No. 01-688, 70 U.S.L.W. 3348 (Nov. 1, 2001); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 931 (7th Cir. 1996); *Free v. Abbott Labs., Inc.*, 51 F.3d 524, 527–30 (5th Cir. 1995). Others have concluded that Congress did not intend to alter the prior case law that prohibited supplemental jurisdiction in diversity cases over any claim by a represented class member that did not satisfy the amount in controversy requirement. *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 221–22 (3d Cir. 1999); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 641 (10th Cir. 1998). The Supreme Court granted certiorari to resolve the conflict, but was unable to do so when Justice O'Connor recused herself and the remaining justices were evenly divided. *Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000). For criticism of the Supreme Court's affirmance by an equally divided court, see Thomas E. Baker, *Why We Call the Supreme Court "Supreme": A Case Study on the Importance of Settling the National Laws*, 4 GREEN BAG 2D 129, 137 (2001) (faulting the Justices for not engaging the merits of an important policy issue). For a defense of the practice of affirmance by an equally divided court, see Edward A. Hartnett, *Making Quorums, Breaking Ties, and Deciding Cases Without a Full Court* 29 (Aug. 10, 2001) (unpublished manuscript, on file with the *Duke Law Journal*) (defending the traditional practice of the Supreme Court when exercising its appellate jurisdiction to affirm if equally divided on the judgment).

6. See, e.g., *Free*, 51 F.3d at 528 n.9 (noting the "inexplicably sharp language" used to criticize the statute, "given the reality that most mistakes become 'clear' once they are identified"); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963, 963–66 (1991) (challenging in overheated terms the arguments of the drafters of § 1367); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 112–13 (1999) (attempting to bridge the gap between legislative historians and rigorous textualists). See generally Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute: A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 856 (1992) (reviewing the status of supplemental jurisdiction under the current statute and providing a comprehensive analysis of the changes and expansions in the prior case law); Symposium, *A Reappraisal of the Supplemental-Jurisdiction Statute: Title 28 U.S.C. § 1367*, 74 IND. L.J. 1 (1998) (dedicating an entire issue to the debate).

Project, has approved a proposed revision of the statute.<sup>7</sup> Although the ALI proposal has been widely praised,<sup>8</sup> I fear that it, too, has the potential to produce troubling unintended consequences. In particular, the ALI's proposed revision of § 1367 could, if enacted, unintentionally undermine the *Kroger* rule.<sup>9</sup>

The *Kroger* rule was formulated in an effort to strike a balance between supplemental jurisdiction and the complete diversity rule, two concepts that are in unremitting tension with each other. The core concept underlying supplemental jurisdiction is that once a federal court has jurisdiction to hear one claim in a case, it should be empowered to hear the whole case, including claims that could not, by themselves, be heard in federal court. If this principle were applied fully in diversity cases, however, the complete diversity rule would vanish.<sup>10</sup>

In *Kroger*, an Iowa plaintiff (Kroger) sued a Nebraska defendant (OPPD), who in turn impleaded a third-party defendant (Owen Equipment) who (it turned out) was a citizen of both Nebraska and Iowa.<sup>11</sup> Two things seemed uncontroversial. First, if the plaintiff herself had simply sued the two defendants, the Court would not have approved the exercise of jurisdiction over the plaintiff's claims against her cocitizen. In the Court's words, "it is clear that [Kroger] could not

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7. AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2 (1998) [hereinafter ALI T.D. NO. 2]; see also John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 IND. L.J. 25, 26 (1998) (discussing the institutional and procedural history of the ALI draft, as well as its principle features). The full text of the proposed § 1367, taken from Reporter John Oakley's article, *supra*, is reproduced in Appendix B to this Essay.

8. See, e.g., Graham Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 IND. L.J. 181, 187 (1998) ("The proposed statute is carefully and masterfully crafted. The Reporter and his colleagues have assayed every problem that has surfaced in the construction of the present § 1367 and anticipated the emergence of others.") (footnote omitted).

9. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978). The practical effect of *Kroger* is that for a plaintiff to avoid the duplicative expenses of pursuing two transactionally related lawsuits in separate forums, the plaintiff must assert all claims in state court. See Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 71 (1987).

10. There is, of course, a similar tension between supplemental jurisdiction and the amount in controversy rules, but the ALI's proposed § 1367 would permit supplemental jurisdiction over claims between diverse parties involving less than the amount in controversy required by § 1332. See ALI proposed § 1367(c)(2) (reprinted *infra* Appendix B) (permitting supplemental jurisdiction over a claim that "would be a freestanding claim on the basis of section 1332 of this title but for the value of the claim"); ALI T.D. NO. 2, *supra* note 7, at 68 (contending that it is "sound jurisdictional policy to permit a freestanding claim in a diversity action to support supplemental jurisdiction over claims by additional diverse parties").

11. 437 U.S. at 367-70.

originally have brought suit in federal court naming Owen and OPPD as codefendants, since citizens of Iowa would have been on both sides of the litigation.”<sup>12</sup> Indeed, such a case would represent a classic example of what is barred by the complete diversity rule.<sup>13</sup>

Second, the Court apparently saw no impediment to the exercise of jurisdiction over the impleader claim itself, even though it lacked an independent basis for federal jurisdiction. While the Court did not need to decide the issue, it voiced approval of lower court decisions upholding the exercise of supplemental jurisdiction over impleader claims.<sup>14</sup> Asserting that the “context in which the nonfederal claim is asserted is crucial,”<sup>15</sup> it pointedly distinguished those cases.<sup>16</sup> In the impleader context, then, the Court evidently was willing to give priority to the core concept underlying supplemental jurisdiction.

The question that divided the Court in *Kroger*, however, was how to handle a situation in between these two uncontroversial ones. The situation arose because the plaintiff did not simply sue the two defendants. Instead, she asserted a claim against her cocitizen Owen Equipment after the defendant had impleaded it as a third-party de-

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12. *Id.* at 374; *see also id.* at 370 (“It is undisputed that there was no independent basis of federal jurisdiction over the respondent’s state-law tort action against the petitioner, since both are citizens of Iowa.”).

13. One way to characterize this conclusion is in action-specific terms, that is, that there is no original jurisdiction over such an action. *See Pfander, supra* note 6, at 128 (“Only after original jurisdiction attached in accordance with these fairly elaborate rules of complete diversity did the doctrine of ancillary jurisdiction come into play.”). Alternatively, one can characterize the rule of complete diversity in claim-specific terms, such that it does “not prohibit the exercise of original jurisdiction over a claim between diverse parties when joined in the complaint with a claim between nondiverse parties” but rather prohibits “the exercise of original jurisdiction over the claim between nondiverse parties—what in modern parlance would be called ‘supplemental jurisdiction.’” ALI T.D. NO. 2, *supra* note 7, at 115. Although I think that the claim-specific approach advocated by the ALI proposal is quite sensible, further evaluation of the competing approaches is beyond the scope of this Essay. For present purposes, it is sufficient to note that the *Kroger* Court rejected such supplemental jurisdiction. 437 U.S. at 374–75 (noting that, if the only test for supplemental jurisdiction in a diversity case were the constitutional test of “common nucleus of operative fact,” “there would be no principled reason why [Kroger] could not have joined her cause of action against Owen in her original complaint as ancillary to her claim against OPPD,” which would constitute an evasion of the complete diversity rule).

14. *Kroger*, 437 U.S. at 375 & n.18 (“It is true . . . that the exercise of ancillary jurisdiction . . . has often been upheld in situations involving impleader . . .”); *see Pfander, supra* note 6, at 119 (noting that the Court “expressed a willingness to permit the assertion of jurisdiction over the defendant’s ancillary claims against a new party under Rule 14”).

15. *Kroger*, 437 U.S. at 376.

