PENDENT PARTY JURISDICTION DENIED IN ABSENCE OF REQUISITE JURISDICTIONAL AMOUNT

National Insurance Underwriters v. Piper Aircraft Corporation, 595 F.2d 546 (10th Cir. 1979)

The Tenth Circuit Court of Appeals, in *National Insurance Underwriters v. Piper Aircraft Corporation,*[1] determined that federal courts in diversity cases may not exercise pendent party jurisdiction over pendent claims not meeting the requisite jurisdictional amount.

Plaintiff insurer, National Insurance Underwriters, issued a hull insurance policy to an aircraft owner. After an accident damaged the aircraft, plaintiff indemnified the owner in the sum of $11,000, subrogating itself to any cause of action held by the insured arising out of the accident.[2] The insured agreed to pay the plaintiff $7,000 for release of the subrogation rights.[3] Although the insured never paid the plaintiff the agreed upon amount, it did settle a claim against the plane's manufacturer, the manufacturer's insurer, and the latter's claims agent.[4] The plaintiff, alleging diversity jurisdiction,[5] brought seven alternative claims in negligence and contract against the manufacturer, the claim's agent of the manufacturer's insurer, the manufacturer's insurer, and the owner's attorney to enforce its subrogation rights.[6] The claims against the manufacturer[7] and the agent of the manufacturer's insurer[8] met the amount in controversy requirement. The claims against the manufac-

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1. 595 F.2d 546 (10th Cir. 1979).

2. *Id.* at 547.

3. *Id.*

4. Shortly after settling the claim for $12,223.59, the insured aircraft owner filed for bankruptcy. *Id.*

5. The claims alleged jurisdiction pursuant to 28 U.S.C. § 1332(a) (1976), which provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States;
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> (2) citizens of a State and citizens or subjects of a foreign state;
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> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
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> (4) a foreign state, . . . as plaintiff and citizen of a State or of different States.

Id.

6. Two of these claims contained allegations against one defendant, an officer and agent of the insured, but the trial court dismissed them and they were not at issue on appeal. 595 F.2d at 547.

7. Plaintiff sued the manufacturer, Piper Aircraft Corporation, for products liability and breach of warranty and prayed for relief in the sum of $11,000. *Id.*

8. This claim, against United States Aviation Underwriters, alleged negligence for failing to

turer's insurer[9] and the owner's attorney[10] did not.

Although denying relief on the claims that satisfied the amount in controversy requirement, the district court found all defendants jointly and severally liable in negligence for failing to protect the plaintiff's subrogation interest and awarded the plaintiff $7,000.[11] On appeal, the defendants argued that even though complete diversity existed,[12] the court lacked subject-matter jurisdiction because the claims against them did not satisfy the amount in controversy requirement. The Court of Appeals for the Tenth Circuit reversed and *held*: Federal courts may not exercise pendent party diversity jurisdiction over parties against whom the claims do not meet the amount in controversy requirement of Section 1332.

The doctrine of pendent jurisdiction permits federal court disposition of state claims[13] brought with a claim alleging proper federal subject-matter jurisdiction. Originally, the doctrine applied only to state *claims*, not to additional *parties*, in cases premised on federal question subject-matter jurisdiction.[14] Analysis of the evolution of pendency be-

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assure the execution of the settlement agreement and for failing to pay plaintiff its subrogation interest. The plaintiff alleged damages in the sum of $11,000. *Id.*

9. Plaintiff alleged that Aetna, the insurer of Piper, negligently failed to pay plaintiff its subrogation interest and requested $7,000 in damages. *Id.*

10. The owner of the aircraft hired an attorney to execute the settlement agreement. The plaintiff alleged that the attorney breached his contract by failing to conclude the settlement agreement, and in the alternative acted negligently in failing to carry out the agreement. Each claim sought $7,000 in damages. *Id.*

11. *Id.*

12. In Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806), the Supreme Court required complete diversity—diversity between each plaintiff and each defendant—to satisfy the intent of the statutory forerunner to 28 U.S.C. § 1332(a)(1976). *But see* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) (complete diversity not a constitutional requirement; doctrine of ancillary jurisdiction requires only minimal diversity). *See also* Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964) (permitting a claim against a non-diverse plaintiff under the doctrine of pendent party jurisdiction).

13. The term "state claim," as used in the context of pendent jurisdiction, refers to those claims without independent federal subject-matter jurisdiction. A "federal claim," on the other hand, is one that fulfills the statutory requirements of federal subject-matter jurisdiction.

14. 28 U.S.C. § 1331(a)(1976) provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

Id.

Pendent jurisdiction applied, however, only to the adjudication of state claims necessary for the disposition of the federal question. Chicago Great W. Ry. v. Kendall, 266 U.S. 94, 97-98 (1924)

gins with *Osburn v. Bank of the United States*.[15] In *Osburn* the Bank of the United States brought suit in a federal district court challenging

(once jurisdiction established, authority vests "to determine all questions involved, including questions of state law . . . ."); Lincoln Gas & Elec. Light Co. v. City of Lincoln, 250 U.S. 256, 263 (1919) (once jurisdiction acquired, court may decide all issues in suit challenging utility rate ordinance on constitutional and state law grounds); Siler v. Louisville & N.R.R., 213 U.S. 175, 194 (1905) (deciding challenge to state railroad rate-fixing statute by statutory interpretation without reaching constitutional objections); Rumbaugh v. Winifrede R.R., 331 F.2d 530, 539 (4th Cir. 1964) (state wrongful discharge action cognizable when brought with a claim under the Railway Labor Act); Hazel Bishop, Inc. v. Perfemme, Inc., 314 F.2d 399 (2d Cir. 1963) (jurisdiction over registered trademark infringement action and pendent claim of unfair competition); UMW v. Meadow Creek Coal Co., 263 F.2d 52, 60 (6th Cir. 1959) (deciding state claim of unlawful conspiracy to injure business in suit alleging secondary boycott in violation of Labor Management Relations Act); Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 543 (2d Cir. 1956) (jurisdiction over unfair competition claim joined with trademark infringement claim under the Lanham Act).

15. 22 U.S. (9 Wheat.) 738 (1824). The first use of the term "pendent jurisdiction" actually followed Hurn v. Oursler, 289 U.S. 238 (1933), in Best & Co. v. Miller, 67 F. Supp. 809 (S.D.N.Y. 1946), *aff'd*, 167 F.2d 374 (2d Cir.), *cert. denied*, 335 U.S. 818 (1948).

Congress recognizes the doctrine of pendent jurisdiction in 28 U.S.C. § 1338(b) (1976), which provides: "[t]he district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection, or trade-mark laws." *Id.* The Reviser's note states:

> Subsection (b) is added and is intended to avoid "piecemeal" litigation to enforce common-law and statutory copyright, patent, and trade-mark rights by specifically permitting such enforcement in a single civil action in the district court. While this is the rule under Federal decisions, this section would enact it as statutory authority. The problem is discussed at length in Hurn v. Oursler. . . .

