Congress accepts Supreme Court's invitation to codify supplemental jurisdiction

Congress's codification of supplemental jurisdiction in response to the Supreme Court's decision in Finley *serves as a model of successful dialogue between the judicial and legislative branches.*

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Just before it recessed last October, Congress filled a widening chasm in the jurisdictional authority of the federal courts. That gap, opened by the Supreme Court a little over a year earlier in *Finley v. United States*,[1] was threatening to subvert the federal courts' power to deal with related matters efficiently, in single rather than in multiple litigation. At risk were the doctrines of pendent and ancillary jurisdiction, which permit parties in many circumstances to litigate an entire controversy, typically all transactionally-related claims, as long as the district court has a statutory basis for asserting subject-matter jurisdiction over a claim raised in plantiff's complaint. In legislation that will appear at 28 U.S.C. §1367 (see page 214), Congress has reaffirmed the long-accepted authority of federal courts to hear pendent and ancillary claims, one of a number of recommendations of the Federal Courts Study Committee that were enacted with admirable dispatch.[2]

Until *Finley*, the doctrines of pendent and ancillary jurisdiction, jointly labeled supplemental jurisdiction in section 1367, seemed both relatively settled and safe from attack. The contours of pendent claim jurisdiction, allowing a plaintiff in the absence of complete diversity to join to a federal question claim a related state claim, had been sensibly shaped by the Court in *United Mine Workers v. Gibbs*.[3] The federal courts also had largely resolved the details of ancillary jurisdiction, which in many circumstances permits the joinder of otherwise jurisdictionally insufficient claims, including claims by or against additional parties, after the filing of plaintiff's complaint. Only the existence of pendent party jurisdiction—whether, for instance, jurisdiction over a claim raised in plaintiff's complaint entails the power to hear a related state claim brought by the same plaintiff against an

1. 109 S. Ct. 2003 (1989).

2. The provision is part of the Federal Courts Study Committee Implementation Act of 1990. It is reprinted at 150 Cong. Rec. H13301-07 (daily ed. Oct. 27, 1990). The Act implements several of the less controversial recommendations of the Federal Courts Study Committee, established by Congress to study and report on possible ways to improve the federal court system. Among the Committee's recommendations that Congress has enacted are modifications of the removal and venue provisions and a 4 year statute of limitations applicable to federal legislation, enacted after the effective date of the Act, creating a right of action but silent as to the applicable limitations period. Moreover, the Committee specifically recommended that Congress codify pendent and ancillary jurisdiction. *Federal Courts Study Committee Report* 47-48 (April 2, 1990).

3. 383 U.S. 715 (1966).

additional, nondiverse defendant—had provoked substantial disagreement among the lower courts. Before *Finley*, the Supreme Court had dealt with pendent party jurisdiction only in limited contexts, and its decisions could be read to suggest that the power was there unless Congress had acted to deny it.[4]

Section 1367

Section 1367, which applies immediately to all civil actions commenced after the Act's effective date of December 1, 1990, provides as follows:

"§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."

The *Finley* case

The 5-4 decision in *Finley* resolved the uncertainty over pendent party jurisdiction, by rejecting Barbara Finley's invocation of pendent party jurisdiction in the context of a Federal Tort Claims Act (FTCA) suit. Finley's husband and children were killed when a plane in which they were flying struck electric transmission wires during its approach to a San Diego airfield. Finley sued the utility company in state court, but when she learned that the Federal Aviation Administration might have been responsible, she brought an action under the FTCA in federal district court, which has exclusive jurisdiction over FTCA suits. Later, Finley tried to append a state law tort claim against a nondiverse defendant, the utility company.[5]

Finley thus presented the Court with a compelling case for recognizing pendent party jurisdiction: the plaintiff's federal claim could not be heard in state court; the federal and state law claims were closely linked, and requiring Finley to pursue her claims in two different forums would be sheer waste of judicial resources (or would force her to abandon one if she chose to bring only a single action).