16. *Id.* (noting that “the nonfederal claim in this case was simply not ancillary to the federal one in the same sense that, for example, the impleader by a defendant of a third-party defendant always is”).

fendant. In this situation, the majority gave priority to the complete diversity rule rather than supplemental jurisdiction and held that there was no jurisdiction over the plaintiff's claim against the third-party defendant. For the majority, permitting such supplemental jurisdiction would too readily allow a plaintiff to evade the complete diversity rule "by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead non-diverse defendants."<sup>17</sup> The dissenters, on the other hand, would have given priority to supplemental jurisdiction, permitted it to be exercised over the plaintiff's claim against the third-party defendant, and required "complete diversity only between the plaintiff and those parties he actually brings into the suit."<sup>18</sup>

Both the current and the proposed § 1367 attempt a legislative balancing of supplemental jurisdiction and the complete diversity rule by a broad grant of supplemental jurisdiction, tempered by particular exclusions in diversity cases. Moreover, both largely (although not completely) mirror the previous judicial balancing. In particular, both are designed to embody the *Kroger* rule's denial of supplemental jurisdiction over claims by plaintiffs against third-party defendants impleaded by defendants.<sup>19</sup>

The current § 1367 achieves this goal rather straightforwardly. It denies supplemental jurisdiction in diversity cases over claims by plaintiffs against persons made parties pursuant to Rule 14.<sup>20</sup> Although the current § 1367 has its problems, failure to maintain the *Kroger* rule is not one of them.

The proposed § 1367 is more complex. Rather than denying supplemental jurisdiction by reference to particular federal rules, it denies supplemental jurisdiction where jurisdiction over the "supplemental claim depends upon a freestanding claim that is asserted in the

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17. *Id.* at 374.

18. *Id.* at 384 (White, J., dissenting).

19. See Oakley, *supra* note 7, at 44 (asserting that the proposed § 1367 "preserves the rule of *Owen Equipment & Erection Co. v. Kroger*").

20. The current § 1367(b) provides:

In any civil action in which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14 . . . when exercising such supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(b) (1994).

same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332.<sup>21</sup>

Even without the help of a definitional section, those familiar with supplemental jurisdiction likely would have little trouble understanding the difference between a freestanding claim and a supplemental claim. A “freestanding” claim is “a claim for relief that is within the original jurisdiction of the district courts independently of this section,” that is, any claim that could, standing alone, be brought in federal court.<sup>22</sup> A “supplemental” claim is “a claim for relief, not itself freestanding, that is part of the same case or controversy under Article III of the Constitution as a freestanding claim that is asserted in the same civil action.”<sup>23</sup>

The statutory definition of the phrase “asserted in the same pleading,” however, is crucial—indeed, it does much of the work.<sup>24</sup>

“Asserted in the same pleading” means that the relevant claims have been asserted either

- [i] in the pleading as originally filed with the court, or
- [ii] by amendment of the pleadings, or
- [iii] by the pleader’s assertion of a claim other than a counterclaim or claim for indemnity or contribution against a third party impleaded in response to the pleading, or
- [iv] by order of the court reformulating the pleading, or
- [v] by the assertion of the claim or defense of an intervenor who seeks to be treated as if the pleading had asserted a claim by or against that intervenor.<sup>25</sup>

How is this designed to embody the *Kroger* rule? First, the original claim by the plaintiff (Iowa) against the diverse defendant (Nebraska) is a freestanding claim. The impleader claim by the defendant

