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The New Supplemental Jurisdiction Statute--Flawed But Fixable

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THE NEW SUPPLEMENTAL JURISDICTION STATUTE — FLAWED BUT FIXABLE

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It is relatively rare for Congress to involve itself in federal courts issues and I think that explains, at least in part, the intensity of reaction about the new supplemental jurisdiction statute.[1] If this were a tax reform provision, we would all understand that the political opportunities for such reforms are limited and must be taken whenever they occur. We would also understand that in the rush to take advantage of such opportunities, ambiguities or technical flaws inevitably result. These ambiguities or flaws would not be cause for undue concern. Instead, we would all await the Treasury Regulations or be confident of technical amendments the following year. Alas, there are no regulations forthcoming and if the venue statute is any indication, flaws in a technical federal courts statute can bedevil the courts for a generation before Congress fixes them.[2]

I agree with Professors Rowe, Burbank, and Mengler[3] that as a result of *Finley v. United States*,[4] there was a strong need for legislative action in this area. I believe that *Finley* was not only wrong as concerned the facts of that particular case, but also that the language of the opinion was extremely sweeping and threatened to destabilize settled law.[5] It is remarkable and commendable that the damage done by *Finley* was undone as quickly as it was.

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[1] 28 U.S.C.A. § 1367 (West Supp. 1991).

[2] The courts struggled for many years to determine where a claim "arose" within the meaning of 28 U.S.C. § 1391. *See* Leroy v. Great W. United Corp., 443 U.S. 173, 184-86 (1979); CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 242-43 (4th ed. 1983). This was finally addressed in the 1990 amendments to § 1391. Similarly, there was great uncertainty on the meaning of § 1391(c), *see* WRIGHT, *supra*, at 247, that was clarified in the 1988 amendments to § 1391(c). *See* John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvement Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 770-74 (1991).

[3] Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion about Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 945-47 (1991).

[4] 490 U.S. 545 (1989).

[5] *See* Wendy Collins Perdue, Finley v. United States*: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539 (1990).

I also agree with Professors Freer and Arthur[6] that this statute, particularly subsection (b), has some significant problems. While it is undoubtedly true that eventually the ambiguities would be resolved by the courts, it would be preferable to seek statutory corrections.

I. MINOR QUIBBLES

Before turning to subsection (b), I have a few quibbles with subsections (a) and (c). I should stress that these are not major objections and they alone would not warrant statutory change. However, in the event Congress undertook other changes in the statute, it might consider changes here as well.

Subsection (a) of the statute provides for supplemental jurisdiction over all 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."[7] This language apparently contemplates that supplemental jurisdiction will be available under the test articulated in *United Mine Workers v. Gibbs*.[8] That test focuses on whether the claims "derive from a common nucleus of operative fact."[9] I believe it would have been preferable to have specified in the statute the test for supplemental jurisdiction rather than simply refer to the Constitution. My concern is not that the courts will be unable to articulate a coherent test; instead I think it is unfortunate to require courts unnecessarily to interpret the Constitution.[10] As Professors Teply and Whitten have argued:

> Nothing in Article III explicitly requires that the scope of 'case' or 'controversy' be defined by reference to the factual relationship be-

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[6] Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life after* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 474-86 (1991).

[7] 28 U.S.C.A. § 1367(a).

[8] 383 U.S. 715 (1966). *See* Thomas M. Mengler, Stephen B. Burbank & Thomas D. Rowe, Jr., *Recent Federal Court Legislation Made Some Noteworthy Changes*, NAT'L L.J., Dec. 31, 1990 - Jan. 7, 1991, at 20, 20.

[9] *Gibbs*, 383 U.S. at 725.

[10] The Court has stated that "*Gibbs* delineated the constitutional limits of federal judicial power." Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 371 (1978). This was, however, dicta and the Court has never been presented with a case that has required it to reconsider this.