The majority in *Finley* was aware of the efficiencies.[6] It nonetheless felt compelled to order dismissal of the claim against the pendent party because Congress had not affirmatively provided for subject-matter jurisdiction over Finley's related state claim against the utility company.[7] Although formally limited to FTCA suits, *Finley* has been interpreted to disapprove of pendent party jurisdiction generally under existing jurisdictional statutes.[8] Even more ominously, the Court's rationale that "with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly,"[9] cut a wider swath. Some lower courts already have understood the Court's language to undermine previously accepted and important forms of supplemental jurisdiction, such as impleader of a nondiverse third-party defendant.[10]

A fair reading of *Finley* suggests that the majority was not oblivious to the possible need for a legislative response. Indeed, Justice Scalia's opinion for the Court virtually invited Congress to fill the jurisdictional gaps its decision had created. "Whatever we say regarding the scope of jurisdiction," the Court explained, "can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."[11] Congress through 28 U.S.C. §1367 has accepted the Court's invitation.

Section 1367

With a few exceptions discussed below, section 1367 codifies supplemental jurisdiction as it existed before the *Finley* decision. Theoretical arguments can be made for broadening supplemental jurisdiction even as it existed prior to *Finley*. But expanding supplemental jurisdiction would require relaxing the requirements for diversity jurisdiction and would cut against the dominant perception, shared by the Federal Courts Study Committee, that federal courts should focus more of their resources on federal question cases and fewer (or none at all) on diversity cases.[12] In order to repair *Finley's* damage in a noncontroversial manner without expanding the scope of

4. *See* Aldinger v. Howard, 427 U.S. 1,18 (1976) (federal courts have jurisdiction over pendent parties as long as "Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence") (Rehnquist, J.). The Supreme Court's message was far from clear. *Compare, e.g.*, Feigler v. Tidex, Inc., 826 F.2d 1435, 1437-39 (5th Cir. 1987) (approving pendent party jurisdiction in an admiralty case), *with* Safeco Ins. Co. v. Guyton, 692 F.2d 551, 555 (9th Cir. 1982) ("This circuit historically has been hostile to the concept of pendent party jurisdiction.").

5. 109 S. Ct. at 2005.

6. *See id.* at 2010 (*Finley* holding "means that the efficiency and convenience of a consolidated action will sometimes have to be forgone in favor of separate actions in state and federal courts").

7. *Id.* at 2007-09.

8. *See, e.g.*, Iron Workers Mid-South Pension Fund v. Terotechnology Corp., 891 F.2d 548, 551 (5th Cir. 1990).

9. 109 S. Ct. at 2007.

10. *See, e.g.*, Aetna Casualty & Surety Co. v. Spartan Mechanical Corp., 738 F. Supp. 664, 673-77 (E.D.N.Y 1990) (reviewing conflicting district court decisions).

11. 109 S. Ct. at 2007.

12. *See Report of the Federal Courts Study Committee, supra* n. 2, at 14-15 (justifying recommendation to abolish diversity jurisdiction on grounds that the federal courts should primarily resolve disputes over federal law).

diversity jurisdiction, the statutory measure was therefore framed to restore and regularize supplemental jurisdiction, not to revamp it.

Section 1367(a), for example, generally authorizes the district courts to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim that provides the basis of the district court's original jurisdiction. In reaching to the limits of Article III, subsection (a) codifies supplemental jurisdiction at the outer constitutional boundary that existed before *Finley's* statutory revisionism.[13] Typically, courts have understood the same constitutional case or controversy to include all claims arising out of a single transaction or occurrence or related series of transactions or occurrences.[14]

The second sentence of subsection (a), making explicit the federal courts' authority to hear supplemental claims "that involve the joinder or intervention of additional parties," in part simply reinstates the prior settled law. Thus, for example, as under pre-*Finley* practice, impleader claims against nondiverse third-party defendants are authorized, as are compulsory counterclaims and cross-claims involving additional parties. The second sentence, however, modifies current law by overruling *Finley*. Congress thus has resolved the controversy over pendent party jurisdiction by providing the explicit statutory authorization found lacking and regarded as necessary by the *Finley* majority.