Id.

See, e.g., Golden Door, Inc. v. Odisho, 437 F. Supp. 956, 962 (N.D. Cal. 1977) (trademark infringement claim and claim under state dilution statute); Sims v. Western Steel Co., 403 F. Supp. 450, 453 (D. Utah 1975) (patent infringement action brought with state claim for breach of license), *rev'd on other grounds*, 551 F.2d 811 (10th Cir.), *cert. denied*, 434 U.S. 858 (1977); Schulman v. Huck Finn, Inc., 350 F. Supp. 853, 857 (D. Minn. 1972) (holding jurisdiction over related unfair competition claim against pendent party defendant), *aff'd*, 472 F.2d 864 (8th Cir. 1973).

See generally J. MOORE, COMMENTARY ON THE UNITED STATES JUDICIAL CODE ¶ 0.03(23) (1949) (statute expands *Hurn* by not requiring identical facts for pendent claims); Barron, *The Judicial Code, 1948 Revision*, 8 F.R.D. 439, 442 (1949) (not an extension or limitation of ancillary jurisdiction); Bernstein, *Pendent Unfair Competition Jurisdiction in Patent, Trademark and Copyright Cases*, 2 PAT. T.M. & COPYRIGHT J. OF RESEARCH & EDUC. 418 (1958) (expanding the scope of *Hurn*); Galston, *An Introduction to the New Judicial Code*, 8 F.R.D 201, 205-06 (1949) (codifies effect of *Hurn*); Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018, 1031 (1962) (a legislative reaction to "the restrictive application *Hurn* had been receiving in this area."); Note, *Problems of Parallel State and Federal Remedies*, 71 HARV. L. REV. 513, 516 (1958) (statute perhaps broader than *Hurn* because it substituted the words "related claim" for "same cause of action"); Note, *The Doctrine of* Hurn v. Oursler *and the New Judicial Code*, 37 IOWA L. REV. 406, 419 (1952) (legislation has failed to codify *Hurn* fully and avoid piecemeal litigation).

Ohio's attempt to collect taxes from it.[16] Chief Justice Marshall held that federal jurisidction was proper "when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause . . . although other questions of fact or of law may be involved in it."[17] Thus, a court of original jurisdiction has the power to decide all the questions presented in the case. Marshall found support for this conclusion in the language of the Constitution granting jurisdiction over "cases," not "questions."[18]

Siler v. Louisville & Nashville R. R. Co.[19] subsequently expanded the *Osburn* doctrine. *Siler* involved an action to enjoin enforcement of a Kentucky Railroad Commission order fixing intrastate rates, on the grounds that the order was not authorized by state law and was unconstitutional.[20] The Court held that the question whether the state statute violated the Constitution gave the district court proper federal question jurisdiction. Once the district court had jurisdiction it "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions

16. Osburn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 740-44 (1824). The challenge rested on supremacy clause grounds.

17. *Id.* at 823.

18. U.S. CONST. art. III, § 2, cl. 1 provides:

> The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of Admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

The Constitution empowers Congress to establish lower federal courts as courts of limited jurisdiction. Not only must the lower courts meet Article III, § 2 limitations, but Congress must also specifically vest them with power to adjudicate claims. The court in Cary v. Curtis, 44 U.S. (3 How.) 236 (1845) stated:

> [T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

Id. at 245.

19. 213 U.S. 175 (1909).

20. *Id.* at 190-91.

only."[21] This rule permits the court to decide issues on state grounds, avoiding when possible constitutional decisions, and it results in one lawsuit, instead of two.[22]

In *Hurn v. Oursler*[23] the Court extended the pendency rule to justify the inclusion of state issues solely because of procedural convenience.[24] Basing its definition of jurisdiction on the concept of "cause of action,"[25] the *Hurn* court held that if the plaintiff's case presented "two distinct grounds," one state and one federal, "in support of a single cause of action," the federal court has jurisdiction over the entire case.[26] Even if the federal ground is not established, the court "may nevertheless retain and dispose of the case upon the *nonfederal ground*. . . ."[27] If the plaintiff, however, alleges "two separate and distinct causes of action," jurisdiction exists only over the federal "cause of action."[28] The *Hurn* test implicitly limited pendent jurisdiction by precluding the joinder of additional litigants as parties exclusively to the pendent claim, because such joinder would present a separate cause of action rather than an additional ground for relief.[29]

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21. *Id.* at 191.

22. M. BATOR, P. MISHKIN, D. SHAPIRO, H. WESCHSLER, HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 922 (2d ed. 1973); C. WRIGHT, LAW OF FEDERAL COURTS 73 (3d ed. 1976).

23. 289 U.S. 238 (1933).

24. C. WRIGHT, note 22 *supra* at 73.

25. The *Hurn* decision did not itself offer a specific definition of "cause of action" but cited and quoted one offered by Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927). *Hurn* did give two broadly worded interpretations of cause of action. "The bill alleges the violation of a single right. . . . And it is this violation which constitutes the cause of action." Hurn v. Oursler, 289 U.S. 238, 246 (1933). A cause of action exists when claims "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances." *Id. Cf.* United States v. Memphis Cotton Oil Co., 288 U.S. 62 (1933) (J. Cardozo):

> A 'cause of action' may mean one thing for one purpose and something different for another. It may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of res judicata.

Id. at 67-68.

The term had provoked much controversy before *Hurn,* and the *Hurn* decision did not eliminate the confusion. *See* CLARK, CODE PLEADING § 19 (1928); POMEROY, CODE REMEDIES §§ 346-56 (5th ed. 1929); Clark, *The Code Cause of Action*, 33 YALE L.J. 817 (1924); Gravit, *A "Pragmatic Definition" of the "Cause of Action"?,* 82 U. PA. L. REV. 129 (1933); McCaskill, *Actions and Causes of Actions,* 34 YALE L.J. 614 (1925); Shulman & Jaegerman, *Some Jurisdictional Limitations in Federal Procedure,* 45 YALE L.J. 393 (1936).

