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A User's Guide to Supplemental Jurisdiction, 27 U. Tol. L. Rev. 85 (1995)

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A USER'S GUIDE TO SUPPLEMENTAL JURISDICTION

*Diane S Kaplan**

I INTRODUCTION

THE new law of supplemental jurisdiction¹ combines the common-law doctrines of pendent² and ancillary³ jurisdiction to create a constitutional

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1 The statute was enacted December 1 1990 as part of the Judicial Improvements Act of 1990 Pub L No 101 650 104 Stat. 5089 (codified as amended at 28 U S C § 1367 (1994)). The statute provides:

§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.

2 See *United Mine Workers v Gibbs* 383 U S 715 725 (1966) (allowing a jurisdictionally

basis for federal subject matter jurisdiction over claims that are jurisdictionally insufficient. Although recent articles have examined the theoretical aspects of this new statute,⁴ none has set forth a methodology for negotiating a section 1367 issue. This article assumes that task. First, the article illustrates how the supplemental jurisdiction scheme works in general. Second, it demonstrates how a section 1367 analysis compares in result to its pendent and ancillary jurisdiction common-law predecessors. Last, it presents a decision-tree analysis of questions and answers to guide the reader through a section 1367 problem. The decision-tree analysis applies to virtually every supplemental jurisdiction issue in which the court's original jurisdiction is based on section 1331 or section 1332, and is wholly objective and non-doctrinal.⁵

II THE STATUTE: ITS HISTORICAL CONTEXT AND PROCEDURAL MEANING

A Definition of Supplemental Jurisdiction

1 Differences Between Section 1331 and Section 1332 Treatment

Section 1367(a) defines supplemental jurisdiction as all jurisdictionally insufficient claims that are so related to jurisdictionally sufficient claims "that they form part of the same case or controversy under Article III of the United States Constitution."⁶ The "case or controversy" language applies to both section 1331 and section 1332 jurisdiction.

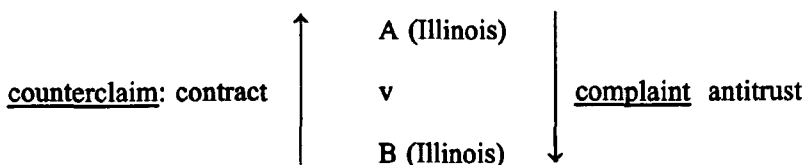
insufficient claim to be appended to a jurisdictionally sufficient claim if both claims arose from a common nucleus of operative facts.") See also *Osborn v. Bank of the United States*, 22 U.S. 738, 823 (1824).

3 The common law doctrine of ancillary jurisdiction required the joinder of claims brought by defendants under Federal Civil Procedure Rules 13(a), 13(g), 14(a) and 24(a). When such claims were both necessary to the defense and dependent on the original claim. See *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

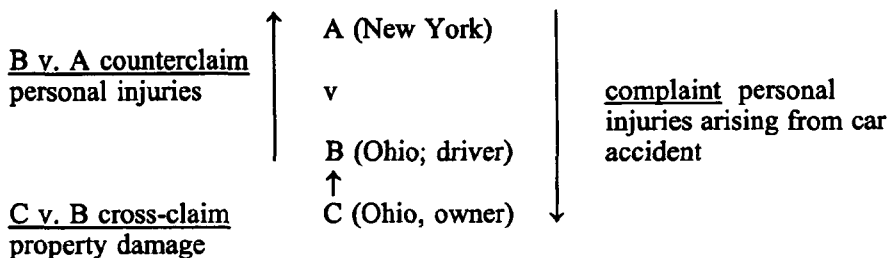
4 See generally Karen N. Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31 (1992); Wendy C. Perdue, *The New Supplemental Jurisdiction Statute—Flawed But Fixable*, 41 EMORY L.J. 69 (1992); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85 (1992); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991); Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute*, 28 U.S.C. § 1367, 19 SETON HALL LEGIS. J. 157 (1994); Dennis McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. L.J. 849, 861 (1992).

