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Civil Procedure--Ancillary Jurisdiction over Plaintiffs' Claims against Third-Party Defendants--Kroger v. Owen Equipment & Erection Company

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RECENT CASES

CIVIL PROCEDURE—ANCILLARY JURISDICTION OVER PLAINTIFFS' CLAIMS AGAINST THIRD-PARTY DEFENDANTS

Kroger v. Owen Equipment & Erection Company[1]

Geraldine Kroger, an Iowa citizen, brought a diversity action in federal district court for the wrongful death of her husband against the Omaha Public Power District (hereafter OPPD), a Nebraska corporation. OPPD filed a third-party complaint[2] against the Owen Equipment and Erection Company (hereafter Owen). Plaintiff then amended her complaint to assert a claim directly against the third-party defendant Owen,[3] describing it as "a Nebraska corporation with its principal place of business in Nebraska." Owen's answer consisted of an admission that Owen was incorporated under the laws of Nebraska and a general denial of all other allegations.[4]

Before trial OPPD was granted a motion for summary judgment and was dismissed from the lawsuit. The only remaining parties were the plaintiff, an Iowa citizen, and the third-party defendant Owen, ostensibly a Nebraska corporation. Three days into the trial, Owen's witness testified that Owen's principal place of business was in Iowa. Owen then requested leave to amend its answer to assert lack of subject matter

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1. 558 F.2d 417 (8th Cir. 1977).
2. FED. R. CIV. P. 14(a) provides in part:
> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him .... The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 ....

3. *Id.* "The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff ...." *But see* FED. R. CIV. P. 82, note 13 *infra*.
4. The court concluded that Owen's general denial failed to raise the defense of lack of subject matter jurisdiction because of its failure to comply with FED. R. CIV. P. 8(b) which provides in part that "[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder."

jurisdiction based on a lack of diversity between the parties. The district court rejected this challenge to its jurisdiction. It held that although no independent basis of jurisdiction existed as to the third-party defendant Owen, it nevertheless had discretion under *United Mine Workers v. Gibbs*[5] to exercise its judicial power over the case. A judgment ultimately was entered for the plaintiff. The Eighth Circuit affirmed.

Kroger presents several problems that have plagued the federal courts for years. The first and most important is whether independent grounds of subject matter jurisdiction are required to support a plaintiff's claim against a third-party defendant impleaded under federal rule 14. The second problem is what effect, if any, a pretrial disposal of the primary claim has upon the court's jurisdiction over an ancillary claim. The final problem concerns what action a district court may take when parties to a lawsuit have concealed information or otherwise misled the court as to the existence of subject matter jurisdiction.

In *Kroger* the Eighth Circuit became the first to adopt the minority view that no independent basis of subject matter jurisdiction is required to support a plaintiff's claim against a third-party defendant brought into the lawsuit through rule 14.[6] The clear weight of authority is to the contrary.[7] Therefore, the future effect of the *Kroger* decision will rest largely upon the strength of the reasoning supporting it.

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5. 383 U.S. 715 (1966).

6. Prior to the *Kroger* decision, there were several district court cases supporting the minority view. Hadinger v. Bentley Laboratories, Inc., 427 F. Supp. 994 (E.D. Pa. 1977); Hood v. Fireman's Fund Ins. Co., 412 F. Supp. 846 (S.D. Miss. 1976); CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975); Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D.C. Kan. 1975); Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968); Myer v. Lyford, 2 F.R.D. 507 (M.D. Pa. 1942); Malkin v. Arundel Corp., 36 F. Supp. 948 (D.C. Md. 1941). *See also* Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972); Olson v. United States, 38 F.R.D. 489 (D.C. Neb. 1965).

7. Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir. 1976), *cert. denied sub nom.* Saalfrank v. Parkview Memorial Hosp., 429 U.S. 922 (1976); Parker v. W.W. Moore & Sons, Inc., 528 F.2d 764 (4th Cir. 1975); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972); Friend v. Middle Atl. Transp. Co., 153 F.2d 778 (2d Cir. 1946); Ayoub v. Helm's Express, Inc., 300 F. Supp. 473 (W.D. Pa. 1969); Joseph v. Chrysler Corp., 61 F.R.D. 347 (W.D. Pa. 1973), *aff'd mem.*, 513 F.2d 626 (3d Cir. 1975); Pasternack v. Dalo, 17 F.R.D. 420 (W.D. Pa. 1955); Welder v. Washington Temperance Ass'n, 16 F.R.D. 18 (D.C. Minn. 1954); McDonald v. Dykes, 6 F.R.D. 569 (E.D. Pa. 1947), *aff'd mem.*, 163 F.2d 828 (3d Cir. 1947); Hoskie v. Prudential Ins. Co., 39 F. Supp. 305 (E.D.N.Y. 1941). *See also* Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir. 1976), *cert. denied sub nom.* Rosario v. United States, 429 U.S. 857 (1976); McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960); Patton v. Baltimore & O.R.R., 197 F.2d 732 (3d Cir. 1952); Mickelic v. United States Postal Serv., 367 F. Supp. 1036 (W.D. Pa. 1973); Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398 (W.D. Pa. 1969); Corbi v. United States, 298 F. Supp. 521 (W.D. Pa. 1969); Palumbo v. Western Maryland Ry., 271 F. Supp. 361 (D.C. Md. 1967).

The major impetus behind the minority view, which has won it widespread support among commentators,[8] is that it will promote judicial convenience and economy through the avoidance of piecemeal litigation.[9] Despite this desirable result, eight cases[10] in five different courts of appeals[11] have refused to treat a plaintiff's claim against a third-party defendant as being ancillary to the original claim.

The reason supporting the majority view was stated in *Friend v. Middle Atlantic Transportation Company*:[12] "Notwithstanding the undoubted convenience of extensive joinder in cases such as this, we must observe the established boundaries of federal jurisdiction, which the rules do not enlarge."[13] The objective of the court in *Kroger* was to determine the outermost limits of those boundaries.[14]

In searching for the limits of its jurisdiction the *Kroger* court, like most of the post-*Gibbs* opinions supporting the minority view,[15] relied heavily upon the language of *United Mine Workers v. Gibbs*[16] and Professor Moore's treatise on federal practice.[17] For this reason *Kroger* can be evaluated only through a careful reading of *Gibbs* and a critical look at Professor Moore's trenchant argument in favor of the minority view.

In attempting to apply *Gibbs* to the *Kroger* case, one is at first confronted with the dissimilarity in the factual settings of the two cases. In *Gibbs* the plaintiff brought suit against the United Mine Workers pursuant to a federal statute. Because the union was brought before the federal court on a valid federal claim, the Supreme Court held that the plaintiff's state claim against the union was within the jurisdictional power of the district court, even though that claim was not independently cognizable in a federal court. *Gibbs* thus involved what properly is termed "pendent jurisdiction," *i.e.*, the joinder in the same action of state and federal claims.[18] *Kroger*, on the other hand, concerned what is

8. *See, e.g.*, 3 MOORE'S FEDERAL PRACTICE § 14.27[1] (2d ed. 1974); Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 41 (1963); Holtzoff, *Entry of Additional Parties in a Civil Action*, 31 F.R.D. 101, 110 (1962); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971).

9. *See, e.g.*, Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968); Malkin v. Arundel Corp., 36 F. Supp. 948 (D.C. Md. 1941).

10. *See* cases cited note 7 *supra*.

11. The Second, Third, Fourth, Fifth, and Sixth Circuits have denied extending ancillary jurisdiction to plaintiffs' claims against third-party defendants on at least one occasion. *See* cases cited note 7 *supra*.

12. 153 F.2d 778, 779 (2d Cir. 1946).

13. The court cited FED. R. CIV. P. 82 which provides: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."

14. 558 F.2d at 420.