26. Hurn v. Oursler, 289 U.S. 238, 246 (1933).

27. *Id.*

28. *Id.*

29. *See* Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines,*

Unfortunately lower courts found *Hurn's* cause of action test difficult to apply.[30] This lack of guidance resulted in lower courts formulating their own definition of the requisite "cause of action."[31]

Concern with the resulting inconsistencies among lower courts led to a reconsideration of the scope of pendent jurisdiction. The Court, in *United Mine Workers v. Gibbs,*[32] liberalized[33] *Hurn*'s "same cause of action" test by declaring a two part standard for determining the propriety of pendent jurisdiction. The first element gave the court the power to grant pendent jurisdiction. It required a substantial federal claim, a "common nucleus of operative facts," and a state claim that would ordinarily be expected to be tried in the same proceedings.[34] The second element, judicial discretion, mandated that a court make such a grant only when convinced that it was necessary for judicial

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22 U.C.L.A. L. REV. 1233, 1270 (1975). *See, e.g.,* Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964), *cert. denied,* 379 U.S. 964 (1965); Rumbaugh v. Winifrede R.R., 331 F.2d 530 (4th Cir.), *cert. denied,* 379 U.S. 929 (1964); New Orleans Public Belt Rys. v. Wallace, 173 F.2d 145 (5th Cir. 1949); Pearce v. Pennsylvania, 162 F.2d 524 (3d Cir.), *cert. denied,* 332 U.S. 765 (1947); Rosenthal & Rosenthal, Inc. v. Aetna Cas. & Sur. Co., 259 F. Supp. 624 (S.D.N.Y. 1966); Grautreau v. Central Gulf S.S. Corp., 255 F. Supp. 615 (E.D. La. 1966); Maher v. Newton Creek Towing Co., 190 F. Supp. 933 (S.D.N.Y. 1961).

30. *See* UMW v. Gibbs, 383 U.S. 715, 724 (1966).

31. *See, e.g.,* Dann v. Studebaker-Packard Corp., 288 F.2d 201, 215 (6th Cir. 1961) ("substantially identical facts"); Errion v. Connell, 236 F.2d 447, 454 (9th Cir. 1956) ("same set of facts"); Strachman v. Palmer, 177 F.2d 427, 430 (1st Cir. 1949) ("facts . . . practically identical"); Musher Foundation, Inc. v. Aba Trading Co., 127 F.2d 9, 10 (2d Cir.), *cert. denied,* 317 U.S. 641 (1942) ("substantial identity between the proof"); United Indus. Corp. v. Nuclear Corp. of America, 237 F. Supp. 971, 975 (D. Del. 1964) ("substantial overlapping testimony").

32. 383 U.S. 715 (1966).

33. For cases reading *Gibbs* as "liberalizing" *Hurn* see Moor v. Madigan, 458 F.2d 1217, 1220 (9th Cir. 1972), *aff'd in part, rev'd in part, sub nom.* Moor v. County of Alameda, 411 U.S. 693 (1973); Morse Electro Products Corp. v. S.S. Great Peace, 437 F. Supp. 474, 484 (D.N.J. 1977). More recently the Supreme Court read *Gibbs* as "expanding" *Hurn.* Aldinger v. Howard, 427 U.S. 1, 12 (1976). At least one scholar describes *Gibbs* as abandoning the *Hurn* test. C. WRIGHT, A. MILLER, O.E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567 at 456 (1975).

34. [The] limited approach [in *Hurn*] is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. Const., art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

383 U.S. 715, 725 (emphasis in original) (footnote omitted).

economy, convenience, and fairness to the litigants.[35] The Court noted that needless decisions of state law should be avoided.[36] *Gibbs'* liberalization of the *Hurn* test has greatly expanded the application of pendent jurisdiction,[37] and in a subsequent decision, *Hagans v. Lavine*,[38] the Court encouraged the hearing of pendent claims.[39]

Pendent jurisdiction as present in *Hagans, Gibbs,* and *Hurn* involved the joinder of separate state and federal claims, but the parties involved were the same in each claim. The concept of "pendent parties" emerged slowly.[40] Leading the way, the Second Circuit held that an admiralty claim against one defendant supported pendent jurisdiction of a state claim against another defendant.[41] The concept of pendent party jurisdiction over federal question[42] and diversity cases[43] found

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35. UMW v. Gibbs, 383 U.S. 715, 726 (1966).

36. *Id.*

37. Some circuits even suggested the avoidance of diversity through the exercise of pendent party jurisdiction. *See, e.g.,* Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122, 1128 (6th Cir. 1970); Stone v. Stone, 405 F.2d 94, 97 (4th Cir. 1968), *cert. denied*, 409 U.S. 1000 (1974). *But cf.* Fawor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977) (in diversity cases courts may not entertain pendent claims against nondiverse third-party defendants).

38. 415 U.S. 528 (1974).

39. The Court said:

> [I]t is evident from *Gibbs* that pendent state law claims are not always or even almost always to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, *Gibbs* contemplates adjudication of these claims.

Id. at 545-46. *See* Seid, *The Tail Wags the Dog*: Hagans v. Lavine *and Pendent Jurisdiction,* 53 J. URB. LAW 1 (1975).

40. *See, e.g.,* Bowers v. Moreno, 520 F.2d 843, 846-48 (1st Cir. 1975); Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1193-96 (5th Cir. 1975); Curtis v. Everette, 489 F.2d 516, 519-20 & n.7 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); Schulman v. Huck Finn, Inc., 472 F.2d 864, 866-67 (8th Cir. 1973); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809-11 (2d Cir. 1971); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627, 629-30 (2d Cir. 1971); Shannon v. United States, 417 F.2d 256, 263 (5th Cir. 1969); Jacobson v. Atlantic City Hosp., 392 F.2d 149, 153-55 (3d Cir. 1968).

The Ninth Circuit has, however, adopted the position that pendent jurisdiction permits joinder of claims, not joinder of parties. *See, e.g.,* Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977), *cert. dismissed*, 435 U.S. 982 (1978); Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972), *aff'd in part, rev'd in part, sub nom.* Moor v. County of Alameda, 411 U.S. 693 (1973); Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969). *See also* notes 72-75 and accompanying text *infra.*

For support of the Ninth Circuit's position see Oritz v. United States, 595 F.2d 65, 70 & n.8 (1st Cir. 1979); Tucker v. Shaw, 308 F. Supp. 1 (E.D.N.Y. 1970).

41. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971).

42. *E.g.,* Bowers v. Moreno, 520 F.2d 843 (1st Cir. 1975); Florida E. Coast Ry. v. United States, 519 F.2d 1134 (5th Cir. 1975); Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); Manges v. Camp, 474 F.2d 97 (5th Cir. 1973); Schulman v. Huck Finn, Inc., 472 F.2d 864 (8th Cir. 1973); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971);

favor with more of the lower courts. The question of pendent party jurisdiction came before the Supreme Court in *Moor v. County of Alameda*,[44] but the dismissal of the pendent claims permitted the Court to bypass the issue of pendent parties, an issue the Court characterized as a "subtle and complex question with far-reaching implications."[45]

Aldinger v. Howard[46] finally placed the issue of pendent party jurisdiction squarely before the Court. *Aldinger* involved a suit joining a civil rights claim against county officials with a state law claim against the county itself.[47] Plaintiff could attain jurisdiction over the county only if pendent party jurisdiction existed,[48] because "persons" liable

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Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds, sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971). Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); Shannon v. United States, 417 F.2d 256 (5th Cir. 1969); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968), *cert. denied*, 409 U.S. 1000 (1974); Connecticut Gen. Life Ins. Co. v. Craton, 405 F.2d 41 (5th Cir. 1968).

43. *See e.g.*, Niebuhr v. State Farm Mut. Auto Ins. Co., 486 F.2d 618 (10th Cir. 1973); Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971); Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3d Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966).