Subsection (b) restricts the federal courts' exercise of supplemental jurisdiction in diversity cases by, in effect, codifying the principal rationale of *Owen Equipment & Erection Co. v. Kroger*.[15] In *Kroger*, the Court held that when jurisdiction rests solely on the general diversity statute, 28 U.S.C. §1332, no supplemental jurisdiction exists for a plaintiff's claim against a nondiverse third-party defendant. To allow supplemental jurisdiction in this circumstance, the Court explained, would encourage plaintiffs to evade the complete diversity requirement of 28 U.S.C. §1332 by naming initially only defendants of diverse citizenship and waiting for them to implead nondiverse defendants.[16] Subsection (b) fully implements the *Kroger* rationale by prohibiting the district courts, in actions founded solely on the diversity statute, from exercising supplemental jurisdiction over claims by plaintiffs against persons made parties through any of several of the joinder devices of the Federal Rules of Civil Procedure—impleader under Rule 14, compulsory joinder under Rule 19, permissive joinder under Rule 20, or intervention under Rule 24—when doing so would be inconsistent with the jurisdictional requirements of section 1332.[17]

In the same vein, the subsection also prohibits the exercise of supplemental jurisdiction in connection with the joinder or intervention of persons as plaintiffs when it would be inconsistent with section 1332.[18] Class actions under Federal Rule of Civil Procedure 23 are not included in the diversity cases to which the restrictions in subsection (b) apply, and the legislative history makes clear that section 1367 is not intended to affect their jurisdictional requirements as previously determined.[19] Thus, the Supreme Court's holdings that only the named class representatives must satisfy the citizenship requirement of section 1332[20] but that all class members must satisfy the amount in controversy requirement,[21] remain good decisional law.

Subsection (b) alters prior law in one modest but significant way, we think in a manner consistent with the spirit of *Kroger*. Anomalously, cases predating section 1367 held that a person might intervene as of right under Federal Rule of Civil Procedure 24(a) on a supplemental basis, but the same person would not come within supplemental jurisdiction if the person was sought to be joined under Federal Rule 19.[22] This disparity, which may have had the effect of encouraging certain nondiverse plaintiffs to evade the diversity requirements by intervening in an action shortly after it was filed by diverse plaintiffs, has been abolished in subsection (b). Now, that person can neither intervene as a plaintiff under Rule 24(a) nor be joined as a plaintiff under Rule 19 if intervention or joinder would be inconsistent with the diversity requirements. In these circumstances, courts should not only deny intervention or joinder, but also consider dismissing the entire action pursuant to Rule 19 when significant interests would be prejudiced by the absentee's exclusion from the action.[23]

Subsection (c) provides federal courts with discretion in some circumstances to decline to exercise supplemental juris-

13. *See* Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 371 (1978); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). *Finley* assumed without deciding that adding claims against pendent parties would be constitutional in federal question cases, *see* 109 S. Ct. at 2006-07, and consequently does nothing that seems to disturb the broad constitutional scope of a "case" recognized in *Gibbs*. Moreover it is undisputed that minimal diversity, which amounts to allowing pendent parties in diversity cases, is constitutional. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967); Kroger, 437 U.S. at 373 n. 13. Pendent party jurisdiction therefore must be constitutional in federal question cases as well.

14. *See* 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §3567.1, at 117 (2d ed. 1984) ("loose factual connection" among the various claims satisfies Article III). Some lower federal courts have implied that they would uphold ancillary jurisdiction over Rule 14 third-party defendants even if the indemnity claims against them did not arise out of the same transaction or occurrence as the plaintiff's claim against the defendant. *See, e.g.*, H.L. Peterson Co. v. Applewhite, 383 F. 2d 430, 433 (5th Cir. 1967). Other courts have held explicitly that "transaction or occurrence" does not define the outer boundaries of supplemental jurisdiction. *See e.g.*, Abromovage v. United Mine Workers, 726 F.2d 972, 990 (3d Cir. 1984) (holding that permissive counterclaims which are set-offs are within supplemental jurisdiction). If such exercises of supplemental jurisdiction are constitutional, section 1367(a) authorizes the federal courts to continue them.

