

§ 1367 *PRODUCAMUS*

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In his thoughtful and gracious response, Professor John Oakley agrees that the American Law Institute's (ALI) proposed § 1367 does not perform as intended, offers a correcting amendment, and presents an intriguing argument that the proposal actually performs better than intended and therefore should be enacted without any amendment.¹ Encouraged that the exchange thus far has produced more light than heat, I want to raise some concerns about both the proffered amendment and the argument for enacting the proposal without amendment. Finally, in an effort to be more than just a critic, I offer an alternative proposal.

I. THE PROFFERED AMENDMENT

To make the ALI's proposed § 1367 perform as intended, Professor Oakley offers to add the following sentence to the beginning of § 1367(c):

The district court shall not have jurisdiction of a supplemental claim under subsection (b) if that supplemental claim has been asserted by an original plaintiff against a third party impleaded by an original defendant and the third party has not asserted a claim against the original plaintiff, when the only basis for such jurisdiction is that a claim asserted by the original defendant against the third-party defendant qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title.²

Note that this amendment does not attempt to limit supplemental jurisdiction over a plaintiff's claim against a party added to a cross-claim. For example, if a plaintiff from New Jersey sues a defendant from Pennsylvania who impleads a third-party defendant from New Jersey, the amendment is designed to preclude supplemental jurisdic-

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1. John B. Oakley, *Kroger Redux*, 51 DUKE L.J. 663 (2001).

2. *Id.* at 675.

tion over the plaintiff's claim against the third-party defendant. However, if a plaintiff from New Jersey sues two defendants from Pennsylvania, and one of those defendants cross-claims against the other, adding a defendant from New Jersey to the cross-claim, nothing would preclude supplemental jurisdiction over the plaintiff's claim against the added defendant. In an oddly reversed echo of one of the problems with the current § 1367,³ the amendment would thus make supplemental jurisdiction over claims by plaintiffs more widely available in multidefendant cases than in single defendant cases.

The proffered amendment also disrupts the structure of the ALI's proposed § 1367, complicating an already complex statute, and thereby increasing the risks of misinterpretation. The proposed § 1367 is structured to provide a broad grant of supplemental jurisdiction, generally preclude supplemental jurisdiction over claims that depend upon diversity claims asserted in the same pleading, and create particular exceptions where supplemental jurisdiction may be exercised over claims that depend upon diversity claims asserted in the same pleading. There is a certain conceptual elegance to this structure, although maintaining it requires rather baroque intricacy in defining "asserted in the same pleading." The proffered amendment, however, sacrifices this structural elegance by precluding supplemental jurisdiction directly in one situation, while precluding it in others via the definition of "asserted in the same pleading."

Perhaps, if the architect is content with the loss of elegance, I cannot complain. The result of the amendment, however, is that supplemental jurisdiction over some claims by plaintiffs against third-party defendants would be precluded by the complex definition of "asserted in the same pleading," while supplemental jurisdiction over other claims by plaintiffs against third-party defendants would be precluded by the proffered amendment. I fear that this combination will prove confusing to many lawyers and judges.⁴

3. See AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2, at 76 (1998) [hereinafter ALI T.D. NO. 2] (noting that under a "plain meaning" approach to the current § 1367, supplemental jurisdiction is more readily available in cases involving a single defendant than in cases involving multiple defendants).

4. In addition, the undefined reference to an "original plaintiff" and an "original defendant" creates ambiguity concerning whether the provision applies when a plaintiff or defendant is added by amendment. Indeed, an overly literal judge effectively might read the provision out of existence, reasoning that where the original plaintiff's claim against the third-party defendant is related to the original plaintiff's claim against the original defendant (as it almost invariably will be) the impleader claim is not "the only basis" for supplemental jurisdiction and therefore the first sentence of subsection (c) does not bar supplemental jurisdiction. At the very least, I

My fears may be exaggerated. But (to switch metaphors) if the ALI's proposal misfired in the skilled and dedicated hands of its creator, there is a substantial risk that a still more complex version will misfire in the hands of the thousands of lawyers and judges who have not studied supplemental jurisdiction with anywhere near his skill and dedication.