21. ALI proposed § 1367(c), *infra* Appendix B.

22. ALI proposed § 1367(a)(1), *infra* Appendix B.

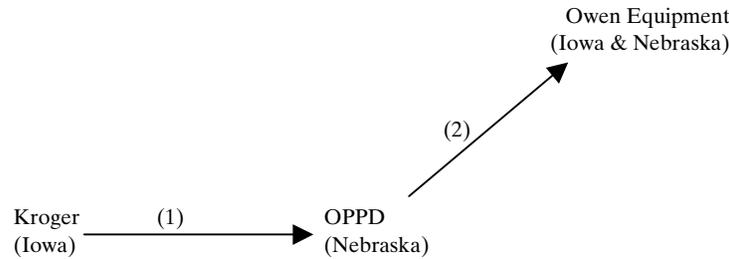
23. ALI proposed § 1367(a)(2), *infra* Appendix B. Although there is no explicit definition of the phrase “depends upon,” ordinary usage would suggest that jurisdiction over a supplemental claim “depends upon” a freestanding claim when it needs that freestanding claim in order to qualify for supplemental jurisdiction. Comment a-9 makes clear that this ordinary meaning of “depends upon” was intended. It notes that the restriction on supplemental jurisdiction applies when a claim “would qualify for supplemental jurisdiction *only* because of its relationship to a diversity-based freestanding claim . . . and the two claims have been ‘asserted in the same pleading.’” ALI T.D. NO. 2, *supra* note 7, at 46 (emphasis added).

24. *See* Lilly, *supra* note 8, at 187–88 (noting that the “first key” to the proposed § 1367 “lies in its ‘definitions’ section and, in particular, in the definition of the phrase ‘asserted in the same pleading’”).

25. ALI proposed § 1367(a)(3), *infra* Appendix B.

(Nebraska) against a third-party defendant (Iowa and Nebraska) is a supplemental claim. While it “depends upon” the freestanding claim of the plaintiff against the defendant, it is not “asserted in the same pleading” as that freestanding claim upon which it depends, as Figure 1 illustrates. Thus it is not excluded from the broad grant of supplemental jurisdiction.

FIGURE 1: APPLYING THE PROPOSED § 1367  
TO THE IMPLEADER CLAIM IN *KROGER*



Claim no. 1 is a freestanding claim. Claim no. 2 is a supplemental claim that “depends upon” but is not “asserted in the same pleading” as claim no. 1. Therefore, supplemental jurisdiction exists over claim no. 2.

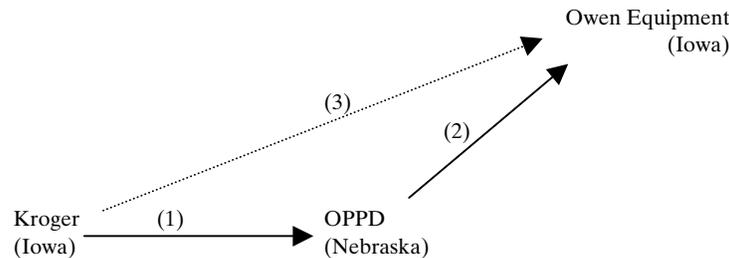
Now consider the claim by the plaintiff (Iowa) against the third-party defendant (Iowa and Nebraska). It is a supplemental claim that “depends upon” the freestanding claim by the plaintiff (Iowa) against the diverse defendant (Nebraska). Moreover, as “the pleader’s assertion of a claim . . . against a third party impleaded in response to the pleading,” it is considered to be “asserted in the same pleading” as the freestanding claim upon which it depends. That is, the plaintiff’s freestanding claim against the defendant and the plaintiff’s supplemental claim against the third-party defendant are considered to be “asserted in the same pleading” as each other. Since the freestanding claim “qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332,” the supplemental claim is excluded from supplemental jurisdiction. Thus the proposed § 1367 produces the same result that the Court’s rule produced in *Kroger*.

So what is the problem? Why do I fear that the *Kroger* rule would not survive the enactment of the ALI’s proposed § 1367 intact?

Consider the very slight variant on *Kroger* presented in Figure 2. Assume that the third-party defendant, instead of being a citizen of Nebraska and Iowa, were a citizen solely of Iowa. Under the rationale

of the Court in *Kroger*, this slight variant should not affect the result. The problem in *Kroger* was that the plaintiff and the third-party defendant were cocitizens, a problem that would not have been avoided if the defendant and third-party defendant were diverse. Similarly, under the current § 1367, diversity between defendant and third-party defendant does not affect the result. There is no supplemental jurisdiction over the plaintiff's claim against the third-party defendant because it is a claim by a plaintiff against a person made a party pursuant to Rule 14.