5 According to section 1367(a) the jurisdictionally sufficient claim must arise under the original jurisdiction of the district court, which means that in addition to sections 1331 and 1332 the jurisdictionally sufficient claim may also be based on sections 1333, 1335, 1337, 1338, 1339 & 1343. See *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 810 (2d Cir. 1971).

6 28 U.S.C. § 1367(a) (1994).

Example 1

In this example, A's federal antitrust claim against B satisfies section 1331 jurisdiction but B's breach of contract counterclaim fails to satisfy section 1332, since both A and B are from Illinois. Nonetheless, under section 1367(a) the court must exercise supplemental jurisdiction over the counterclaim because, in addition to being "part of the same case or controversy" as the antitrust claim,⁷ it is also a compulsory counterclaim under Rule 13(a).⁸

Example 2

In this example, A, from New York, sues B and C, both from Ohio, for personal injuries sustained when A was struck by a car owned by C, but driven by B. The complaint charges B with negligent driving and C with negligent maintenance of the vehicle. B's counterclaim charges A with negligence. C's cross-claim charges B with property damage to the car. Jurisdiction, as between A and B, is based on diversity. C's cross-claim against B lacks an independent jurisdictional basis, since there is no diversity between B and C. However, the court must exercise supplemental jurisdiction over C's cross-claim because it is "part of the same case or controversy" as A's claim against B and C and is not barred by section 1367(b).⁹ Similarly, even if B's counterclaim against A seeks only \$20,000 in damages, the court must exercise supplemental jurisdiction over

7 28 U.S.C. § 1367(a) (1994)

8 FED. R. CIV. P. 13(a). See *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1237 (3d Cir. 1994).

9 28 U.S.C. § 1367(b) (1994); *Meritor Sav. Bank v. Camelback Canyon Investors*, 783 F. Supp. 455, 457 (D. Ariz. 1991).

it since it satisfies the “case or controversy” requirement of section 1367(a), even though it is insufficient under section 1332¹⁰

2 *The Case or Controversy versus Common Nucleus of Operative Facts*

It is important to note that the “case or controversy under Article III” test has taken the place of “the common nucleus of operative facts” test of *United Mine Workers v Gibbs*¹¹ Although both tests require a close relationship between the jurisdictionally sufficient and jurisdictionally insufficient claims, the two tests are not identical¹² The distinctions are few, but important

First, although the scope of most jurisdictional statutes is narrower than their constitutional authority,¹³ the scope of the supplemental jurisdiction statute is coextensive with its constitutional authority under Article III¹⁴ The *Gibbs* test, however, was not rooted in the constitution, but rather, in the federal courts’ inherent authority to administer justice fairly, efficiently, and with minimal waste and burden¹⁵ Therefore, the federal courts’ constitutional authority to join supplemental claims under section 1367 logically should be broader than its common-law authority under *Gibbs*¹⁶ Although it is inevitable that the

10 If the counterclaim sought \$51 000 in damages supplemental jurisdiction would not be necessary since the counterclaim itself would satisfy section 1332 diversity 28 U S C § 1332 (1994)

11 383 U S 715, 725 (1966) (approving the use of pendent jurisdiction over a jurisdictionally insufficient claim that arose from the same common nucleus of operative facts as the jurisdictionally sufficient claim)

12 *But see* Salei v Boardwalk Regency Corp No 94-CV 72239 DT 1996 U S Dist. LEXIS 739 at *8 9 (E D Mich Jan 23 1996)

13 A comparison of Article III diversity jurisdiction language to section 1332 reveals that the statute is narrower than its constitutional authority *See* 28 U S C § 1332 (1994) A similar difference in scope can be found between Article III federal question jurisdiction and 28 U S C § 1331 (1994) *See* Ankenbrandt v Richards 112 S Ct 2206 2212 (1992) (explaining that if inferior courts were created, [Congress was not] required to invest them with all the jurisdiction it was authorized to bestow under Art. III) (citing *Palmore v United States* 411 U S 389 401 (1973)) Furthermore federal courts only have the power to preside over cases for which there is both a constitutional and congressional grant of authority *Finley v United States*, 490 U S 545, 547-48 (1989)