> tween the joined claims, as opposed to, for example, the entire relationship between the parties to an action, which may include factually unrelated claims. Sound reasons may sometimes exist for defining the scope of a case or controversy to include unrelated claims — reasons grounded in policies designed to protect or enhance the operation of federal subject-matter jurisdiction.[11]

My other concern is with subsection (c). Here the statute appears to codify the discretion prong of *Gibbs*,[12] but the tone of subsection (c) is somewhat different than *Gibbs*. *Gibbs* had stated that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right"[13] and then listed the relevant considerations. Subsection (c) enumerates three specific circumstances in which the courts may decline to exercise supplemental jurisdiction and then provides a catchall provision that allows courts to decline jurisdiction "in exceptional circumstances, [if] there are other compelling reasons for declining jurisdiction."[14] The phrasing of this catchall provision seems to suggest that it is only in "exceptional circumstances" and for "compelling reasons" that jurisdiction should ever be declined. Thus, subsection (c) could be read to suggest that the courts should be very sparing in exercising their discretion under this section — more sparing than *Gibbs* suggested.

As noted above, however, this is largely a quibble. It is difficult to write precise rules concerning discretion. My hunch is that the courts will continue to exercise their discretion exactly as they have been and that this is what was intended.

II. SUBSECTION (b)

A. *Supplemental Jurisdiction and Diversity*

My primary concerns focus on subsection (b). Before addressing some of the ambiguities in the statute, a few preliminaries are in order. I com-

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[11] LARRY L. TEPLY & RAPLH U. WHITTEN, CIVIL PROCEDURE 102 (1991).

[12] *See Gibbs*, 383 U.S. at 726-27. The House Report states that subsection (c) "codifies the factors that the Supreme Court recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim." H.R. REP. No. 734, 101st Cong., 2d. Sess. 21 (1990).

[13] *Gibbs*, 383 U.S. at 726.

[14] 28 U.S.C.A. § 1367(c).

pletely agree with the approach of the statute which singles out diversity for different treatment. This different treatment is necessary not because diversity is the poor step-sister of federal question jurisdiction, but for a much less sinister reason. If supplemental jurisdiction were allowed in diversity cases to the full extent allowed by the Constitution, this would obliterate the total diversity rule. So long as there was diversity between one plaintiff and one defendant, supplemental jurisdiction could be used to add additional non-diverse plaintiffs and defendants.

In addition, I think it appropriate that the subsection attempts to codify the principles set forth in *Owen Equipment & Erection Co. v. Kroger*.[15] *Kroger* focused on several basic concerns in determining whether there should be supplemental jurisdiction. First, the Court was concerned that an overly generous rule of supplemental jurisdiction would undermine the total diversity rule.[16] Specifically, the Court was concerned about sneaky plaintiffs who might have claims against non-diverse defendants. The Court hypothesized that rather than abandon the federal forum as an option, the sneaky plaintiff might sue a diverse party in federal court, knowing that this defendant would implead the true target.[17] The sneaky plaintiff could then rely on supplemental jurisdiction and sue the impleaded party. The underlying concern here seems to be one of docket control — the Court did not want the availability of supplemental jurisdiction to increase the number of diversity cases in federal court.

Second, I believe the Court wanted to avoid burdening trial judges with an unduly fact specific inquiry. In the actual facts of *Kroger*, there was little reason to believe that Mrs. Kroger was a sneaky plaintiff seeking to circumvent the total diversity rule. Up until the middle of trial, everyone apparently believed that Mrs. Kroger was diverse from the impleaded party.[18] The majority, however, rejected this particularized inquiry and focused instead on the broader category of cases in which a plaintiff seeks to claim against a non-diverse impleaded party. I agree that it makes sense to treat equally all cases in the same procedural posture. It is just not worth the effort to determine in each case whether, without supplemental jurisdiction, this particular plaintiff would have brought suit in

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[15] 437 U.S. 365 (1978). I disagree with Professor Freer on this. *See* Freer, *supra* note 6, at 476.
[16] *Kroger*, 437 U.S. at 373-74, 377.
[17] *Id.* at 374-75.
[18] *Id.* at 378 (White, J. dissenting).

federal court anyway.[19]