15. 437 U.S. 365 (1978).

16. *Id.* at 374.

17. Subsection (b), in prohibiting certain *claims* by a plaintiff, is silent regarding *counterclaims* by the plaintiff in reaction to the claims of joined parties against the plaintiff. Such counterclaims, at least if compulsory, are therefore within supplemental jurisdiction. *See, e.g.*, Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970).

18. Obviously, the same rule applies to a plaintiff's amended complaint seeking to name a co-plaintiff who is not diverse from all defendants.

19. H.R. Rep. No. 734, 101st Cong., 2d. Sess. 29 (1990) [hereinafter House Report]. The Senate Judiciary Committee did not prepare a report on supplemental jurisdiction; Senator Grassley, however, a member of that committee, inserted in the record a section-by-section analysis, identical in all respects to the House Report's analysis. *See* 136 Cong. Rec. S17580-81 (daily ed. Oct. 27, 1990). In effect, then, the pertinent legislative history is the House Report.

20. Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921).

21. Zahn v. International Paper Co., 414 U.S. 291 (1973).

22. *See* 7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, §1917, at 472-81 (2d ed. 1986).

23. Subsection (b) modifies supplemental jurisdiction in one other respect. Under pre-section 1367 decisions, if the joinder of a person found to be a necessary defendant under Rule 19 of the Federal Rules of Civil Procedure would be inconsistent with the jurisdictional requirements of 28 U.S.C. §1332, the person could not be joined even on a supplemental basis. Under section 1367, a person found to be a necessary defendant under Rule 19 may be joined on a supplemental basis, but the plaintiff may not initiate a claim against that person. For further analysis, see Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. Rev. 247, 284-87.

diction. It codifies those factors that the Supreme Court in *United Mine Workers v. Gibbs* recognized as providing a sound basis for a lower court's discretionary decision to decline supplemental jurisdiction.[24] Under subsection (c), a district court may dismiss a supplemental claim if it raises a novel or complex issue of state law, substantially predominates over the claim or claims over which the district court has original jurisdiction, or if the district court has dismissed all claims over which it has original jurisdiction and judicial efficiency does not clearly favor adjudicating the supplemental claim.[25] Additionally, the subsection accommodates exceptional circumstances, not defined, in which grounds for dismissal of the supplemental claim may be compelling. In each of these circumstances, the House Report cautions, the district court in exercising its discretion must undertake a case-specific analysis.[26] Illustrative is *Perez v. Ortiz*.[27] In *Perez*, the Second Circuit reversed the district court for failing to articulate any reasons for dismissing pendent state claims brought by five plaintiffs in a federal civil rights suit under 42 U.S.C. §1983; the district court may simply have had a docket-clearing practice of dismissing pendent claims.

Dismissing claims

The possibility that a district court may dismiss supplemental claims brought by one or more parties raises a variety of concerns. Section 1367(d) addresses one of these issues, and the House Report discusses a few others. One concern is that a party, in refiling a claim in state court after the federal court has dismissed it, may face a limitations problem. Congress has explicitly addressed this problem in subsection (d) by providing a period of tolling of statutes of limitations for any supplemental claim that is dismissed and for any other claims voluntarily dismissed at the same time or thereafter. These claims are tolled for 30 days after they are dismissed, unless state law provides a longer period. As the House Report notes, the purpose of subsection (d) is to prevent the loss of claims to statutes of limitations where state law fails to toll the running of its limitations period while a supplemental claim is pending in federal court.[28] Moreover, subsection (d) eliminates any disincentive to parties who wish to litigate their entire action in state court after their supplemental claims have been dismissed, by providing a tolling period of at least 30 days (more if state law allows) for the nonsupplemental claims voluntarily dismissed in federal court and refiled in state court.[29]