14 *See* *Brazinski v Amoco Petroleum Additives Co* 6 F 3d 1176 1181 (7th Cir 1993); *Palmer v Hospital Authority of Randolph County* 22 F 3d 1559 1566 (11th Cir 1994); *Lewis v Richardson*, No 94-509 JD, 1995 U S Dist. LEXIS 16607 at *3-4 (DNH Nov 8 1995); *Kedziora v Citicorp Nat Servs Corp*, No 91 C-3428 1995 U S Dist LEXIS 12137, at *11 12 (ND Ill Aug 12 1995)

15 *Executive Software North America, Inc v United States District Court*, 24 F 3d 1545 1552 (9th Cir 1994) To qualify for pendent jurisdiction treatment, the jurisdictionally insufficient claim had to satisfy one or more of the following tests: (1) logical relationship; (2) transactional relationship; or (3) substantial commonality of facts, occurrences or causes *See* *Plant v Blazer Fin Servs* 598 F 2d 1357, 1360 (5th Cir 1979)

16 *See e g* *Amco Construction Co v Mississippi State Bldg Comm n*, 602 F 2d 730 (5th Cir 1970) This case arose when a construction project was abandoned, and Stiglet (a Mississippi corporation and subcontractor) sued Houston General (a Texas corporation and Amco s surety) in

“common nucleus of operative facts” and “case or controversy” tests will yield equivalent results in some instances, an argument can be made for broader jurisdictional authority under section 1367, given its constitutional basis

The broader scope of supplemental jurisdiction is further confirmed in the last sentence of section 1367(a), which provides that “supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties”¹⁷ This language reverses the decision in *Finley v United States*,¹⁸ by authorizing federal courts to preside over supplemental claims brought by or against an “additional party”¹⁹ The following example illustrates the “additional party” concept

Example 3

A (Illinois)	
v	<u>complaint:</u>
B (Illinois) ---	antitrust
C (Illinois) ---	contract

Mississippi state court for payments due under a performance bond. Houston General removed the action to the United States District Court for the Southern District of Mississippi on the basis of diversity jurisdiction *Id* at 732 Holcomb Asphalt Company Inc then intervened as a plaintiff and Houston implied the project engineer, the Mississippi State Building Commission and Amco Construction Company, Inc for indemnification and money owed. *Id* Amco as a third party defendant, cross-claimed against the commission and project engineer for defective plans negligence, and breach of contract. *Id* The Commission filed a counterclaim to Amco s cross-claim for costs incurred for unperformed work. *Id* Subsequently all claims were either settled or dismissed except for the cross-claim between Amoco and the Commission, who were not diverse *Id* The court dismissed the cross-claim for lack of ancillary jurisdiction because it did not arise from the same transaction which gave rise to the original claim” and because it was legally and logically independent of the original claim *Id* at 733 If section 1367 had been enacted at the time the court could have exercised supplemental jurisdiction over the cross-claim because it arose from the same case or controversy as the original claims, even though it did not arise from the identical transaction and was capable of being litigated independently of such claims

17 28 U S C § 1367(a) (1994) See *Palmer v Hospital Authority of Randolph County* 22 F 3d 1559 1567 (11th Cir 1994)