FIGURE 2: APPLYING THE CURRENT § 1367 TO THE  
*KROGER* VARIANT



Claim no. 3 is a claim by a plaintiff against a person made a party pursuant to Rule 14. Therefore, supplemental jurisdiction does not exist over claim no. 3 under the current § 1367.

But watch what happens under the proposed § 1367. First, as in the real *Kroger*, the original claim by the plaintiff (Iowa) against the diverse defendant (Nebraska) is a freestanding claim. However, the impleader claim by the defendant (Nebraska) against the third-party defendant (Iowa) is *not* a supplemental claim, but a freestanding claim. Freestanding claims are not limited by the definitional section of proposed § 1367 to those asserted by the original plaintiff.<sup>26</sup> Indeed, that section's illustration 5 specifically points to a third-party impleader claim based on diversity as an example of a freestanding claim.<sup>27</sup>

Now consider the claim in the *Kroger* variant by the plaintiff (Iowa) against the third-party defendant (Iowa). While it remains a supplemental claim, it need not “depend[] upon” the claim by the

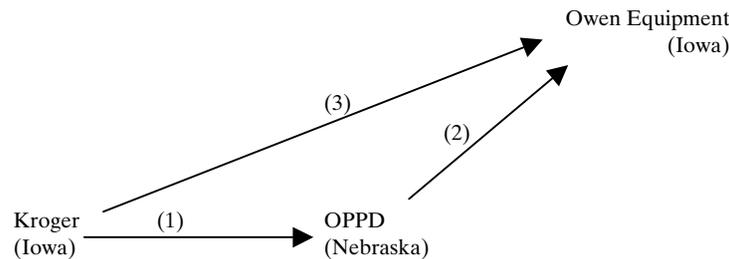
26. ALI proposed § 1367(a)(1), *infra* Appendix B.

27. ALI T.D. No. 2, *supra* note 7, at 38–39.

plaintiff (Iowa) against the diverse defendant (Nebraska). Instead, it can “depend[] upon” a different freestanding claim, the claim by the defendant (Nebraska) against the third-party defendant (Iowa). Put slightly differently, the plaintiff’s claim against a nondiverse third-party defendant can be understood as supplemental to the defendant’s impleader claim against the third-party defendant rather than as supplemental to the plaintiff’s original claim against the defendant.<sup>28</sup>

The proposed § 1367 then would deny jurisdiction only where the supplemental claim and the claim upon which it depends are “asserted in the same pleading.” And it is difficult to see, even under the proposed § 1367’s expansive definition of “asserted in the same pleading,” how the defendant’s claim against the third-party defendant and the plaintiff’s claim against the third-party defendant could be considered “asserted in the same pleading” as each other. As a result, there is supplemental jurisdiction over the plaintiff’s claim against the third-party defendant, as shown in Figure 3.

FIGURE 3: APPLYING THE PROPOSED § 1367 TO THE  
*KROGER* VARIANT



Claim no. 1 is a freestanding claim. Claim no. 2 is also a freestanding claim. Claim no. 3 is a supplemental claim that “depends upon” but is not “asserted in the same pleading” as claim no. 2. Therefore, supplemental jurisdiction would exist over claim no. 3 under the proposed § 1367.

28. Illustration 10 makes clear that where a supplemental claim is related to more than one freestanding claim, supplemental jurisdiction is proper if any one of those freestanding claims is not asserted in the same pleading as the supplemental claim. *See* ALI T.D. NO. 2, *supra* note 7, at 62 (noting that where a supplemental claim is related to two freestanding claims, the “restriction of subsection (c) would prohibit supplemental jurisdiction . . . if the only basis for supplemental jurisdiction” were a freestanding diversity-only claim asserted in the same pleading, but that “because the supplemental claim . . . is also related to” another freestanding claim and “those two claims were *not* ‘asserted in the same pleading,’ the district court has supplemental jurisdiction . . . notwithstanding the restriction of supplemental jurisdiction by subsection (c)”).