15. *E.g.*, Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D.C. Kan. 1975); Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972).

16. 383 U.S. 715 (1966).

17. 3 MOORE'S FEDERAL PRACTICE § 14.27[1] (2d ed. 1974).

18. *See* C. WRIGHT, LAW OF FEDERAL COURTS 75 (3d ed. 1976).

known as "ancillary jurisdiction," a much broader concept which includes the joinder of parties.[19] Although it has been said that there are no practical differences between the two concepts,[20] the factual distinctions are relevant. *Kroger* was a diversity case, not a federal question case as was *Gibbs*. Moreover, in *Gibbs* the original claim as well as the pendent claim involved the same two parties. In *Kroger*, however, the original claim was between plaintiff and OPPD, while the ancillary claim was between plaintiff and Owen. Thus, unlike *Gibbs*, there were no independent grounds of jurisdiction between the two parties in question.

Despite factual disparity, the broad language in *Gibbs* has been relied upon by several district courts to extend ancillary jurisdiction to plaintiffs' claims against third-party defendants.[21] According to Professor Moore, "[p]roperly read, *United Mine Workers* reemphasizes the fundamental principle that a federal court has *jurisdictional power* to adjudicate the *whole case, i.e.,* all claims state or federal, which derive from a common nucleus of operative facts."[22] This broad view, on which the majority in *Kroger* relied, does not seem tenable in the light of the decisions in *Zahn v. International Paper Co.*[23] and *Aldinger v. Howard.*[24] In both of those recent Supreme Court cases, claims arising from the same "common nucleus of operative facts" as the primary claim were held to be beyond the jurisdictional reach of the federal courts despite the presence of strong considerations of judicial economy and convenience. Both decisions were based squarely upon the principle that congressional intent had precluded federal jurisdiction.[25]

In *Aldinger* the Court pointed out that analysis must go beyond the vague article III considerations addressed in *Gibbs.* In reaching this conclusion the Court stated:

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19. *Id.* at 75 n.27.

20. Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines,* 22 U.C.L.A.L. REV. 1263 (1975).

21. *See* cases cited note 15 *supra.*

22. 3 MOORE'S FEDERAL PRACTICE § 14.27[1], at 569 (2d ed. 1974) (author's emphasis).

23. 414 U.S. 291 (1973). In *Zahn* the owners of lakefront property brought a class action suit for damages caused by defendant's discharge of inadequately treated waste into the lake. Although the petitioners argued that ancillary jurisdiction would allow them to represent the interests of all parties, even though some of the members of the class did not have claims amounting to $10,000, the majority opinion did not mention ancillary jurisdiction. Instead, the majority opinion placed great emphasis on the congressional reenactment of 28 U.S.C. § 1332(a) without modification of the "matter in controversy" phrase. The Court pointed out that Congress had reenacted the statute in the face of numerous court decisions strictly construing the phrase. Thus, the Court found that Congress had intended that each claim meet the required jurisdictional amount. For a discussion of the *Zahn* case see Adams, *Civil Procedure—Class Actions—Closing the Doors to the Federal Courts,* 39 MO. L. REV. 447 (1974).

24. 427 U.S. 1 (1976).

25. *Accord,* Snyder v. Harris, 394 U.S. 332 (1969).

> *Gibbs* and its lineal ancestor, *Osborn*, were couched in terms of Art. III's grant of judicial power .... But the question whether jurisdiction over the instant suit [exists] ... turns initially, not on the general language in Art. III ... but upon deductions which can be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts.[26]

Thus, although it is recognized that *Congress* may be able to grant federal courts the power to hear claims based upon minimum diversity,[27] the courts currently are bound by 28 U.S.C. section 1332 (1970) which requires complete diversity.[28] *Kroger*'s reliance on *Gibbs*, which merely stated the parameters of the federal courts' article III power,[29] was inappropriate in light of the congressional statement in section 1332 that each and every plaintiff must be diverse to each and every defendant.