II. THE ARGUMENT FOR THE UNAMENDED ALI PROPOSAL

To some extent, the discussion above may knock at an open door, for Professor Oakley does not actually advocate the amendment he offers. Instead, he argues that the ALI proposal should be enacted without amendment, even though it does not operate as intended.⁵ In his view, supplemental jurisdiction over a plaintiff's claim against a third-party defendant *should* be barred only where that supplemental claim "depends solely on the plaintiff's own assertion of a claim against a diverse defendant" and *should* be permitted where that supplemental claim depends on some other freestanding claim, including a defendant's claim against a diverse third-party defendant.⁶ Professor Oakley dubs this a "minimal conception" of the *Kroger* rule, and it is important to see just how minimal it is: under this proposal, pretty much the only situation in which jurisdiction over a plaintiff's claim against a third-party defendant would be precluded would be where the third-party defendant shares citizenship with *both* the plaintiff *and* the defendant. This is not common. In Professor Oakley's words, it is "far more likely that the third-party defendant will be a cocitizen of *either* the original plaintiff or the original defendant than that it will be a cocitizen of both."⁷

Outside of that unlikely situation, a plaintiff seeking a federal court could do precisely as the Court in *Kroger* feared: file a federal action naming only those defendants diverse from the plaintiff, expecting that those defendants will implead the others who share the plaintiff's citizenship, and then file a claim against those third-party defendants. Professor Oakley thinks that "discretionary judicial denial of supplemental jurisdiction in such cases adequately can curtail

would suggest placing the proffered amendment at the end of subsection (c), rather than the beginning.

5. Oakley, *supra* note 1, at 686.

6. *Id.* at 681–86.

7. *Id.* at 667. Such supplemental jurisdiction also would be precluded where the impleader claim falls below the amount in controversy, but I suspect that cases in which the primary claim exceeds the amount in controversy but the impleader claim does not are quite rare.

such an evasion.”⁸ Maybe so, but I tend to doubt it. First, it is far from clear that the proposed § 1367(d) would authorize such a discretionary denial of supplemental jurisdiction, bearing in mind that if Congress enacts the ALI proposal as is, it will have done so aware that it was authorizing supplemental jurisdiction in such a circumstance. Could a court properly conclude, then, that such a scenario presented “exceptional circumstances” and “compelling reasons” to decline supplemental jurisdiction? Second, discretionary denials predicated on deliberate evasion would seem to require factfinding as to the intent of the plaintiff or counsel. Courts may well be reluctant to undertake such inquiries and introduce yet another source of satellite litigation.

Professor Oakley does not suggest an amendment to the proposed § 1367(d) specifically authorizing or encouraging this basis for denial of supplemental jurisdiction. Moreover, to do so would be in some tension with his more fundamental reason for favoring the ALI’s proposal without amendment: to “preserve[] symmetry in the jurisdictional posture of the litigation without regard to which party sues first.”⁹ Indeed, he finds the virtue of symmetry in what appears initially as simply the unintended arbitrariness of the ALI proposal’s distinction between cases in which the defendant and the third-party defendant are cocitizens and cases in which they are not. To demonstrate the symmetry he admires, Professor Oakley posits what he calls a “conventional three-cornered relationship” where two of the parties (A and AA) are from the same state and the third (B) is from a different state. He states that in this scenario, “it is possible for one of the parties [B] to bring a diversity suit against the other two,” thereby enabling federal adjudication of all claims by and against all parties, and explains how under the ALI proposal it is possible to obtain the same result no matter which party initiates the action. He “can see no good reason for federal jurisdiction over this relationship to be available only if B initiates the litigation, but not A or AA.”¹⁰

If Professor Oakley is right that there is “no good reason” for federal jurisdiction to exist when B initiates the litigation but not when A or AA does, there equally would seem to be “no good reason” why A could not simply initiate the litigation against B and AA. Professor Oakley does not go quite this far, although he comes pretty

8. *Id.* at 683.