Under special circumstances the courts have shown a willingness to exercise pendent party jurisdiction to avoid the jurisdictional amount requirement. The courts tend to exercise such jurisdiction more readily if party plaintiffs are relatives, *see, e.g.*, Wiggs v. City of Tullahoma, 261 F. Supp. 821 (E.D. Tenn. 1966) (claims by two minor sisters for less than $10,000, with claims by five members of same family satisfying the amount requirement); Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960) (plaintiff brings action for personal injuries, and as administrator for wrongful death of his wife, the latter claim limited by state statute to less than $10,000), if party defendants are relatives, *see e.g.*, Stone v. Stone, 405 F.2d 94 (4th Cir. 1968) (plaintiff brought action against daughter-in-law and grandson, failing to satisfy the amount requirement as to the latter), and if defendants are numerous insurance companies, *see, e.g.*, Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917 (6th Cir. 1970) (claims against two of three insurers fail to satisfy the amount in controversy requirement); Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1970) (exercising pendent jurisdiction over 24 defendant insurers when claims against 34 defendant insurers fulfilled the $10,000 requirement).

In light of the Supreme Court's holding in Zahn v. International Paper Co., 414 U.S. 291 (1973), courts now apply a strict construction of the amount in controversy requirement.

44. 411 U.S. 693 (1973).

45. *Id.* at 715.

46. 427 U.S. 1 (1976).

47. *Aldinger* "decide[d] only the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. . . . [I]n this case Congress has by *implication* declined to extend jurisdiction over a party such as Spokane County." 427 U.S. at 18-19 (emphasis added).

48. Jurisdiction over the county was perhaps possible under § 1331, but plaintiff failed to raise the issue and relied instead on § 1343. *See* 427 U.S. at 4 n.3.

under judicial interpretations of the 1871 Civil Rights Act[49] and its accompanying jurisdictions statute[50] excluded counties.[51] The Court held that pendent party jurisdiction may exist only if "Congress in the statutes conferring jurisdiction has not expressly or by implication *negated* its existence."[52] The *Aldinger* Court backed down from formulating an "all-encompassing jurisdictional rule," noting that the proper approach was to define what *Gibbs* did and did not decide and to apply those principles to *Aldinger*.[53] The *Gibbs* standard, stated the *Aldinger* Court, was based upon an interpretation of federal judicial power under Article III clearly justifiable because "Congress had not addressed itself by statute to this matter."[54] The question of impleading a

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49. 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

50. 28 U.S.C. § 1343 (1976) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
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> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
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> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
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> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

51. 427 U.S. at 17. *Aldinger* relied on Monroe v. Pape, 365 U.S. 167, 187-91 (1961), and Kenosha v. Bruno, 412 U.S. 507, 511-13 (1973) in excluding counties from the "persons" answerable under 42 U.S.C. § 1983 (1976). Ironically, the Supreme Court overruled its decision in *Monroe* two years after deciding *Aldinger*. *See* Monell v. Department of Social Servs., 436 U.S. 658 (1978). In *Monell* the Court held that "persons" include local governments for the purposes of 42 U.S.C. § 1983 (1976). The Court, by its decision in *Monell,* overruled its substantive holding in *Aldinger*.

52. 427 U.S. at 18 (emphasis added).

53. *Id.* at 13.

54. *Id.* The Court stated:

> *Gibbs* and its lineal ancestor, *Osborn,* were couched in terms of Art. III's grant of judicial power in "Cases . . . arising under this Constitution, the Laws of the United States, and [its] Treaties," since they (and implicitly the cases which linked them) represent inquiries into the scope of Art. III jurisdiction in litigation where the "common nucleus of operative fact" gave rise to nonfederal questions or claims between the parties. None of them posed the need for a further inquiry into the underlying statutory grant of federal jurisdiction or a flexible analysis of concepts such as "question,"

new party, the Court noted, was both factually and legally distinguishable from *Gibbs*. The Court held that the joinder of the county as an additional party for the purposes of a pendent claim was beyond the power of the district court.[55] Thus, *Aldinger* requires a federal court to base its grant of pendent jurisdiction on an examination not only of its Article III power, but also of implied and express statutory limits.[56]

The *Aldinger* Court's willingness to define the scope of pendent jurisdiction in terms of the source of the federal court's power, constitutional or statutory, is consistent with both earlier and more recent decisions. In *Zahn v. International Paper Co.*[57] the Court rejected federal jurisdiction in a class action because not all members of the class action met the amount in controversy requirments.[58] It ruled that even though the named plaintiffs' claims met the $10,000 requirement, they could not represent members whose claims did not.[59] Subsequently in *Owen Equipment & Erection Co. v. Kroger*,[60] the Court refused to apply the doctrine of ancillary jurisdiction[61] to circumvent the congressio-

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"claim," and "cause of action," because Congress had not addressed itself by statute to this matter. In short, Congress had said nothing about the scope of the word "Cases" in Art. III which would offer guidance on the kind of elusive question addressed in *Osborn* and *Gibbs*: whether and to what extent jurisdiction extended to a parallel state claim against the existing federal defendant.

Id.

55. *Aldinger* requires that in addition to satisfying the *Gibbs* two-pronged test, a court must determine and satisfy the statutory limitations imposed by Congress. *See* notes 103-04 *infra* and accompanying text. *But see* notes 66-68, 105-07 *infra* and accompanying text.

56. National Ins. Underwriters v. Piper Aircraft Corp., 595 F.2d 546, 548 (10th Cir. 1979).

57. 414 U.S. 291 (1973).

58. *See* FED. R. CIV. P. 23(b)(3). *But cf.* New York State Ass'n for Retarded Children, Inc. v. Carey, 438 F. Supp. 440, 445 n.5 (E.D.N.Y. 1977)(reading *Zahn* as presaging the decision in *Aldinger* and yet not denying ancillary jurisdiction in absence of requisite amount in controversy). *See also* note 43 *supra*.

59. In *Zahn* the plaintiffs alleged jurisdiction under 28 U.S.C. § 1332(a)(1) (1976). *See also* Osbahr v. H & M Constr. Inc., 407 F.Supp. 621, 623 (N.D. Iowa 1975); Freeman v. Gordon & Breach, Science Publishers, Inc., 398 F.Supp. 519, 525-26 (S.D.N.Y. 1975); United Pacific/Reliance Ins. Co. v. Lewiston, 372 F.Supp. 700, 704 (D. Idaho 1974). *But cf.* Uniroyal, Inc. v. Heller, 65 F.R.D. 83, 88 (S.D.N.Y. 1974) (*Zahn* applies only in multiple plaintiff context).

60. 437 U.S. 365 (1978).