It is submitted that the proper analysis of an ancillary jurisdiction case such as *Kroger* requires an initial consideration of article III of the Constitution. If the exercise of ancillary jurisdiction is within the general bounds of article III, there must be further inquiry into section 1332 to determine whether Congress has forbidden such jurisdictional power.[30] *Kroger* did not take the second step of this analysis. As a result the court failed to address the question of congressional intent.

In addition to relying on Professor Moore's interpretation of *Gibbs*, the court in *Kroger* placed considerable reliance upon his criticism of the majority rationale.[31] The arguments most frequently mentioned in favor of the majority view were summarized in *Kenrose Manufacturing Co. v. Fred Whitaker Co.*:[32]

> (1) [P]laintiff should not be allowed, by an indirect route, to sue a co-citizen under diversity jurisdiction when he is not permitted to sue that party directly;[33]

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26. 427 U.S. at 13-17. For a suggested standard for determining congressional intent see Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127, 146-47 (1977).

27. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967).

28. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 575 (1806).

29. U.S. CONST. art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases ... arising under ... the Laws of the United States ...." *Gibbs* sought only to determine the breadth of the term "Cases." The Court concluded that insofar as article III was concerned, a federal claim joined with a state claim against the same defendant was but one constitutional "Case." For a discussion of how *Aldinger* has affected *Gibbs*, see Comment, *supra* note 26, at 146-47.

30. *See* 558 F.2d at 431 (Bright, J., dissenting); Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Comment, *supra* note 26, at 140-41; Note, *Supreme Court Says No to Pendent Parties—At Least This Time*, 38 U. PITT. L. REV. 395, 410-16 (1976).

31. 558 F.2d at 427 n.37.

32. 512 F.2d 890, 893-94 (4th Cir. 1972).

33. Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960); Palumbo v. Western Md. Ry., 271 F.

(2) the majority rule prevents collusion between plaintiff and defendant to obtain jurisdiction over a party who would otherwise not be within the court's reach;[34]
(3) the rule which generally does not require diversity as between plaintiff and the third-party defendant proceeds on the assumption that the plaintiff is seeking no relief against the third-party defendant;[35] and
(4) federal dockets are so overcrowded that the federal courts should not reach out for state based litigation.[36]

In response to the first point Professor Moore took the position that because it is the *defendant's* "choice" to implead a third party, and not the decision of the plaintiff, considerations of judicial economy and convenience may dictate that the court dispose of the whole case.[37] Moore also concluded that the second justification for the majority rule is too rigid, and that the possibility of collusion should be dealt with on a case-by-case basis by the application of 28 U.S.C. section 1359 (1970),[38] which forbids collusive joinder to invoke jurisdiction. Thus, Professor Moore contended that only in cases where collusion is actually present should the court be deprived of its discretionary power to retain jurisdiction over ancillary claims.[39]

Unfortunately, the cases stating the minority view have overemphasized the importance of the collusion argument, thus providing themselves with a convenient avenue of attack upon what they have deemed to be the basis of the majority rationale. What would appear to be the true majority view was stated in *Palumbo v. Western Maryland Railway*:[41]

Supp. 361 (D.C. Md. 1967); Hoskie v. Prudential Ins. Co., 39 F. Supp. 305 (E.D.N.Y. 1941).

34. *E.g.*, Hoskie v. Prudential Ins. Co., 39 F. Supp. 305 (E.D.N.Y. 1941).

35. *See, e.g.*, Stemler v. Burke, 344 F.2d 393 (6th Cir. 1965). Professor Moore argued that ancillary jurisdiction is broad enough to encompass both the third-party complaint and plaintiff's action against the third-party. 3 MOORE'S FEDERAL PRACTICE § 14.27 [1], at 571 (2d ed. 1974). His view, however, is based upon a broad interpretation of *Gibbs* which no longer appears tenable. *See* text accompanying notes 22-30 *supra*.