Another concern expressed in *Kroger* was a desire to promote fairness and efficiency.[20] In distinguishing the situation in *Kroger* from situations involving impleader, cross-claims, or counterclaims, the Court stressed that the latter situations involve "claims by a defending party haled into court against his will."[21] In addition, the Court observed that "[i]t is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit."[22]

Thus, the *Kroger* Court was not indifferent to the issues of fairness and efficiency,[23] but it was attempting to balance these against its concern for protecting the total diversity rule. Mrs. Kroger was forced to forgo her claim against the impleaded party and this may seem both inefficient and unfair since it would force her to litigate a second suit in state court.[24] But as the *Kroger* Court pointed out, the plaintiff picked the forum and she could achieve the desired efficiency by taking the entire case to state court.[25] Of course, to achieve this efficiency, the plaintiff must forgo her right to a federal forum for her claim against the original defendant. But the dilemma faced by the plaintiff is no different than she would have confronted had she wanted to sue both defendants originally — the total

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[19] Of course, even accepting that these issues should be addressed by category, an empirical question remains. Will allowing plaintiffs to claim against non-diverse impleaded parties in fact increase the number of cases in federal court? Neither the Court, Congress, nor the statute's supporters offered any empirical data on this. *See* Rowe, Burbank & Mengler, *supra* note 3, at 952-53. Still, this is surely not the first time Congress has made a policy choice without any empirical basis.

[20] *See Kroger*, 437 U.S. at 376-77.

[21] *Id.* at 376.

[22] *Id.* at 377.

[23] I have argued elsewhere that fairness and efficiency are not really separate concerns, but are in many respects simply different descriptions of the same basic problem that arises when a litigant must litigate related claims in different fora. *See* Perdue, *supra* note 5, at 542-43.

[24] In fact, Mrs. Kroger was not forced simultaneously to litigate two different suits because her claim against the original defendant previously had been dismissed. *See Kroger*, 437 U.S. at 368. However, the Court did not limit its analysis or holding to such situations.

[25] *Id.* at 376. In *Kroger*, the plaintiff probably did suffer some actual burden and unfairness because she did not know until the middle of trial that the impleaded party was non-diverse and thus the dismissal of the claim resulted in a waste of time. However, as with the Court's concern for protecting the total diversity rule, the Court's approach to the unfairness concern focused on categories of cases, not on individual cases.

diversity rule forces plaintiffs to choose between their right to sue the diverse defendant in federal court or their desire for an efficient resolution against all defendants. The result is that the only way to accommodate the fairness and efficiency consideration is to abandon the previously discussed concern about preserving the total diversity rule and preventing an increase of filings in the federal courts.[26]

In some situations, efficiency and fairness can be accommodated without risking an increase in the number of cases in federal court. The most obvious situation is that of a defendant who may have a counterclaim that lacks the requisite amount in controversy or an impleader claim against a non-diverse third party.[27] If supplemental jurisdiction is not allowed, there will have to be separate litigation. This is inefficient and, where the defendant did not choose the forum, seems unfair. Moreover, allowing these claims provides no increased incentive for plaintiffs to file in federal court.[28]

In sum, *Kroger* does provide good guidance on the appropriate rules for supplemental jurisdiction in diversity cases. First, these rules should take into account the effect on the total diversity rule and whether allowing jurisdiction will have any likely impact on the number of diversity cases in federal court. Second, the rules should promote fairness and efficiency, particularly as to parties who did not choose the forum. Finally, the rules should be relatively easy to apply and hence should focus on entire categories of procedural situations, rather than on the particular circumstances of individual cases.

To these three principles, I would add a fourth — as to each procedural category, the rules should be clear. Professors Rowe, Burbank, and Mengler suggest that subsection (b) was drafted to avoid "statutory rigidity."[29] The drafters, they explained, did not want to forego "the benefits of the lower court case law development."[30] If the statute contemplates, as does *Kroger*, that answers to these jurisdictional issues will be decided for entire procedural categories, I see little to be gained by having lower

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[26] *See supra* notes 16-17 and accompanying text.