61. Ancillary jurisdiction permits the court to adjudicate an entire controversy despite the fact it lacks independent federal subject matter jurisdiction over claims among parties. These parties must have interests necessarily affected by a federal decision. "The *ordinary* concern was not economy or convenience, but rather to provide an immediate forum for the party not in court by his own choice." Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines,* 22 U.C.L.A. L. REV. 1263, 1267 (1975) (emphasis added)(footnote omitted). The exercise of ancilliary jurisdiction usually involves defects in subject-matter jurisdiction in cross-claims, counterclaims, and contribution and indemnity cases. *See generally* Note, *The Evolution and*

nally mandated requirement[62] of complete diversity.[63] The Court in *Owen* construed congressional reenactments of the citizenship requirement as negating federal subject matter jurisdiction in the absence of complete diversity.[64] Those reenactments demonstrated to the Court the importance of the dual statutory limitations.[65]

Aldinger did recognize that other statutory grants of jurisdiction and other claims might, however, permit pendent party jurisdiction.[66] In particular the *Aldinger* Court indicated the propriety of exercising pendent party jurisdiction in cases that arise under an exclusive jurisdiction statute[67] because the federal forum offers the only opportunity to

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Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 COLUM. L. REV. 1018 (1962); Note, Kroger v. Owen Equipment & Erection Co.: *Radical Departure from Traditional Jurisdictional Concepts?*, 23 S.D.L. REV. 499 (1978); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971).

62. "Whatever may have been the original purposes of diversity of citizenship jurisdiction, this subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant." 437 U.S. at 373-74 (footnotes omitted). *See also* note 18 *supra*, notes 99-100 *infra* and accompanying text.

63. *See* note 12 *supra*. *See also* Ireland, *Entire Case Removal Under 1441(c): Toward a Unified Theory of Additional Parties and Claims in Federal Courts*, 11 IND. L. REV. 555 (1978).

64. 437 U.S. at 373. *See* J. MOORE, FEDERAL PRACTICE ¶ 0.71 [4] (2d ed. 1979). *But see* S. REP. No.1830, 85th Cong., 2d Sess. 3-4 (1958); H. R. REP. No.1706, 85th Cong., 2d Sess. 3 (1958); Comment, 77 COLUM. L. REV. 127, 147 n.107 (1977); note 48 *supra*. *But cf.* Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966) (pendent jurisdiction destroying diversity); Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964) (same); Campbell v. Triangle Corp., 336 F.Supp. 100 (E.D. Pa. 1972) (same).

In *Owen* the Court followed its earlier decision in *Snyder v. Harris*, 394 U.S. 332, 338-39 (1969). In *Snyder* the Court held that reenactments of the amount in controversy requirement, in light of case law interpreting congressional intent as prohibiting the aggregation of claims, precluded the abandonment of the aggregation doctrine. Thus, the Court in two cases before the Tenth Circuit's decision in *National Insurance Underwriters* relied on congressional reenactments to discern congressional intent.

65. 437 U.S. at 373. *See* notes 102, 105 *infra* and accompanying text.

66. The Court recognized that suits arising under exclusive federal subject-matter jurisdiction, as in tort claims against the United States under 28 U.S.C. § 1346(b) (1976), might permit the exercise of pendent jurisdiction. *See* note 69 *infra*.

67. Congress vests exclusive subject-matter jurisdiction in the federal courts under 28 U.S.C. § 1333(1) (1976)(admiralty and maritime cases); 28 U.S.C. § 1334 (1976)(bankruptcy proceedings); 28 U.S.C. § 1338 (1976)(patent and copyright cases); 28 U.S.C. § 1346 (1976)(suits against the United States); 28 U.S.C. § 1351 (1976)(suits against members of diplomatic missions); 28 U.S.C. § 1355 (1976)(fines, penalties, and forfeitures under Acts of Congress); 28 U.S.C. § 1356 (1976)(seizures not within admiralty or maritime jurisdiction); 28 U.S.C. § 1364 (1976) (actions against insurers of members of diplomatic missions); 28 U.S.C. § 1582 (1976)(actions pursuant to the Tariff Act); 15 U.S.C. §§ 15, 26 (1976)(antitrust actions); 15 U.S.C. § 78(aa) (1976)(actions under the Securities Exchange Act); 15 U.S.C. § 717(u) (1976)(actions under the Natural Gas Act);

adjudicate all of the claims together.[68] The Tenth Circuit Court of Appeals followed this approach in *Transok Pipeline Co. v. Darks*.[69] *Transok* involved a federal action for condemnation of Indian lands[70] and a pendent state claim against non-Indian cotenants. The court permitted the pendent party claim because only the federal forum offered an opportunity to try all of the claims in one proceeding.[71]

The Ninth Circuit, prior to *Aldinger*, had refused to recognize constitutional power to entertain claims against pendent parties.[72] In *Ayala v. United States*,[73] decided after *Aldinger*, the Ninth Circuit indicated its continued constitutional objections. Despite exclusive subject-matter jurisdiction[74] in *Ayala*, the court refused to entertain the pendent claim

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25 U.S.C. § 357 (1976)(condemnation of Indian lands under State laws); 40 U.S.C. § 270(b) (1976)(actions under the Miller Act). *See also* note 94 *infra*.

68. 427 U.S. at 18.

69. 565 F.2d 1150 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978). Other courts have also applied the *Aldinger* dictum exercising pendent party jurisdiction in cases arising under exclusive subject-matter jurisdiction statutes. *Compare* Transok Pipeline Co. v. Darks, 565 F. 2d 1150, 1155 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978)("[O]ur case is similar to the test discussed in *Aldinger*; under § 357, there is exclusive jurisdiction in federal court to try the federal claim, whereby there can be a trial of all of the claims only in federal court.") and *Aldinger*:

> Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal court may all of the claims be tried together.

427 U.S. at 18 (footnote omitted) *with* National Ins. Underwriters v. Piper Aircraft Corp., 595 F.2d 546, 550-51 (10th Cir. 1979) ("This is not a situation where the plaintiff can only bring all of his claims in federal court because of an exclusive grant of jurisdiction, as in *Transok Pipeline Co.* . . . Thus, one of the stronger arguments for allowing pendent party jurisdiction is not available here.")(citation omitted). *See also* note 94 *infra*.

70. 25 U.S.C. § 357 (1976) provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

71. 25 U.S.C. § 357 (1976) vests exclusive jurisdiction in federal courts. *See* notes 66-69 *supra*.

72. *See* note 40 *supra*.

73. 550 F.2d 1196 (9th Cir. 1977), *cert. dismissed*, 435 U.S. 982 (1978). The case involved damages resulting from an explosion of bomb laden box cars. Plaintiffs brought tort claims against the United States, as owner of the explosives, and against Pullman, the manufacturer of the box cars.

74. Plaintiffs brought their action against the United States under the Federal Tort Claims Act. 28 U.S.C. §§ 2671-80 (1976). In their action against Pullman some plaintiffs satisfied the subject-matter jurisdiction requirements of 28 U.S.C. § 1332 (1976) (diversity of citizenship), the remaining plaintiffs attempted to gain jurisdiction as pendent parties.

on grounds that it lacked constitutional power to do so.[75] The Ninth Circuit remains the only circuit to adopt this restriction.