18 490 U S 545 (1989) In this case plaintiff Finley sued the San Diego Gas and Electric Company and the City of San Diego in California state court for the death of her husband and two children *Id* at 546 The complaint alleged that the defendants had negligently maintained transmission lines and illuminated runway lights, resulting in the crash of the plane that carried her family *Id* When Finley subsequently learned that the Federal Aviation Administration was responsible for the runway lights she filed suit in the United States District Court for the Southern District of California claiming jurisdiction over the United States under the Federal Tort Claims Act, 28 U S C § 1346(b) (1994) Finley also moved to amend her complaint to add the original, but non-diverse, state court defendants The district court granted her motion, asserting pendent jurisdiction based on *United Mine Workers v Gibbs* 383 U S 715 (1966) The United States Court of Appeals for the Ninth Circuit reversed. The Supreme Court affirmed the judgment of the Court of Appeals, holding that a federal court may only exercise jurisdiction over pendent claims not pendent parties

19 See *Stromberg Metal Works Inc v Press Mechanical, Inc*, 77 F 3d 928 (7th Cir 1996)

In this example, A sues B for a federal antitrust violation, and C for breach of a contract related to the antitrust violation. Under pendent jurisdiction, a federal court could not preside over A's claim against C because there was neither diversity nor federal question jurisdiction over the contract claim.²⁰ C was deemed the ignominious 'pendent party'.²¹ However, under section 1367(a), the court may now exercise supplemental jurisdiction over A's claim against C because the contract claim "form[s] part of the same case or controversy" as the antitrust claim.²²

Supplemental jurisdiction's "additional party" language can also apply when the federal court's original jurisdiction is based on section 1332

Example 4

	<u>complaint</u> personal injury
A (Georgia)	\$60,000 damages
B (Georgia)	\$10,000 damages
v	
C (Florida)	

In this example, father A and daughter B are simultaneously injured when the car in which they are driver and passenger is hit by C. Diversity exists between A and C, but not between B and C because the jurisdictional amount is insufficient.²³ B, therefore, is a "pendent party" in a suit based on diversity jurisdiction and, under the common law, could not be joined.²⁴ Under section 1367(a), however, supplemental jurisdiction exists over B, who can be joined as an "additional party," even though her claim lacks the requisite amount in controversy as both claims form part of the same case or controversy.²⁵

20 28 U.S.C. § 1367 (1994)

21 *Finley* 490 U.S. at 555

22 28 U.S.C. § 1367(a) (1994)

23 28 U.S.C. § 1332 (1994)

24 *United Mine Workers v. Gibbs* 383 U.S. 715, 725 (1966)

25 28 U.S.C. § 1367 (1994). See *Stromberg Metal Works Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996); *Shanaghan v. Cahill*, 58 F.3d 106, 109 (9th Cir. 1995); *Lewis v. Richardson*, No. 94-509 JD, 1995 U.S. Dist. LEXIS 16607 at *5 (D.N.H. Nov. 8, 1995); *Booty v. Shoney's, Inc.* 872 F. Supp. 1524, 1527 (E.D. La. 1995); *Garza v. National Am. Ins. Co.* 807 F. Supp. 1256, 1257 (M.D. La. 1992); *Lindsay v. Kvortek, Kasto Serv. Inc.* 865 F. Supp. 264, 272, 73 (W.D. Pa. 1994). But see *First Interstate Mortgage Co. v. Hinshaw & Culbertson*, No. 95 C 3867, 1995 U.S. Dist. LEXIS 19436 (N.D. Ill. Dec. 27, 1995); *Chee Chung Leung v. Checker Motors Corp.*, No. 93 C 2704, 1993 U.S. Dist. LEXIS 17174 (N.D. Ill. Dec. 2, 1994). The question of whether the additional party language of section 1367(a) overrules the amount in controversy requirement of *Zahn v. International Paper Co.* 414 U.S. 291 (1973) in the non-class action context is the subject of significant dispute in the courts. See *Lindsay v. Kvortek, Kasto Serv. Inc.* 865 F. Supp. 264, 273 (W.D. Pa. 1994); *Patterson v. Bridgestone/Firestone Inc.* 812 F. Supp. 1152, 1154, 55 (D. Kan. 1993); *ITT Comm. Fin. Corp. v. Unlimited Automotive Inc.* 814 F. Supp. 664