36. *E.g.*, Ayoub v. Helm's Express, Inc., 300 F. Supp. 473 (W.D. Pa. 1969).

37. 3 MOORE'S FEDERAL PRACTICE § 14.27 [1], at 570-71 (2d ed. 1974).

38. Section 1359 provides: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

39. *Accord*, Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D.C. Kan. 1975); Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972); Fraser, *supra* note 8, at 42; Note, *supra* note 8 at 275.

40. Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 702 (D.C. Kan. 1975). Judge Rogers, in defending his rejection of the majority view, stated: "The first and foremost argument against allowing a plaintiff to assert a claim directly against a third-party defendant is that this might allow a plaintiff to 'collusively' obtain jurisdiction over a party that he could not sue directly."

41. 271 F. Supp. 361, 362 (D.C. Md. 1967) (emphasis added).

> Fear of collusion is not the principal argument supporting the majority rule. *Collusion between the plaintiff and the original defendant is not necessary.* Wherever the law provides for contribution among joint tortfeasors, or a defendant has a possible claim for indemnity, the defendant will ordinarily file a third-party complaint, giving plaintiff the opportunity to assert a claim against the third-party defendant.

These observations go to the heart of the problem. If a plaintiff can compel a defendant, through the *practical* consideration of inconsistent judgments and expensive relitigation, to deliver the third-party defendant into the judicial grasp of the plaintiff, then the will of Congress, as expressed by section 1332, has been held for naught. For example if "Missouri Consumer" (*MC*) is injured by a defective product which was manufactured by "Missouri Manufacturer" (*MM*), but sold to *MC* in Illinois by "Illinois Retailer" (*IR*), *MC* can defeat section 1332 under the doctrine in *Kroger*. Although *MC* could not sue *MM* alone in federal court, nor join *MM* and *IR* in his original complaint, he can sue *IR* in federal court (possibly even in Missouri). If *IR* does not implead *MM* and assert his claim for indemnity, he may fail in his later claim against *MM* and be left to bear the burden of the judgment alone. With this possibility of being left singularly liable on a large products liability claim, it is doubtful that *IR* will perceive that he has the "choice" referred to by Professor Moore.[42] Instead *IR* probably will implead *MM* as a third-party defendant. Under *Kroger, MC* then can amend his complaint and assert against *MM* the very claims he could not have asserted directly. Moreover, notwithstanding the blatant avoidance of the requirements of section 1332, it would appear that section 1359[43] would be of little help. There is clearly no collusion, and though section 1359 also precludes parties "improperly" made or joined, it is doubtful the courts could apply the statute where there is nothing overtly improper about the plaintiff's conduct.

At this point it is not unreasonable to query how the conclusion that a plaintiff's claim against a third-party defendant should not be ancillary can be reconciled with what now appears to be a substantial minority view that a third-party defendant's claim against the original plaintiff should be treated as ancillary.[44] Indeed, the majority in *Kroger* seemed impressed by this apparent incongruity. As stated in *Revere Copper & Brass Inc. v. Aetna Casualty & Surety Co.*: "the two situations are the converse of each other only superficially and there are differences which militate against identical treatment."[45]

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42. *See* note 37 and accompanying text *supra*.
43. *See* note 38 *supra*.
44. *See generally* Annot., 12 A.L.R. Fed. 402 (1972).
45. 426 F.2d 709, 716 (5th Cir. 1970).

> One of the obvious differences was pointed out in *Revere*:[46]
> [T]he plaintiff has the option of selecting the forum where he believes he can most effectively assert his claims, he has not been involuntarily brought to a forum, faced with the prospect of defending himself as best he can under the rules that forum provides, or defending himself not at all.

Bearing in mind that the doctrine of ancillary jurisdiction has developed to a large extent to prevent unfairness,[47] it is clear that the third-party defendant, involuntarily brought before the court, should have a stronger argument for ancillary jurisdiction than the plaintiff who chose the forum.