In *National Insurance Underwriters v. Piper Aircraft Corporation,*[76] the Court of Appeals for the Tenth Circuit applied *Aldinger* in deciding whether it had jurisdictional power to hear pendent party claims that failed to satisfy the amount in controversy requirement of its diversity jurisdiction. The court, assuming *arguendo* that the claim satisfied the *Gibbs* test,[77] addressed the nature of the nonfederal claim to determine whether Congress, in the language or history of 28 U.S.C. § 1332, had negated the exercise of pendent jurisdiction.[78] The court relied upon *Owen*[79] and *Zahn*[80] to make its determination of congressional intent. Reviewing *Owen*'s interpretation of the legislative history of the diversity statute,[81] the court considered it as dispositive of the congressional intent to negate pendent jurisdiction in cases in which the amount in controversy was not satisfied. To further support its narrow interpretation of the amount in controversy requirement, the court turned to *Zahn*. The court noted that if the *Zahn* Court had found no subject-matter jurisdiction over parties voluntarily entering the federal forum, it should dismiss claims against party defendants involuntarily brought before a federal forum.[82] The court implied that subject matter jurisdiction depends on the nature of the "power" conferred upon the federal judiciary by Congress, not on the discretionary exercise of the "judicial economy, convenience, and fairness" principles.[83]

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75. 550 F.2d at 1199-1200.

76. 595 F.2d 546 (10th Cir. 1979).

77. *Id.* at 550.

78. *Id.*

79. *See* notes 60-65 *supra* and accompanying text.

80. *See* notes 57-59 *supra* and accompanying text.

81. 595 F.2d at 550. The court stated that *Owen*:

> [s]ets forth two obvious requirements for the existence of diversity jurisdiction. Congress, in enacting "amount in controversy" minimums, with the changes therein on reenactments over the years, has demonstrated its view of the importance of these limits. As the Court said in *Owen Equipment*, referring to the reenactments of the citizenship requirement, "this subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant." Here, this "subsequent history" of reenactment as to the dollar amount must lead us to the same conclusion. Thus, under *Owen Equipment*, plaintiff's claims against these defendants, for amounts less than $10,000, cannot be supported jurisdictionally by the pendent jurisdiction doctrine.

Id.

82. 595 F.2d at 550. *But see* Uniroyal, Inc. v. Heller, 65 F.R.D. 83 (S.D.N.Y. 1974) (*Zahn* applies only in multiple plaintiff context).

83. National Ins. Underwriters v. Piper Aircraft Corp., 595 F.2d 546, 549-50 (10th Cir. 1979).

In reaching its decision the court found no difficulty in distinguishing its earlier decision in *Transok Pipeline Co. v. Darks*.[84] In *Transok Pipeline* the subject-matter jurisdiction of the federal claim existed exclusively in the federal courts,[85] suggesting that Congress neither impliedly nor expressly negated pendent jurisdiction in that case.[86] In *National Insurance Underwriters* the Tenth Circuit emphasized the availability of the state courts as an alternative forum for resolving all claims in one suit.[87] Because the federal courts had no power to adjudicate the pendent claims, the Court of Appeals reversed the lower court's judgment in favor of the plaintiff.[88]

National Insurance Underwriters reflects the trend, encouraged by *Aldinger,* toward redefining the scope of pendent party jurisdiction. *Gibbs* expanded the scope of federal jurisdiction to encompass state claims in federal question cases,[89] claims against nondiverse parties in diversity cases,[90] and state claims in cases brought under a variety of exclusive federal jurisdictional statutes.[91] *Aldinger,* however, directed that the federal courts not circumvent statutory limitations on jurisdiction. The holding in *National Insurance Underwriters* responds to this reservation.

The need for a reexamination of the scope of judicial power to define jurisdiction stems from a concern that the federal judiciary must respect its institutional role within the federal system.[92] The existence of parallel state and federal remedies, so that one's exercise of judicial

84. 565 F.2d 1150 (10th Cir. 1977).

85. *See* notes 70-71 *supra* and accompanying text.

86. *Id.*

87. National Ins. Underwriters v. Piper Aircraft Corp., 595 F.2d 546, 550-51 (10th Cir. 1979).

88. *Id.* at 551.

89. *See* note 42 *supra.*

90. *See* cases cited in note 64 *supra. But cf.* Grimes v. Chrysler Motors Corp., 565 F.2d 841 (2d Cir. 1977) (holding that pendent party jurisdiction destroyed diversity).

91. *See* note 67 *supra.*

92. *See* Dann v. Studebaker-Packard Corp., 288 F.2d 201, 213 (6th Cir. 1961) ("unless we are to abandon altogether any concept of a dichotomy of federal and state jurisdiction . . . it is clear that a line must be drawn somewhere to mark the limits of federal jurisdiction"); Strachman v. Palmer, 177 F.2d 427, 433 (1st Cir. 1949) (Magruder, J., concurring) ("federal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation"); Frank, *Historical Basis of the Federal Judicial System,* 13 LAW & CONTEMP. PROB. 3, 22-28 (1948); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROB. 216, 225 (1948). *But see generally* Wechsler, *supra* at 225-26 ("amount in controversy has no place in judging the propriety of the original jurisdiction in any case involving rights asserted under federal law").

power necessarily denies the other's opportunity to adjudicate, presents a major concern of federalism.[93] Although concepts of "judicial economy, convenience, and fairness" expanded the scope of pendent jurisdiction under *Gibbs,*[94] those concepts, when considered in light of the

93. *See* Note, *Problems of Parallel State and Federal Remedies,* 71 HARV. L. REV. 513 (1958). *See generally* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURT (1965).

94. UMW v. Gibbs, 383 U.S. 715, 726. *See* Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines,* 22 U.C.L.A. L. REV. 1262, 1272-74 (1975).

Some courts have held that considerations of convenience and economy do not extend beyond plaintiffs with parallel remedies for the same wrong. *See, e.g.,* Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); Anthony v. Cleveland, 355 F. Supp. 789 (D. Hawaii 1973); Letmate v. Baltimore & Ohio R.R., 311 F.Supp. 1059 (D. Md. 1970); Tucker v. Shaw, 308 F. Supp. 1 (E.D.N.Y. 1970); Maher v. Newton Creek Towing Co., 190 F. Supp. 933 (S.D.N.Y. 1960).

The "fairness" criterion affects the doctrine of pendent jurisdiction in cases arising under exclusive federal subject-matter statutes.

For cases arising under 28 U.S.C. § 1333 (1976) *see, e.g.,* Morse Electro Prods. Corp. v. S.S. Great Peace, 437 F. Supp. 474 (D. N.J. 1977) (pendent claims permitted among various defendants); Princess Cruises Corp., Inc. v. Bayly, Martin & Fay, Inc., 373 F. Supp. 762 (N.D. Cal. 1974) (pendent party jurisdiction).