Jurisdiction can also be exercised over B's claim because it is not prohibited under any of the exceptions set forth in section 1367(b)²⁶

B Limitations on Diversity Jurisdiction

While subsection 1367(a) defines the general principle of supplemental jurisdiction, subsection 1367(b) contains its exceptions²⁷. All such exceptions apply exclusively to diversity jurisdiction²⁸. Section 1367(b) specifically excludes from supplemental jurisdiction all claims by "plaintiffs against persons made parties under Rules 14, 19, 20 or 24," and "persons proposed to be joined as *plaintiffs* under Rule 19 or 24" when the exercise of supplemental jurisdiction would be inconsistent with the diversity requirements of section 1332²⁹. Three questions arise from this language. What does it mean? How does it work? Is it a good idea?

1 *What Does It Mean?*

Simply put, section 1367(b) means that when original jurisdiction is based on section 1332, a plaintiff cannot use Rules 14, 19, 20 or 24 to bring a claim against a non-diverse defendant. This limitation on diversity jurisdiction has several rationalizations: there is no constitutional basis for subject matter jurisdiction over such claims, there was no precedential basis under the prior common law for such claims, and, as a matter of policy, plaintiffs should not be allowed to circumvent diversity jurisdiction requirements by joining to a lawsuit new defendants who could not have been sued in federal court in the first place.

2 *How Does It Work?*

Practically speaking, section 1367(b)'s limitations on diversity jurisdiction mean that some "cases or controversies" will not be capable of complete resolution in

669 (N D Ill 1992); *Haslam v Lefta, Inc* No 93 C 4311 1994 U S Dist. LEXIS 3623 (N D Ill Mar 24 1994); *Corporate Resources Inc v Southeast Suburban Ambulatory Surgical Center Inc* 774 F Supp 503 506 (N D Ill 1991). *Contra* *Griffin v Dana Point Condominium Assoc* 768 F Supp 1299 (N D Ill 1991); *Averdick v Republic Fin Servs Inc* 803 F Supp 37 45 (E D Ky 1992); *Duet v Lawes* No 94-0739 1994 U S Dist. LEXIS 4755 (E D La Apr 7, 1994)

²⁶ 28 U S C § 1367(b) (1994); *Miller v. American Home Prods*, No 95 3567 1996 U S Dist. LEXIS 2413 (E D Pa. Feb 27, 1996); *Patterson v Bridgestone/Firestone, Inc*, 812 F Supp 1152 1154 (D Kan 1993); *Hanshaw v US Fidelity & Guaranty Co* 746 F Supp 55 58 (D Kan 1990); *Pellegrino v Pesch*, No 91 C 4967 1992 U S Dist. LEXIS 9507 (N D Ill June 29 1992); *Congram v Giella*, No 91 Civ 1134 1992 U S Dist. LEXIS 17230 (S D N Y Nov 10, 1992); *Knac Agencies v Masterpiece Apparel, Ltd.*, No 94 Civ 1073, 1994 U S Dist. LEXIS 7459 (S D N Y June 7 1994); *Cheremie v Texaco Inc* No 91 3114, 1991 U S Dist. LEXIS 15616 (E D La. Oct 31 1991); *Chouest v American Airlines, Inc*, 839 F Supp 412, 415 (E D La 1993)

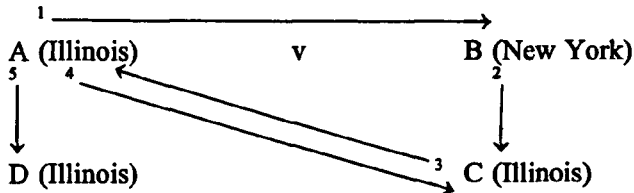
²⁷ 28 U S C § 1367 (1994)

²⁸ 28 U S C § 1367 (1994)

²⁹ 28 U S C § 1367(b) (1994) (emphasis added) *See* *Development Fin Corp v Alpha Housing & Healthcare* 54 F 3d 156, 160 (3d Cir 1995)

a federal court An example of this phenomenon can be observed in the application of section 1367 to Federal Rule of Civil Procedure 14