[27] *See Kroger*, 437 U.S. at 375-76.

[28] Indeed, denying jurisdiction in these situations might increase the filings in federal courts by plaintiffs wishing to avoid counterclaims.

[29] Rowe, Burbank & Mengler, *supra* note 3, at 959.

[30] *Id.*

courts struggle to figure out the correct answer for each category. Thus, for example, either plaintiffs can counterclaim against non-diverse impleaded parties or they cannot. The statute should provide the answer clearly and concretely. The ideal solution might be a set of regulations, like Treasury Regulations, that spelled out the various procedural permutations and provided the answer as to how those are to be treated. Given that such an option is unavailable, I think it is reasonable to expect the statute to provide clear answers to the full set of foreseeable procedural permutations.

B. Specifics of the Statute

1. Meaning of the Last Clause

Subsection (b) prohibits supplemental jurisdiction under certain specified situations "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."[31] This language appears to invite a *Kroger*-type inquiry into whether allowing jurisdiction would undermine total diversity by encouraging suits to be filed in federal court that otherwise would not have been filed there. Thus, as to whether in response to a counterclaim, a plaintiff can implead a non-diverse party, I assume one would analyze the likelihood of a sneaky plaintiff scenario.

I have two problems with this clause. First, if the purpose is as I have described above, the language could have been clearer. One might conclude that anytime non-diverse parties are allowed to claim against each other, that is "inconsistent with the jurisdictional requirements of section 1332." Under this interpretation of the language, there would be no circumstance in which a plaintiff could ever claim against a non-diverse party. Thus, the clause could not be used to permit a plaintiff either to counterclaim against a non-diverse third party or to implead a non-diverse third party in response to a counterclaim.[32] Of course, this interpretation would make this clause surplus because one needs to rely on supplemental jurisdiction only if there is no independent basis for jurisdiction. One might nonetheless justify this interpretation as a restatement of what con-

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[31] 28 U.S.C. § 1367(b).

[32] *See* Rowe, Burbank & Mengler, *supra* note 3, at 959-60 (arguing that the clause might be used to permit jurisdiction in such cases).

stitutes supplemental jurisdiction. Even if this is not the best reading of this clause, I can report that about a third of the 260 law students to whom I taught this statute last year thought that the clause obviously had this meaning. While I do not offer this as a scientific survey, I do think it at least suggests that lawyers who are not steeped in *Kroger* may not fully appreciate the significance of this clause.

Assuming that the clause will allow courts sometimes to find jurisdiction over claims between non-diverse parties,[33] the second problem is that the intended scope of this authorization is unclear. Professors Rowe, Burbank, and Mengler suggest that the clause should be treated as a kind of catchall provision that will deal with situations not otherwise covered by the statute.[34] That, however, is not the way the statute is written. Instead, the clause appears to apply in *all* situations, not merely in unforeseen situations.

For example, consider how a case identical to *Kroger* would be analyzed under the statute. The statute does not say that a plaintiff can never claim against a non-diverse impleaded party. Rather, it says that a plaintiff cannot claim against that party if it would be inconsistent with § 1332. This might be construed to invite a case by case examination of whether this plaintiff was attempting to circumvent the total diversity rule. Under this analysis, jurisdiction would have been allowed in *Kroger* because, as noted above, there was little reason to think Mrs. Kroger was a sneaky plaintiff.[35] Alternatively, the clause at the end of subsection (b) may be addressed to categories of cases, but may mean that the statute itself does not take a position on whether jurisdiction should be permitted in any of the listed situations. Instead, the statute simply invites the federal courts to decide whether, in any category of cases, allowing supplemental jurisdiction would undermine § 1332. If this is what the clause means, then it would have been much clearer to eliminate the enumeration of particular situations within that subsection and simply to provide that, in diversity cases, supplemental jurisdiction shall not be permitted where it would be inconsistent with § 1332. At least the courts would then know that the entire area had been turned over to them. The third possibility is that the clause is a catchall to cover unforeseen situations. If this

[33] *See id.* at 953.