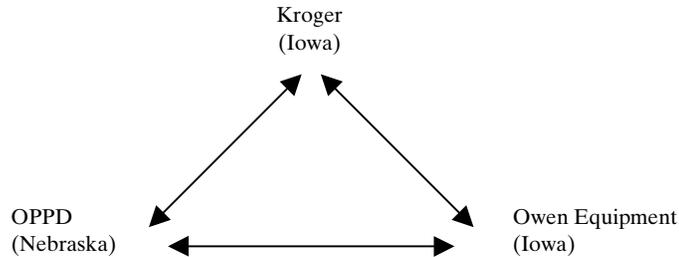
9. *Id.* at 684.

10. *Id.* at 685.

close. Indeed, although his proposal does not embrace minimal diversity, whereby a single diversity claim enables jurisdiction over the entire constitutional controversy, it instead embodies what might be called “double diversity” or “two-pair diversity”: so long as there are two pairs of parties with claims that meet the requirements of diversity jurisdiction, the court may adjudicate the entire constitutional controversy.

Before taking this step, we should consider critically his symmetry argument. There are undoubtedly some cases involving three parties, each with claims against each other, and in which any one of the three might well initiate litigation against the other two. The diagram of such a case, in contrast to typical civil procedure diagrams, might be an equilateral triangle, as shown in Figure 1.

FIGURE 1: ENVISIONING THE *KROGER* VARIANT AS AN EQUILATERAL TRIANGLE



In this way of visualizing the *Kroger* variant, Kroger, OPPD, and Owen Equipment would be viewed as each having claims against the other two. Viewed this way, it would be essentially arbitrary which of the three were to initiate litigation.

But I question how common such cases are.

Take the *Kroger* variant, illustrated above, as an example. That is, assume that Owen Equipment were a citizen only of Iowa, and not also of Nebraska. Using Professor Oakley’s terminology, Mrs. Kroger would be A, OPPD would be B, and Owen Equipment would be AA. How likely is it that OPPD would initiate litigation against Mrs. Kroger and Owen Equipment? Should we really structure the law of supplemental jurisdiction in order to mirror, in a case brought by Kroger, what we would see if OPPD were to bring such a suit? Indeed, if OPPD were to bring suit against Kroger and Owen Equipment, might not a court conclude that the parties should be realigned

as *Kroger v. OPPD and Owen Equipment* and that therefore diversity jurisdiction was lacking?¹¹ If so, then Professor Oakley's proposal would not create symmetry, but instead would permit broader federal jurisdiction in the more likely scenario of the injured party initiating suit than in the less likely scenario of one of the alleged tortfeasors initiating suit. More generally, while "litigants do not come labeled as 'plaintiffs' and 'defendants' as a matter of preexisting Platonic reality," but instead receive those labels as "a product of our remedial and substantive rules,"¹² one's alignment as a plaintiff or a defendant in a particular action is generally less arbitrary than Professor Oakley's formulation suggests.

III. AN ALTERNATIVE PROPOSAL

If I have my doubts about both Professor Oakley's proffered amendment and his argument for enacting the ALI's proposed § 1367 without amendment, what do I think should be done? I am acutely aware that it is far easier to be a critic than a creator, far harder to build than to poke holes. Therefore, in an effort to be constructive, I also offer the following proposal, well aware that it is likely to have greater flaws than what I have criticized.

Professor Oakley explains that the ALI rejected the possibility of a statute that would be a "paradigm of simplicity" consisting of "an express legislative delegation of discretionary power authorizing the federal courts to shape and apply doctrines of supplemental jurisdiction as they see fit."¹³ I agree that a grant of unconstrained discretionary power would not be wise.¹⁴ But in rejecting the prospect of giving the federal courts a blank check, the ALI's proposed § 1367—at least with regard to the categorical restrictions of supplemental jurisdiction in diversity cases—may have gone too far in the opposite direction, attempting to provide clear rule-based statutory answers to as many

11. See generally 13B CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 3607 (2d ed. 1984) (discussing the realignment of parties in diversity jurisdiction cases).

12. RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 912 (4th ed. 1996).

13. Oakley, *supra* note 1, at 674.

14. Cf. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1718-26 (2000) (criticizing the unconstrained discretion involved in certiorari practice). But see David L. Shapiro, *Supplemental Jurisdiction: A Confession, An Avoidance, and a Proposal*, 74 IND. L.J. 211, 218 (1998) (advocating "a law establishing the principle of supplemental jurisdiction, and then [leaving] all or most of the details to be worked out by the courts").

situations as possible. Such a statute invites, if not demands, the kind of close textual analysis to which I have subjected the proposal.