Example 5



In claim 1, A sues B for personal injuries sustained in a car accident. In claim 2, B impleads C, its insurance company, under Rule 14(a). In claim 3, C files a counterclaim against A under Rule 14(a) for contributory negligence. In claim 4, A files a claim against C in response to C's counter-claim against A.³⁰ In claim 5, A files a third-party claim for indemnification against D, A's insurance company, under Rule 14(b).³¹ However, claims 4 and 5 will be barred under section 1367(b) because each is brought by a 'plaintiff against persons made parties under Rule 14,' and also, because to do otherwise "would be inconsistent with the jurisdictional requirements of section 1332."³² As a result, B can implead his insurer for indemnification, but A cannot implead his insurer, even though there is no diversity for either third-party claim.

3 *Is It A Good Idea?*

Obviously, section 1367(b)'s preclusion of plaintiffs from the full use of Rule 14 results in treating Rule 14 plaintiffs quite differently from all other categories of litigants.³³ Is this disparate treatment constitutional? Due process may question why one class of litigant should be treated differently from all other classes of litigants. That question, however, must be viewed in light of the distinction between joinder and jurisdiction. The joinder rules merely permit various configurations of parties and claims to be combined in one lawsuit, whereas the rules of jurisdiction provide the constitutional basis for the federal

30 FED. R. CIV. P. 14 (When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.)

31 FED. R. CIV. P. 14(b); *Chase Manhattan Bank, N.A. v. Aldridge*, 906 F. Supp. 866 (S.D.N.Y. 1995); *Janey Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 412 n.15 (3d Cir. 1993); *Guaranteed Sys., Inc. v. American Nat'l Can. Co.*, 842 F. Supp. 855, 857-58 (M.D.N.C. 1994); *Fairman*, *supra* note 4 at 177-78.

32 FED. R. CIV. P. 14.

33 28 U.S.C. § 1367(b) (1994). See generally *Fairman*, *supra* note 4 at 175 n.111.

courts' power to preside over the dispute. In that light, joinder never trumps jurisdiction.

Even assuming there are no due process problems, section 1367(b)'s disparate treatment of plaintiffs may not be a good idea. The value of the joinder rules is founded in their ability to efficiently resolve multiple claims, by and against multiple parties, in one action. In some instances, however, section 1367(b)'s exceptions may virtually defeat Rule 14's efficiency function. In Example 5, assume that in claim 6, B files a counterclaim against A for the personal injuries she sustained in the car accident. Under Rule 14(b), A is then entitled to implead D, his insurance company.³⁴ However, D and A are not diverse. Therefore, A must litigate against B in federal court and against D in state court. Assume that the federal court finds that A's negligence caused B's injuries and that a judgment is entered for B. Assume also that the state court finds that A did not cause B's injuries and, therefore, D does not have to indemnify A. Now A is stuck in the unfortunate and litigiously wasteful situation of being liable to B without the benefit of indemnification. What is gained? The federal docket will not be burdened with A's supplemental claim against D, even though it still will be burdened with the rest of the action. The remainder of the dispute, however, will be subject to duplicative litigation in the state court.

What is lost? The intrinsic value of Rule 14 is neutralized by requiring multiple suits between the same parties, on the same issues, risking inconsistent judgments at the expense not only of the plaintiff, but also of the judiciary, which will then be subject to the indignity of contradicting itself. If diversity jurisdiction is so odious, why single out plaintiffs for such disparate treatment?³⁵

C The Guidelines

Section 1367(c) sets forth four "guidelines" under which "courts may decline to exercise supplemental jurisdiction"³⁶ even if the case or controversy requirement has been met:

- (1) When the supplemental claim raises a complex or novel issue of state law
- (2) When the supplemental claim substantially predominates over the claim on which the court's original jurisdiction is based;
- (3) When the district court has dismissed all jurisdictionally sufficient claims and only the supplemental claim remains;
- (4) When other compelling reasons exist for declining supplemental jurisdiction.³⁷

34 FED. R. CIV. P. 14(b)

35 Judge Easterbrook notes similar incongruencies in the treatment of Rules 19 and 20 by section 1367. See *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996).