[34] *Id.* at 959-60.

[35] *See supra* note 18 and accompanying text.

is the correct interpretation, then the language should be modified to clarify that the clause applies only in situations not otherwise addressed by the statute.

2. *The Cases Not Covered by Subsection (b)*

Subsection (b) does not provide clear answers on how courts are supposed to treat supplemental jurisdiction in some easily foreseeable situations: class actions,[36] joinder of non-diverse plaintiffs under Rule 20,[37] counterclaims of plaintiffs against impleaded third parties,[38] impleader claims by a plaintiff in response to a counterclaim,[39] or claims by plaintiffs against impleaded parties where the case was removed to federal court.[40] As to all of these, the statute should provide a clear answer.[41] I am sure that, even without statutory amendment, consensus answers eventually will emerge from the cases. But why should we have to wait?

3. *Necessary Parties and Intervenors*

As to the above described cases, uncertainty exists because the statute simply does not appear to address those situations. In contrast, the statute

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[36] *See* Freer, *supra* note 6, at 485-86; Rowe, Burbank & Mengler, *supra* note 3, at 960 n.90.

[37] *See* Rowe, Burbank & Mengler, *supra* note 3, at 961 n.91.

[38] *See* Freer, *supra* note 6, at 482-84.

[39] *See id.*

[40] *See id.* at 485; Rowe, Burbank & Mengler, *supra* note 3, at 960 n.90.

[41] Professor Freer argues, as have others, that the total diversity requirement for alienage jurisdiction should be changed. *See* Freer, *supra* note 6, at 474-75; Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 968 (1979); Nancy M. Berkley, Note, *Federal Jurisdiction Over Suits Between Diverse United States Citizens with Aliens Joined to Both Sides of the Controversy Under 28 U.S.C. § 1332(a)(3)*, 38 RUTGERS L. REV. 71, 75 (1985). Freer notes that this goal could have been accomplished through supplemental jurisdiction, but concludes that § 1367 probably precludes this. Freer, *supra* note 6, at 475. The response of Professors Rowe, Burbank, and Mengler is ambiguous. At one point, they seem to suggest that the last clause of § 1367(b) may enable courts to use supplemental jurisdiction as Freer suggests. *See* Rowe, Burbank & Mengler, *supra* note 3, at 954-55. On the other hand, they also seem to argue that supplemental jurisdiction is not the proper cure for the problem Freer identifies, and that the new statute does *not* provide this cure. Instead, they suggest that both the problem and the solution lie in reinterpreting or amending § 1332. *See id.* I do not think it makes sense to read the last clause of § 1367(b) to permit supplemental jurisdiction in a situation that is flatly inconsistent with the accepted understanding of § 1332. Although this statute did present an opportunity for Congress to reconsider the alienage rule, I do not find it particularly troubling that Congress chose not to consider that issue. As Professors Rowe, Burbank, and Mengler correctly note, nothing in § 1367 would preclude the courts from reinterpreting, or Congress from amending, § 1332.

does specifically address Rule 19 and 24 parties. Nonetheless, I perceive significant uncertainty both as to the statute's application and as to its rationale. If the statute does what I think it does, I question its wisdom.

a. Rule 19/24 "Anomaly"

Prior to the passage of § 1367 federal courts had ancillary jurisdiction over intervenors of right,[42] but not over Rule 19 parties.[43] This different treatment is not really an anomaly, but merely an attempt to walk the line between the total diversity rule and the fairness concerns described above.[44] Intervenors do not choose the forum and have no ability to move the case to a forum in which they can participate. If we believe in the concept of intervention of right, then we ought to allow people into suits regardless of their citizenship. Of course, it is possible to have the sneaky plaintiff problem. A plaintiff may have wanted a non-diverse potential intervenor in the case all along but not joined her, knowing, or at least hoping, that the intervenor would enter on her own. In determining the supplemental jurisdiction rules, the choice is whether to keep out all non-diverse intervenors, so as to prevent the small increase in federal filings we would get from these sneaky plaintiffs, or to allow a slight docket increase because we believe that people having an interest in litigation ought to be able to intervene. Given this choice, allowing supplemental jurisdiction seems appropriate.[45]