There is, of course, an intermediate course: codify the principles that courts must follow. Professor Oakley explains that the ALI sought to “codify a more modest conception of the *Kroger* rule” than the current § 1367 in order not to prejudice plaintiffs who are also defending parties.¹⁵ I have no quarrel with this principle. Indeed, I would generalize it: Supplemental jurisdiction should be available, even in diversity cases, to parties placed in a defensive posture. Why not codify that principle?

I suggest that a fourth clause be added to the ALI’s proposed § 1367(d), permitting supplemental jurisdiction in diversity cases where the supplemental claim “is asserted by a party in response to a claim asserted against that party.” I believe that this language would cover not only third-party claims by plaintiffs who find themselves in a defensive posture, but also counterclaims, cross-claims between defendants, and third-party claims by defendants against third-party defendants. If this is correct, then the entire complex concept of “asserted in the same pleading” could be jettisoned. The definition contained in the ALI’s proposed § 1367(a)(3) and the phrase “that is asserted in the same pleading and” in the ALI’s proposed § 1367(c), could both be deleted. The resulting proposed statute appears in the Appendix following. Its basic structure would provide a broad grant of supplemental jurisdiction, generally preclude supplemental jurisdiction over claims that depend upon diversity claims, and create particular exceptions where supplemental jurisdiction may be exercised over claims that depend upon diversity claims, the largest of which would be for claims asserted by those in a defensive posture.

Admittedly, this formulation would permit supplemental jurisdiction in at least one situation in which the ALI’s proposal would not. In particular, where a defendant is sued on a federal-question claim by a citizen of another state and responds with a permissive state-law counterclaim, unrelated to the federal-question claim, that exceeds the requisite amount in controversy, my formulation would authorize supplemental jurisdiction over a claim against an additional party to that counterclaim, even where the additional party to the counterclaim shares citizenship with the defendant. The ALI’s pro-

15. Oakley, *supra* note 1, at 675; *see also id.* at 664 n.5 (noting that “one of the problems of the current § 1367 is that, absent a strained construction, it forbids supplemental jurisdiction even of claims by plaintiffs against third-party defendants *impleaded by plaintiffs*”).

posed § 1367 (with or without Professor Oakley's proffered amendment) would not, because the freestanding diversity claim and the supplemental claim would be "asserted in the same pleading."¹⁶

I am not troubled by this modest expansion of supplemental jurisdiction compared to the ALI proposal. First, I am skeptical that there are many defendants who are sued on a federal-question claim by a citizen of another state *and* have an unrelated state claim (in excess of the amount in controversy) to raise against that plaintiff *and* against a citizen of the defendant's own state. I am quite certain that it would be a very rare litigant indeed who would contrive to be sued in federal court on a federal-question claim by a citizen of another state, *in order to* be able to litigate an unrelated state claim against that plaintiff and a citizen of the defendant's own state in federal court. It seems to me that we are *at least* as far away from the *Kroger* rationale here as we are when a plaintiff seeks to implead a third-party defendant in response to a counterclaim.

I also recognize that courts might not always agree on whether a particular claim is "asserted by a party in response to a claim asserted against that party," although the room for disagreement does strike me as relatively small. Yet even if courts disagree about this issue more than I expect, at least they would be debating the issue in terms of a valuable principle rather than as an arid exercise in textual exposition. For my money, that would be an improvement over both the current § 1367 and the ALI's proposed § 1367 (with or without Professor Oakley's amendment).

16. See ALI T.D. No. 2, *supra* note 3, at 59-60 (explaining that if OPPD had sued Mrs. Kroger on a federal-question claim and Mrs. Kroger filed an unrelated permissive counterclaim for her husband's wrongful death based on diversity, there would be no supplemental jurisdiction over her claim against additional party Owen Equipment); see also *id.* at 62-63 (making the same point using the stylized parties H, I, and J).

APPENDIX

ALI's Proposed § 1367 (with Hartnett modification)

(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; or

(4) is asserted by a party in response to a claim asserted against that party.

(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 dis-

trict 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.