Fairness alone, however, is not the only distinction. Allowing the plaintiff to state a claim against a third-party defendant without requiring independent grounds for jurisdiction would seem much closer to what Congress has forbidden than permitting under the same circumstances a claim by the third-party defendant against the plaintiff. Virtually all would agree that a plaintiff could not sue one defendant, then later amend to add a second non-diverse defendant on the grounds that the second claim is ancillary to the first.[48] As pointed out earlier, however, the same result can be achieved under the rule in *Kroger* by a plaintiff who is fortunate enough to have an out-of-state defendant who has a right to contribution or indemnity against an in-state defendant.

The court in Kroger should not have considered the factors of judicial efficiency, convenience, and fairness to the parties until it first determined whether *Congress* had precluded the exercise of jurisdiction.[49] It should not be ignored that Congress repeatedly has reduced the jurisdiction of federal courts in diversity cases, both by increasing jurisdictional amounts and by restricting diversity requirements.[50] It has been said that the policy of Congress is to force litigants to settle their claims in state courts whenever they cannot meet the jurisdictional requirements.[51] This policy is intended to reflect a deference for the indepen-

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46. *Id.*

47. *See generally* Comment, *supra* note 20; Note, *Ancillary Jurisdiction of the Federal Courts,* 48 IOWA L. REV. 383, 384-85 (1963).

48. *But see* Wittersheim v. General Transp. Servs., Inc., 378 F. Supp. 762 (E.D. Va. 1974) (plaintiff allowed to join a non-diverse defendant in a diversity case). Note, however, the sharp criticism given this case in Parker v. W.W. Moore & Sons, Inc., 528 F.2d 764, 766 (4th Cir. 1975).

49. *See* Note, *supra* note 30, at 416.

50. DISTRICT COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—AMOUNT IN CONTROVERSY, S. REP. No. 1830, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3124-26; FEDERAL JURISDICTION—DIVERSITY OF CITIZENSHIP, S. REP. No. 1308, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2778.

51. *See, e.g.,* Sturgeon v. Great Lakes Steel Corp., 143 F.2d 819, 821 (6th Cir.), *cert. denied,* 323 U.S. 779 (1944).

dence of state courts,[52] as well as the practical need to reduce federal court caseloads.[53] Since *Strawbridge v. Curtiss*[54] it has been held that the diversity statute requires complete diversity. Despite criticism, Congress has allowed that requirement to remain. The statutory and public policy arguments behind the diversity doctrine seem equally applicable to situations where a plaintiff seeks to assert a claim directly against a third-party defendant.[55] Thus, the majority in *Kroger* has chosen to make available to plaintiffs the means to avoid the congressional requirement of complete diversity even though, in the vast majority of cases, the convenience purportedly sought by the plaintiff is available in a state forum, often in the courts of his own state.

Setting aside for a moment the arguments regarding congressional intent, assume that the majority had considered the ramifications of section 1332, and had concluded that Congress has not precluded the exercise of ancillary jurisdiction over plaintiffs' claims against third-party defendants. Given this result, it still would be necessary to consider what effect, if any, the dismissal before trial of the primary claim had upon the court's discretion to retain the case. In answering this question the majority stated:

> Defendant Owen attacks the applicability of this doctrine [ancillary jurisdiction] to the case at bar, asserting that the dismissal of the plaintiff's claim against OPPD before trial limits the discretion of the District Court. We do not so conclude. It is but one factor, among many others, to be considered.[56]

In support of its conclusion, the court relied upon the general principle that a federal court may use its discretion in deciding whether to retain an ancillary claim after disposition of the primary claim.[57] As the court observed, the policy arguments for retaining jurisdiction over ancillary claims in other circumstances are equally applicable to a plaintiff's claim against third-party defendants.[58] The *Gibbs* case, however, suggested a different result: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."[59] The continued