In effect, section 1367(d) contemplates, without specifically addressing the procedural means for doing so, that some parties will desire to take their entire action to state court if they are prohibited from raising some or all of their supplemental claims in federal court. Those procedures, the House Report notes, already exist in Federal Rule of Civil Procedure 41(a). The standards generally governing voluntary dismissal under Rule 41(a) should control here as well.[30]

Not all parties, of course, will choose or be able to refile their entire action in state court after their supplemental claims are dismissed.[31] Some will continue to litigate what is left of their federal action in federal court, while choosing to refile their supplemental claims in state court. When the district court has exercised its discretion to dismiss a supplemental claim pursuant to subsection (c), a party is forced by court order to split a single "constitutional case" between the federal and state court systems, if that party wishes both to retain its right to a federal forum and to pursue the supplemental claim in a forum that will adjudicate it. To ensure that a party is not discouraged from litigating in federal district court the claims that are within its original jurisdiction, the House Report advises the district court, "in deciding that party's claims over which the court has retained jurisdiction, [to] accord no claim preclusive effect to a state court judgment on the supplemental claim."[32] Thus, if the supplemental claim reaches final judgment in the state court before the federal district court has resolved the claims over which it has retained jurisdiction, claim preclusion should have no effect on the party's federal court action—although state court determinations on common *issues* could provide a basis for issue preclusion in the federal action.

Conclusion

Congress's codification of supplemental jurisdiction in response to the Supreme Court's decision in *Finley* serves as a model of successful dialogue between the judicial and legislative branches, dialogue that was facilitated by the work of the Federal Courts Study Committee. In May 1989, the Court in *Finley* rejected the exercise of pendent party jurisdiction without explicit statutory authorization, raised doubts concerning the statutory basis for other forms of supplemental jurisdiction, and, in the opinion itself, suggested that Congress could provide a statutory grounding. Just 17 months later, Congress responded by codifying supplemental jurisdiction largely as it had evolved through judicial decisionmaking. In so doing, Congress preserved the federal courts as hospitable forums for the resolution of entire cases or controversies within original federal jurisdiction. □

24. 383 U.S. at 726-27.

25. *See* Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 n.7 (1988) (*Gibbs*' statement that supplemental claims should be dismissed after the claims within the court's original jurisdiction have been dismissed is not an inflexible mandate but a guideline for the exercise of judicial efficiency).

26. House Report, *supra* n. 19, at 29.

27. 849 F.2d 793, 798 (2d Cir. 1988).

28. House Report, *supra* n. 19, at 30. This provision implements in specific context a general recommendation of the American Law Institute in its 1969 *Study of the Division of Jurisdiction Between State and Federal Courts*, §1386(b), at 65. In section 1386(b), the ALI recommended that Congress enact legislation providing that if an action timely filed in federal court is dismissed for lack of subject-matter jurisdiction, a litigant should have 30 days to refile the action in state court. The ALI considered and rejected the contention that such a provision was unconstitutional as being an "invalid exercise of federal power to direct a state court to entertain such a cause if it would be barred under the state's own law." *Id.* at 453 (supporting memorandum containing the ALI's analysis of the constitutional issue).

29. House Report, *supra* n. 19, at 30.

30. *Id.*

31. Indeed, when the nonsupplemental claims are within the exclusive jurisdiction of the federal courts, a party must split its action in order to litigate both the exclusive federal claims and the supplemental claims that have been dismissed—which could be a reason for the federal court to exercise its discretion to retain the supplemental claims.

32. House Report, *supra* n. 19, at 29-30.

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The authors participated in the drafting of the legislation codifying supplemental jurisdiction at 28 U.S.C. §1367. See H.R. Rep. No. 734, 101st Cong., 2d. Sess. 27 n.13 (1990).