Is there any way to avoid this result under the proposed § 1367?

I do not see how the language can get us there. To treat the defendant's claim against the third-party defendant and the plaintiff's claim against the third-party defendant as "asserted in the same pleading" as each other would mean that a pleader would be understood to have asserted a claim in the same pleading as her adversary. In addition to unhinging any link between a "pleader" and a "pleading," it also would detach the concept of "same pleading" from any particular pleading (whether as originally filed, amended, or functionally treated as amended), leaving us to envision a claim "asserted in the same pleading" as various claims contained in various pleadings.

Worse, the problem extends beyond the interpleader context.<sup>29</sup> Suppose, as diagrammed in Figure 4, a plaintiff from Pennsylvania sues two defendants from New Jersey in diversity. Next, one of the defendants files a cross-claim against the other defendant, joining a citizen of Pennsylvania as a defendant on that cross-claim.<sup>30</sup> So long as the cross-claim by the New Jersey defendant against the Pennsylvanian exceeds the requisite amount in controversy, it is a freestanding claim. Therefore, it can support supplemental jurisdiction over a claim by the Pennsylvania plaintiff against the Pennsylvanian who was joined as a defendant on the cross-claim.<sup>31</sup> More generally, under the ALI's proposed revision of the supplemental jurisdiction statute, any time a freestanding diversity claim enters the case, the plaintiff can rely on that freestanding claim to anchor a supplemental claim against a cocitizen.

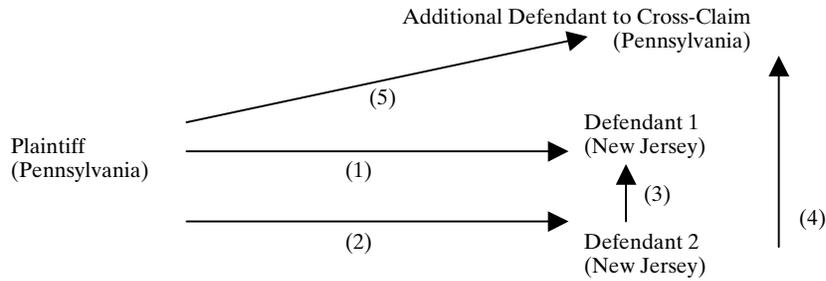
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29. I am indebted to my colleague Howard Erichson for pursuing this point.

30. See FED. R. CIV. P. 13(h) (permitting the addition of parties to cross-claims).

31. Professor Oakley has suggested in private correspondence that a similar problem might beset the current § 1367 because it is FED. R. CIV. P. 13(h) that permits the addition of a party to a cross-claim and Rule 13 is not mentioned in § 1367(b). Joinder under Rule 13(h), however, is only permitted "in accordance with the provisions of Rules 19 and 20." FED. R. CIV. P. 13(h). Thus a party joined under Rule 13(h) is *also* joined under Rule 19 or Rule 20, and the exclusion in § 1367(b) applies.

FIGURE 4: APPLYING THE PROPOSED § 1367 TO A CASE INVOLVING  
A CROSS-CLAIM JOINING AN ADDITIONAL DEFENDANT



Claim no. 1 and claim no. 2 are freestanding claims. Claim no. 3 is a supplemental claim that “depends upon” but is not “asserted in the same pleading” as either claim no. 1 or claim no. 2. Claim no. 4 is a freestanding claim. Claim no. 5 is a supplemental claim that “depends upon” but is not “asserted in the same pleading” as claim no. 4. Therefore, supplemental jurisdiction would exist over claim no. 5 under the proposed § 1367.