36 28 U.S.C. § 1367(c) (1994)

37 28 U.S.C. § 1367(c) (1994)

Although this language sounds similar to the *Gibbs* guidelines, it actually inverts the *Gibbs* position³⁸ *Gibbs* treated pendent jurisdiction as a power to be exercised or declined at the discretion of the court³⁹ Under section 1367(c), however, the instruction to the court is mandatory⁴⁰ The language, “[t]he district courts *may* decline to exercise supplemental jurisdiction if⁴¹ any of the four guidelines exist, implies that absent such conditions, the discretion to decline jurisdiction does not exist⁴² When read in conjunction with the directive in section 1367(a) that district courts “*shall* have supplemental jurisdiction,”⁴³ section 1367(c) actually curtails the courts’ discretion to decline jurisdiction over supplemental claims since, absent any of the guidelines, district courts “*shall*” exercise supplemental jurisdiction⁴⁴

D *Grace Period and the Tolling of the Statute of Limitations*

Section 1367(d) tolls the statute of limitations for supplemental claims and provides a grace period of an additional thirty days after their dismissal from federal court⁴⁵ As a result, no penalty attaches for seeking federal, rather than state, recourse in the first instance⁴⁶ More specifically, the thirty-day grace period saves those supplemental claims dismissed under section 1367(c)(3) which, after years of litigation in the federal court, may be time-barred⁴⁷

III DECISION-TREE ANALYSIS

Theories, history, and policy aside, the following decision-tree analysis should provide a helpful checklist for negotiating section 1367 issues where the original jurisdiction of the court arises under sections 1331 or 1332

A *The Five Questions*

- 1 Is there a jurisdictionally sufficient claim based on section 1331 or section 1332?
If yes, go to Question 2
- 2 Is there a jurisdictionally insufficient claim? If yes, go to Question 3
- 3 Does the insufficient claim arise from the same case or controversy as the sufficient claim?

38 *United Mine Workers v Gibbs* 383 U.S. 715, 725 (1966)

39 *Id.* at 726

40 28 U.S.C. § 1367(c) (1994); *Gudenkauf v Stauffer Comm. Inc.*, 896 F. Supp. 1082, 1084 (D. Kan. 1995)

41 28 U.S.C. § 1367(c) (1994)

42 *See Executive Software North America, Inc. v United States District Court*, 24 F.3d 1545, 1556 (9th Cir. 1994)

43 28 U.S.C. § 1367(a) (1994) (emphasis added)

44 28 U.S.C. § 1367(c) (1994) *See Executive Software North America, Inc. v United States District Court*, 24 F.3d 1545, 1556 (9th Cir. 1994)

45 28 U.S.C. § 1367(d) (1994)

46 28 U.S.C. § 1367(c) (1994)

47 28 U.S.C. § 1367(c)(3) (1994)

- (a) If the sufficient claim is based on section 1331, then the insufficient claim qualifies for section 1367(a) treatment even if it requires the joinder of an “additional party” Go to Question 5
 - (b) If the sufficient claim is based on section 1332, go to Question 4
 - (c) If the insufficient claim does not arise from the same case or controversy as the sufficient claim, then there is no supplemental jurisdiction Dismiss the insufficient claim and file it in state court per section 1367(d)
- 4 If the sufficient claim is based on section 1332 is the insufficient claim subject to any of the exceptions of section 1367(b)?
- (a) If yes, then there is no supplemental jurisdiction Dismiss the claim and file it in state court per section 1367(d)
 - (b) If no, then you have a supplemental claim even if it requires the joinder of an “additional party” Go to Question 5
- 5 Does the supplemental claim fall within any of the four guidelines of section 1367(c)?
- (a) If yes, dismiss the claim and refile it in state court per section 1367(d)
 - (b) If no then you can proceed to litigate the supplemental claim in federal court