With respect to Rule 19 parties, the attempt to accommodate the total diversity rule and fairness can sensibly lead to the decision to exclude supplemental jurisdiction. The fairness considerations are somewhat different because there is no outsider seeking to join the case.[46] Moreover, the court has the ability through Rule 19(b) to prevent serious unfairness, either by restructuring the remedy or dismissing the case. On the other hand, al-

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[42] *See* Wichita R.R. & Light Co. v. Public Utils. Comm'n, 260 U.S. 48, 53-54 (1922); Phelps v. Oaks, 117 U.S. 236, 240-41 (1886); 7C CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1917 (2d ed. 1986).

[43] *See* 7C WRIGHT, MILLER & KANE, *supra* note 42, at 479-80.

[44] *See supra* notes 16-28 and accompanying text.

[45] *See* 7C WRIGHT, MILLER & KANE, *supra* note 42, at 481.

[46] As Professor Steinman has noted, intervention is a "reality check on the contention that the absentee truly is concerned that its interests may be impaired." Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, the New Law, and Rule 19*, 38 KAN. L. REV. 863, 918 (1990).

lowing supplemental jurisdiction over Rule 19 parties seems more likely to encourage sneaky plaintiffs to sue in federal courts than would a similar result in the Rule 24 context. Plaintiffs are likely to know, or be able to ascertain, the identity of Rule 19 parties and plaintiffs do not have to rely on the desire of the absent party to participate — the absent party can be forced into the case under Rule 19.

The law in existence prior to the statute went one step further in its attempt to walk the line between accommodating the total diversity rule and fairness. If an intervenor met the criteria of a Rule 19(b) party, the court would not permit intervention, but would instead dismiss the case.[47] In denying supplemental jurisdiction, the courts in essence held that the case should have been filed originally with the non-diverse party included. Had that happened, the suit, of course, would have been dismissed. The situation in which we have a non-diverse and indispensable party is in some respects the paradigm case that violates the total diversity rule. Moreover, the fairness problem is mitigated by dismissing the suit. The case will presumably be refiled in state court where the indispensable intervenor can either join or be joined in the suit.

In sum, I felt that the Rule 19/24 "anomaly" was a workable accommodation between the competing concerns of protecting the total diversity rule and protecting fairness to non-parties with a significant interest in ongoing litigation. Other balances between these interests could obviously be struck.[48] My objection to the statute is that it appears to put a priority on eliminating the difference in treatment between Rules 19 and 24 and ignores the underlying reasons for those differences.

b. Rule 19 and 24 Parties Under Subsection (b)

According to Professors Rowe, Burbank, and Mengler's interpretation of § 1367, a non-diverse person cannot intervene as a *plaintiff* under Rule 24 or be joined as a plaintiff under Rule 19.[49] On the other hand, a non-diverse person can intervene as a *defendant* under Rule 24 or be joined as

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[47] *See* 7C WRIGHT, MILLER & KANE, *supra* note 42, at 477-78.

[48] For example, one could allow supplemental jurisdiction over all Rule 19 parties, concluding that the benefit outweighs the increase in federal court cases. *See* Freer, *supra* note 6, at 477, and authorities cited therein.

[49] *See* Thomas M. Mengler, Stephen B. Burbank & Thomas D. Rowe, Jr., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 215 (1991).

a defendant under Rule 19.[50] However, although Rule 19 and 24 defendants can be *joined*, the plaintiff cannot claim against them.[51]

I have several difficulties with this approach. First, like Professors Freer and Arthur,[52] I find the distinction between joining someone as a defendant and claiming against that defendant unsatisfying. I do not understand how one can be a party without having a claim or being claimed against.[53]

Second, even if subsection (b) does not *prohibit* jurisdiction over added parties but only over claims by or against those parties, subsection (b) does not itself *grant* jurisdiction. The grant of jurisdiction comes from subsection (a) and that subsection only authorizes jurisdiction over "claims." Thus, if the distinction Professors Rowe, Burbank and Mengler draw with respect to subsection (b) applies to subsection (a), subsection (a) only authorizes supplemental jurisdiction over added parties when they claim or are claimed against.