A decade ago, the hurried enactment of § 1367 led to mistakes. Today, despite the dedicated efforts and careful scrutiny of the American Law Institute, drafting a supplemental jurisdiction statute remains treacherous.

## APPENDIX A

## Current 28 U.S.C. § 1367

## Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under

subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

## APPENDIX B

## ALI's Proposed § 1367

(a) Definitions. As used in this section:

(1) A “freestanding” claim means a claim for relief that is within the original jurisdiction of the district courts independently of this section.

(2) A “supplemental” claim means a claim for relief, not itself freestanding, that is part of the same case or controversy under Article III of the Constitution as a freestanding claim that is asserted in the same civil action.

(3) “Asserted in the same pleading” means that the relevant claims have been asserted either in the pleading as originally filed with the court, or by amendment of the pleading, or by the pleader’s assertion of a claim other than a counterclaim or a claim for indemnity or contribution against a third party impleaded in response to the pleading, or by order of the court reformulating the pleading, or by the assertion of the claim or defense of an intervenor who seeks to be treated as if the pleading had asserted a claim by or against that intervenor.

(4) The term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(b) General grant of supplemental jurisdiction. Except as provided by subsection (c) or as otherwise expressly provided by statute, a district court shall have original jurisdiction of all supplemental claims, including claims that involve the joinder or intervention of additional claiming or defending parties.

(c) Restriction of supplemental jurisdiction in diversity litigation. When the jurisdiction of a district court over a supplemental claim depends upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title, the court

shall have jurisdiction of the supplemental claim under subsection (b) only if it—

(1) is asserted representatively by or against a class of additional unnamed parties; or

(2) would be a freestanding claim on the basis of section 1332 of this title but for the value of the claim; or

(3) has been joined to the action by the intervention of a party whose joinder is not indispensable to the litigation of the action.

(d) Discretion to decline to exercise jurisdiction. This section does not permit a district court to decline to exercise jurisdiction of any freestanding claim except as provided by subsection (e). A district court may decline to exercise jurisdiction of a supplemental claim if—

(1) all freestanding claims that are the basis for its jurisdiction of a supplemental claim have been dismissed before trial of that claim; or

(2) the supplemental claim raises a novel or complex issue of State law that the district court need not otherwise decide; or

(3) the exercise of supplemental jurisdiction would substantially alter the character of the litigation; or

(4) in exceptional circumstances, there are other compelling reasons for declining supplemental jurisdiction.

(e) Joinder of additional defendant after removal. If after removal of a civil action the plaintiff moves to amend the complaint to join a supplemental claim against an additional defendant that is subject to the jurisdictional restriction of subsection (c), the district court may either deny such joinder, or permit such joinder and remand the entire action to the State court from which the action was removed, or permit such joinder without remanding the action. In exercising its discretion the district court shall consider judicial economy, convenience, and fairness to litigants, as well as the reasons permitting supplemental jurisdiction to be declined under subsection (d). If the district court decides to permit such joinder without remanding the action, it may exercise supplemental jurisdiction of the claim so joined as provided by subsections (b) and (d) without regard to the jurisdictional restriction of subsection (c).

(f) Disposition of supplemental claims; tolling of limitations period. When a district court lacks or declines to exercise supplemental jurisdiction, the court shall dismiss the supplemental claim unless it was joined before removal of the action, in which case the district court shall remand the claim to the State court from which it was removed. The period of limitations for the following claims shall be tolled until 30 days after their dismissal becomes final, unless the applicable law provides for a longer tolling period:

(1) any supplemental claim dismissed because the district court lacks or declines to exercise supplemental jurisdiction; and

(2) any other claim in the same civil action that is voluntarily dismissed as the result of a notice or stipulation of dismissal, or motion for order of dismissal, filed within 30 days after—

(A) the dismissal or remand of a supplemental claim because the district court lacks or declines to exercise supplemental jurisdiction; or

(B) the court's decision under subsection (e) to refuse to permit the joinder of a supplemental claim against an additional defendant.