B Application

To demonstrate how the decision-tree analysis works, let us revisit Examples One and Four

Example 1

A (Illinois)

counterclaim: contract

v

complaint antitrust

B (Illinois)

In this example, A, a manufacturer, and B, a distributor, enter into an exclusive agreement for the nationwide distribution of Power Ranger toys To the surprise of both A and B, the toys become the hottest items to hit the market since Cabbage Patch Dolls A observes that B is slow in filling orders and becomes convinced that B lacks the ability to meet the increasing demand for the product A is informed by a lawyer that the distributorship contract contains numerous antitrust problems and that B’s distribution practices raise still others A sues B in federal court under the antitrust laws B counterclaims for wrongful termination of the distributorship contract

We can now apply the decision-tree analysis to this example The answer to Question One is yes, because A’s federal antitrust claim satisfies section 1331 jurisdiction The answer to Question Two is yes, because B s breach of contract claim is jurisdictionally insufficient under both sections 1331 and 1332 The

answer to Question Three is yes, because both claims arise from the same distributorship agreement. Since the court's original jurisdiction is based on section 1331, Question Three, subsection (a) informs us that the insufficient claim qualifies as a supplemental claim and instructs us to skip Question Four and go directly to Question Five. Question Five instructs us to determine if the supplemental claim falls within any of the four guidelines of section 1367(c). Assuming that it does not, then Question Five, subsection (b) tells us that we can proceed to litigate the supplemental claim in federal court.

Now, let us play the law professor's favorite game. Once the relationship between the statute and the facts is clearly explained to everyone's satisfaction, change the facts. Assume that instead of one contract, A and B had entered into two totally separate contracts, one for the national distribution of Power Ranger toys and one for the exclusive distribution of X-Men toys in Kansas. Once A files the antitrust claim against B for the Power Ranger contract, B counterclaims for breach of the X-Men contract. Now, let us return to the five questions.

The answer to Question One remains yes. The answer to Question Two remains yes. The answer to Question Three, however, becomes no because the claim and the counterclaim arise from unrelated disputes. Question Three subsection (c) informs us that B's counterclaim does not qualify as a supplemental claim, and directs us to dismiss it and refile in state court.

To see how the five questions work when the court's original jurisdiction is based on section 1332, let us re-examine Example Four.

Example 4

	<u>complaint</u> personal injury
A (Georgia)	\$60,000 damages
B (Georgia)	\$10,000 damages
v	
C (Florida)	

Father A and daughter B are simultaneously injured when the car in which they are driver and passenger is struck by C. Diversity exists between A and C, but does not exist between B and C because the jurisdictional amount is insufficient.

Our answers to the Five Questions are as follows: The answer to Question One is yes, because the original jurisdiction of the court is based on section 1332. The answer to Question Two is yes, because the amount in controversy as between B and C is insufficient under section 1332. The answer to Question Three is yes, because both claims arise out of the same car accident. We are then instructed under Question Three, subsection (b) to proceed to Question Four, which asks if the insufficient claim is subject to any of the exceptions of section 1367(b). The answer to this question is no, because B's claim is not made under any of Rules 14, 19, 20 or 24. According to Question Four, subsection (b) we are informed that we have a supplemental claim and instructed to proceed to Question Five. Assuming, *arguendo*, that none of section 1367(c)'s guidelines apply, then

Question Five, subsection (c) informs us that we can proceed to litigate our claim in federal court

IV CONCLUSION

The meaning and application of section 1367 now rests with the courts. Current decisions construing the statute reveal considerable discord. Despite such uncertainty, there can be little doubt that supplemental jurisdiction issues will arise with great frequency in the federal courts. Hopefully, the explanations, examples, and decision-tree analysis contained in this article will provide some assistance to that endeavor.