Third, even if the distinction between being joined and being claimed against is sustainable, then it seems sustainable as to both defendants and plaintiffs. The statute prohibits jurisdiction "over *claims* by persons proposed to be joined as plaintiffs under Rule 19 . . . or seeking to intervene as plaintiffs under Rule 24."[54] Thus, although Professors Rowe, Burbank, and Mengler assert that the statute prohibits joinder of Rule 19 and 24 plaintiffs,[55] it seems it could just as easily be read to permit joinder,

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[50] *See* Rowe, Burbank & Mengler, *supra* note 3, at 957 & n.68.

[51] *See id.*

[52] Arthur & Freer, *supra* note 6, at 967-72.

[53] I found Professors Freer and Arthur's analogy to interpleader particularly persuasive. *See id.* at 971-72. In both Martin v. Wilks, 490 U.S. 755 (1989), and Helzberg's Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc., 564 F.2d 816 (8th Cir. 1977), the defendants were like stakeholders. In *Wilks* the "stake" was seniority rights; in *Helzberg's* the "stake" was exclusive access to a mall. In both cases, if the defendant gave the plaintiffs the rights they sought, those defendants would be unable to give the same right to the absent party. Thus, although the plaintiff in those cases did not have a claim against the absent party, that party was a potential claimant against the "stakeholding" defendant. This analysis may suggest that the Rule 19 parties in those cases should be considered plaintiffs, not defendants. *Cf.* Reeves v. Harrell, 791 F.2d 1481, 1484 (11th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) (white sheriffs intervened to challenge a consent decree between black sheriffs and county commissioners; in determining whether intervenors were liable for attorney fees, court treated intervenors as plaintiffs). However, if they are plaintiffs, then according to Professors Rowe, Burbank, and Mengler, they cannot be joined.

[54] 28 U.S.C.A. § 1367(b) (emphasis added).

[55] *See* Mengler, Burbank & Rowe, *supra* note 49, at 215.

but prohibit those joined parties from claiming.

Fourth, the statute does not differentiate between intervenors of right and permissive intervenors. Under prior law, there was no supplemental jurisdiction over permissive intervenors under Rule 24(b).[56] Under the statute, as least as to intervening *defendants*, there is supplemental jurisdiction over permissive intervenors. Of course, if the distinction between being joined and being claimed against holds, no plaintiff can claim against an intervening defendant. That restriction, if it means anything, is likely to suit the intervenors just fine. Thus, the statute seems to expand supplemental jurisdiction to permissive intervenors.

Fifth, assuming, as I noted above, that Rule 19 and 24 *plaintiffs* can be joined, but cannot claim, then this expansion of supplemental jurisdiction applies to plaintiff permissive intervenors.

Consequently, I am unsure whether the new statute expands or contracts supplemental jurisdiction for Rule 19 and 24 parties. The statute draws distinctions between plaintiffs and defendants, but if my interpretation is correct, that distinction is more apparent than real. On the other hand, if the statute does indeed treat Rule 19 and 24 plaintiffs differently than defendants, then neither the legislative history nor the statute's backers have offered any explanation for the different treatment. The "anomaly" the statute tried to fix seems less troubling than the cure.

C. A Proposed Revision to Subsection (b)

As indicated earlier, I believe it would be appropriate to seek revisions to subsection (b). In the interest of advancing this goal, I offer below revised language for subsection (b). Although confident that others will be able to improve upon this draft, I offer it simply as an attempt to begin the revision process.