For cases arising under 28 U.S.C. § 1338 (1976) *see, e.g.,* Astro Music, Inc. v. Eastham, 564 F.2d 1236 (9th Cir. 1977) (pendent unfair competition claim); Knickerbocker Toy Co., Inc. v. Faultless Starch Co., 467 F.2d 501 (C.C.P.A. 1972) (validity of copyright as pendent claim); Astro-Honor, Inc. v. Grosset & Dunlap Inc., 441 F.2d 627 (2d Cir. 1971) (pendent party jurisdiction), *rev'd on other grounds,* 551 F.2d 811 (10th Cir.), *cert. denied,* 434 U.S. 858 (1977).

For cases arising under 28 U.S.C. § 1346 (1976) *see, e.g.,* Dick Meyers Towing Serv., Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978) (pendent jurisdiction over private party); Murphey v. United States, 451 F. Supp. 544 (D. D.C. 1978) (pendent party jurisdiction extending over the District of Columbia); Maltais v. United States, 439 F. Supp. 540 (N.D.N.Y. 1977) (pendent jurisdiction over private party). *But cf.* Kack v. United States, 570 F.2d 754 (8th Cir. 1978) (pendent jurisdiction does not apply to additional party absent independent subject-matter jurisdiction); Mickelic v. United States Postal Serv., 367 F. Supp. 1036 (W.D. Pa. 1973) (pendent jurisdiction does not apply to lessor of post office).

For cases arising under 15 U.S.C. § 15 (1976) *see, e.g.,* Gerecht v. American Ins. Co., 344 F. Supp. 1056 (W.D. Mo. 1971) (pendent contract claim despite absence of diversity); Metropolitan Fed. Sav. & Loan Ass'n of New York v. East Brooklyn Sav. Bank, 319 F. Supp. 393 (E.D.N.Y. 1970) (pendent unfair competition claim even when federal antitrust claim dismissed).

For cases arising under 15 U.S.C. § 78(a)(a) (1976) *see, e.g.,* Hidell v. International Diversified Inv., 520 F.2d 529 (7th Cir. 1975) (pendent state securities law permitted even after federal claim dismissed).

For cases arising under 15 U.S.C. § 78(aa) (1976) *see, e.g.,* Hidell v. International Diversified 1150 (10th Cir. 1977), *cert. denied,* 435 U.S. 1006 (1978) (pendent claims against non-Indian cotenants).

The "fairness" criterion also affects the doctrine of pendent jurisdiction in situations where a unity of action exists such that the failure to exercise federal jurisdiction over the pendent party claim will prejudice one of the parties. *See, e.g.,* Mas v. Perry, 489 F.2d 1396, 1401 (5th Cir.) (noting the propriety of exercising jurisdiction where there exists "almost complete interdependence . . . [of] proof" arising out of landlord's installation of two-way mirror in bedroom and bathroom of couple), *cert. denied,* 419 U.S. 842 (1974); Hatridge v. Aetna Cas. & Sur. Co., 415

policies inherent in federalism, now ironically support a narrowing of the doctrine. Requiring a litigant to defend a state claim in federal court that—except for the doctrine of pendent party jurisdiction—lacks power to adjudicate the claim, raises a clear question of fairness.[95] *National Insurance Underwriters* seems to speak to this concern by implying that if all of an action's claims can be adjudicated in a state court, that forum best serves the goal of efficiency implicit in pendent jurisdiction.[96]

National Insurance Underwriters, although accurately following the Supreme Court's application of *Aldinger* in *Owen,* demonstrates the limitations of *Aldinger*'s reasoning when applied to other jurisdictional grants. *Aldinger* mandated that federal courts determine whether Congress "negated" pendent jurisdiction under the applicable jurisdictional statute.[97] It applied previous judicial interpretations of the statutory provisions to conclude that Congress actually intended the statutory limitations to bar access by the pendent party to a federal forum.[98] The Supreme Court in *Owen* applied *Aldinger*'s reasoning to determine the necessity of complete diversity under Section 1332.[99] In looking at statutory reenactments it held that the "subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available" absent complete diversity.[100] Devoid of the prior interpretations of congressional intent present in *Aldinger,* however, this analysis appears to require the affirmative fulfillment of the statutory requirements to gain access to the federal forum. Thus, in essence, the Court requires congressional *affirmation*—not "negation"[101]—of pendent party jurisdiction. The Tenth Circuit in *National Insurance Underwrit-*

F.2d 809 (8th Cir. 1969) (success of wife's claim for lost consortium of $9,999.99, depended on success of husband's claim for personal injuries); Fahrner v. Gentzsch, 355 F. Supp. 349 (E.D. Pa. 1972) (exercising jurisdiction, despite plaintiff's son destroying complete diversity, because of state law requiring claims of parents and minors to be enforced in one action).

95. In exclusive federal jurisdiction cases, requiring the splitting of claims between federal and state forums might unfairly burden the plaintiff, possibly placing a remedy beyond his means. But when the additional party defendant would not otherwise be subject to suit in the federal forum, exercising pendent jurisdiction might unfairly burden him. *See* Note, UMW v. Gibbs *and Pendent Jurisdiction,* 81 HARV. L. REV. 657, 664 (1968).

96. 595 F.2d at 551.

97. *See* note 52 *supra* and accompanying text.

98. *See* notes 48-49 *supra* and accompanying text.

99. *See* notes 60-65 *supra* and accompanying text.

100. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978), *quoted in* National Ins. Underwriters v. Piper Aircraft Corp., 595 F.2d 546, 550 (10th Cir. 1979).

101. Courts nevertheless express the inquiry into congresssional intent in terms of "negation,"

ers focused, as required by *Owen,* on statutory reenactments of Section 1332's jurisdictional amount requirement.[102] The Court's ruling demonstrated the limitations of the *Aldinger-Owen* approach. Here the congressional reenactments hardly show congressional intent to bar access to the courts, because the reenactments do not exist in light of substantive case law interpreting congressional intent as in *Aldinger*.[103] Rather, the reenactments exist in light of substantial case law recognizing the validity of pendent jurisdiction.[104]

The Tenth Circuit recognized that in cases arising under exclusive federal jurisdiction courts may apply less stringent requirements.[105] *Aldinger* indicated that in granting exclusive subject-matter jurisdiction Congress exercises its authority[106] to allocate judicial power between the federal judiciary and the state courts by precluding the assertion of parallel remedies in nonfederal forums.[107] Thus, the less stringent test of congressional "negation," rather than affirmation, suffices.[108] In

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see 595 F.2d at 550 ("there still remains the question whether Congress has expressly or impliedly negated pendent party jurisdiction").