> (B) IN ANY CIVIL ACTION OF WHICH DISTRICT COURTS HAVE ORIGINAL JURISDICTION FOUNDED SOLELY ON SECTION 1332 OF THIS TITLE, OR FOUNDED ON SECTION 1441 OF THIS TITLE WHERE THE SOLE BASIS FOR REMOVAL WAS THE EXISTENCE OF JURISDICTION UNDER SECTION 1332, THE DISTRICT COURTS SHALL NOT HAVE SUPPLEMENTAL JURISDICTION EXCEPT AS PROVIDED BELOW:

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[56] *See* 7C WRIGHT, MILLER & KANE, *supra* note 42, at 466.

> (1) IN CLASS ACTION SUITS, SUPPLEMENTAL JURISDICTION MAY BE USED TO JOIN NON-DIVERSE UNNAMED CLASS MEMBERS WHOSE CLAIMS MEET THE AMOUNT IN CONTROVERSY;
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> (2) SUPPLEMENTAL JURISDICTION MAY BE USED TO JOIN AN INTERVENOR UNDER RULE 24(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE, PROVIDED THAT THE INTERVENOR DOES NOT MEET THE CRITERIA FOR A RULE 19(B) PARTY;
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> (3) SUPPLEMENTAL JURISDICTION MAY BE USED BY ANY PARTY TO (I) JOIN ANY THIRD PARTY UNDER RULE 14 AND BRING A RULE 14 CLAIM AGAINST THAT THIRD PARTY; (II) JOIN ANY RULE 13(H) PARTY AND CLAIM AGAINST THAT PARTY; AND (III) BRING A COMPULSORY COUNTERCLAIM OR CROSS-CLAIM AGAINST ANY OTHER PARTY.

This draft is intended largely to codify the law in existence before § 1367 was enacted. As a matter of political reality, I think revisions to subsection (b) are more likely to pass if they are viewed as mere technical corrections. I would save for another day battles about class actions or about expanding or contracting diversity jurisdiction.

The revised version provides that there shall be no supplemental jurisdiction in diversity cases except as specified in the statute. I do not intend this to codify an anti-diversity bias, but instead to reflect the fact that full supplemental jurisdiction is inconsistent with the total diversity rule. The exceptions to this general rule are intended to insure that there is supplemental jurisdiction in those situations where fairness and efficiency demand it.

This statute would codify the law as it existed before § 1367 with respect to class actions, intervenors, and Rule 19 parties, and would allow anyone to counterclaim or cross-claim. It would also codify the result in *Kroger*, but would allow a plaintiff to implead a third party in response to counterclaims filed against the plaintiff. In addition, the statute would allow a plaintiff to counterclaim against a non-diverse third party impleaded by someone else (as in *Kroger*), where the third party claims against the plaintiff.

Finally, for the sake of simplicity, the statute provides that the rules are the same in cases of removal. One could make the case in the removal situation that the plaintiff should be able to join anyone since she did not pick the forum.[57] Likewise, one might prohibit a removing defendant from impleading a non-diverse third party.[58] Nonetheless, I think it would unduly complicate the law to have different rules for supplemental jurisdiction in removed cases.

There is, however, a potential unfairness that can arise in the removal context. Where the case is removed to federal court and the plaintiff seeks to join non-diverse parties, it may be unfair both to deny joinder and to keep the case in federal court.[59] The solution is found in § 1447(e) which provides: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."[60] This provision provides some protection where the plaintiff wants to add a new party. It does not, however, apply in a case like *Kroger*, where the plaintiff seeks to claim against a non-diverse party joined by someone else. In order to remedy this, I would amend § 1447(e) to read: "If after removal the plaintiff seeks to join additional *claims or parties where there is no subject matter jurisdiction over those claims or parties*, the court may deny joinder, or permit joinder and remand the action to the State court."

CONCLUSION

The new supplemental jurisdiction statute was a prompt and necessary response to the mess that *Finley* created. Unfortunately, subsection (b) of the statute has significant flaws. However, those flaws are correctable and the statute warrants prompt revision before too many judicial resources are expended.

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[57] *See* Steinman, *supra* note 46, at 902.
[58] *See* Perdue, *supra* note 5, at 565.
[59] *See* Steinman, *supra* note 46, at 930-31.
[60] 28 U.S.C. § 1447(e) (1988).