102. *See* note 50 *supra*. *See also* National Bank & Trust Co. of South Bend v. United States, 589 F.2d 1298 (7th Cir. 1978) (must inquire into intent of Congress when exercising pendent jurisdiction); 3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 18.07 [1.4] (2d ed. 1974); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 23 (2d ed. 1970); Comment, *Aldinger v. Howard and Pendent Jurisdiction,* 77 COLUM. L. REV. 127, 146-47 (1977); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983,* 55 MINN. L. REV. 1201, 1207 (1971) (too speculative "[t]o determine what Congress would have thought had it been thinking about something it was not").

103. *See* notes 64-65 *supra* and accompanying text.

104. *See* notes 40-43 *supra* and accompanying text.

105. 595 F.2d at 550-51. *See* also notes 67-71 *supra* and accompanying text.

Although the court in *National Ins. Underwriters* indicated that congressional negation of pendent party jurisdiction depended on the language of the statute "or legislative history," 595 F.2d at 550, the opinion is void of any legislative history. The court, following the Supreme Court's decisions in *Owen* and *Snyder,* relied solely on congressional reenactments. For a discussion of more traditional methods of statutory interpretation, see generally W. STATSKY, LEGISLATIVE ANALYSIS (1975); Kernochan, *Statutory Interpretation: An Outline of Method,* 3 DALHOUSIE L.J. 333 (1976).

106. *See* notes 46-56 *supra* and accompanying text.

107. Where the jurisdiction-conferring claim is a federal question over which state courts have concurrent jurisdiction—for example civil rights and general federal questions—fairness does not demand that both actions be brought in the federal forum, though judicial economy may. However, when the jurisdiction-conferring claim must be brought in federal court, both claims may be heard in the same forum only if pendent jurisdiction is exercised. In these cases, the rationale favoring settlement of all issues in a single forum is most convincing.

Bowers v. Moreno, 520 F.2d 843 (1st Cir. 1975) *quoting* Comment, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons Not Party to Jurisdiction-Conferring Claims,* 73 COLUM. L. REV. 153, 165 (1973).

108. *See* Morse Electro Prods. Corp. v. S.S. Great Peace, 437 F. Supp. 474, 485 (D. N.J. 1977) ("the prohibition set forth in *Aldinger* should not be extended . . . [to a case] within exclusive

such cases the *Gibbs* requirements, as applied to pendent party jurisdiction, limit pendent party claims to those normally expected to be litigated with the exclusive federal claim. The combination of congressional allocation of judicial power through exclusive jurisdictional statutes, together with the *Gibbs* limitations, eases federalism concerns by insuring that federal courts remain "courts of limited jurisdiction."[109]

By requiring affirmative statutory authority, *National Insurance Underwriters* effectively requires federal subject-matter jurisdiction over each and every party,[110] unless the plaintiff may only bring all his

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federal admiralty jurisdiction. Clearly, only in a federal court could all of the claims be tried together. There is no indication whatever that Congress implicitly or explicitly has determined that the parties . . . should not be joined"). *See, e.g.,* cases cited in note 68 *supra*. *See also* notes 84-88 *supra* and accompanying text.

109. *See, e.g.,* Victor Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971) ("[t]o afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law"); Jorden v. Metropolitan Utils. Dist., 498 F.2d 514, 516 (8th Cir. 1974) ("District Courts of the United States are courts of limited jurisdiction," and Congress had not empowered them to entertain claims under the civil rights statute, 42 U.S.C. § 1983, against municipal corporation); Commercial Sec. Bank v. Walker Bank & Trust Co., 456 F.2d 1352, 1355 (10th Cir. 1972) ("federal courts can take cognizance of only those matters which Congress has entrusted to them by statute"); Kuhl v. Hampton, 451 F.2d 340, 342 (8th Cir. 1971) ("federal courts are courts of limited jurisdiction . . . and were not established to mediate any and all types of complaints and alleged wrongs"); Williams v. Rogers, 449 F.2d 513, 517-18 (8th Cir.) (emphasis added), *cert. denied,* 405 U.S. 926 (1971) ("Federal courts are courts of limited jurisdiction, possessing only the power that the Congress *expressly* has conferred upon them by statute"); Wallach v. City of Pagedale, 376 F.2d 671, 675 (8th Cir. 1967) ("Federal courts have only that jurisdiction which Congress, acting within the limits of the Constitution, confers upon them"); Giancana v. Johnson, 335 F.2d 366, 368 (7th Cir.), *cert. denied,* 379 U.S. 1001 (1964) (jurisdiction is "narrowly limited"); Kaufman v. Liberty Mut. Ins. Co., 245 F.2d 918, 919 (3d Cir. 1957) ("it is a truism that the 'inferior' federal courts are courts of limited jurisdiction"). *See generally* U.S. CONST. art. 1, § 1; Act of Sept. 24, 1789, 1 Stat. 73 (Judiciary Act); P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURT AND THE FEDERAL SYSTEM 921-26 (2d ed. 1973); J. MOORE, *supra* note 102 at ¶ 18.07 [1.2-1.4]; C. WRIGHT, *supra* note 102 at § 19; 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3567 (1975); Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction,* 33 U. PITT. L. REV. 759 (1972); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction,* 83 YALE L.J. 498 (1974); Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 34 U. PITT. L. REV. 1 (1972); Shakman, *The New Pendent Jurisdiction of the Federal Courts,* 20 STAN. L. REV. 262 (1968); Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,* 62 COLUM. L. REV. 1018 (1962); Note, UMW v. Gibbs *and Pendent Jurisdiction,* 81 HARV. L. REV. 657 (1968); Note, *The Supreme Court, 1965 Term,* 80 HARV. L. REV. 91, 220-24 (1966); Note, *Federal Pendent Party Jurisdiction and* United Mine Workers v. Gibbs—*Federal Question and Diversity Cases,* 62 VA. L. REV. 194 (1976).

110. *Accord,* United States Gen., Inc. v. City of Joliet, 598 F.2d 1050, 1055 (7th Cir. 1979) ("addition of a completely new party for purposes of a state law claim . . . would run counter to the well established principle that federal courts . . . are courts of limited jurisdiction"); Ortiz v.

claims in federal court. If claims against pendent parties in diversity and federal question cases must satisfy the statutory requirements, such claims must have independent subject-matter jurisdiction. This case reflects an era of redefinition for the scope of federal judicial power and results in the narrowing, if not near abolition, of pendent party jurisdiction.

United States, 595 F.2d 65 (1st Cir. 1979) (permitted pendent jurisdiction since independent basis of federal jurisdiction exists); Libby, McNeill, and Libby v. City Nat. Bank, 592 F.2d 504, 510 (9th Cir. 1978) ("Pendent jurisdiction . . . does not reach parties for whom there is no independent basis for federal jurisdiction"); Harris v. Steinem, 571 F.2d 119 (2d Cir. 1978) (permissive counterclaims require independent jurisdictional grounds); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057 (2d Cir. 1977) (permissive counterclaims require independent jurisdictional grounds); Blake v. Pallan, 554 F.2d 947 (9th Cir. 1977) (requiring independent federal jurisdiction).