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52. Healy v. Ratta, 292 U.S. 263, 270 (1934).
53. Snyder v. Harris, 394 U.S. 332, 339-40 (1969).
54. 7 U.S. (3 Cranch) 575 (1806).
55. Fawvor v. Texaco, Inc., 546 F.2d 636, 638 (5th Cir. 1977).
56. 558 F.2d at 426.
57. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1444, at 234-37 (1971).
58. Fairness to the parties is the primary rationale behind retaining jurisdiction. A contrary view would require ancillary claims to be asserted at the risk that they later may be dismissed after they are barred by the statute of limitations, or after expensive trial preparation. Such a policy would defeat the value of ancillary jurisdiction.
59. 383 U.S. at 726.

validity of the *Gibbs* dictum was questioned seriously, however, in *Rosado v. Wyman.*[60] In *Rosado* the Court refused to apply the *Gibbs* dictum to a pendent state claim, even though the primary claim had been dismissed as moot prior to trial. Instead, the court stated:

> We are not willing to defeat the commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.[61]

Thus, the *Kroger* court was probably correct in concluding that the retention of the ancillary claim remained discretionary after the disposition of the primary claim. Nevertheless, the analysis should not stop there. The factors of judicial economy, convenience, and fairness, mentioned in *Gibbs,*[62] are still relevant.[63] Of course, because of Owen's delay in raising the defense, there hardly could be a stronger case for retaining jurisdiction than was presented in *Kroger*. If Owen had raised the defense immediately upon dismissal, however, it is doubtful that the case would have been retained unless, at that time, the state statute of limitations already had run. As a general rule, because there is usually no hardship present, the ancillary claim will be dismissed if the primary claim is disposed of before trial.[64]

The last issue presented by the *Kroger* case is the propriety of the court's actions against a party to a lawsuit who has concealed facts or otherwise misled the court as to the existence of subject matter jurisdiction. The view of the vast majority, as expressed by federal rule 12,[65] is that the court *must* dismiss the case *whenever* it appears that the court lacks subject matter jurisdiction.[66] There is some authority, however, for the proposition that where one party has misled the court as to the existence of jurisdiction *and* dismissal would result in severe hardship for the innocent party, the court may refuse to hear belated challenges to its

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60. 397 U.S. 397 (1970).
61. *Id.* at 405.
62. 383 U.S. at 726.
63. *See* Note, *supra* note 30, at 416.
64. For a good discussion of the treatment of ancillary claims after the disposal of the primary claim, see Note, *Ancillary Jurisdiction—Rule 14—Disposition of Third Party Claim When the Primary Claim Has Been Dismissed,* 23 S.C.L. REV. 261 (1971).
65. FED. R. CIV. P. 12(h) (3) provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."
66. *See generally* 2A MOORE'S FEDERAL PRACTICE § 12.23, at 2451-61 (2d ed. 1975); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1393 (1969).

jurisdiction.[67] This minority approach sometimes has been referred to as "jurisdiction by estoppel."[68]

The latter portion of the *Kroger* opinion, which discusses Owen's concealment of its principal place of business, is confusing in that the court discussed two different types of estoppel. One type, which the court apparently adopted, is that expressed in *Murphy v. Kodz.*[69] The court in *Murphy* stated that when a party fails to bring to the court's attention factors which the court normally would consider in exercising discretion over ancillary or pendent claims, that party is estopped from claiming that the trial court abused its discretion. Although the majority in *Kroger* concluded that the trial court had not abused its discretion,[70] the majority opinion nevertheless went on to say that Owen could not have challenged the trial court's decision even if there had been an abuse of discretion.[71]

The second type of estoppel the majority refers to is like that expressed in *Di Frischia v. New York Central Railroad Company.*[72] The basic concept of the jurisdiction by estoppel rule is that, even though there is absolutely no basis for federal jurisdiction, a federal court may retain a case, for the purpose of preventing injustice, if the party moving for dismissal has admitted the existence of jurisdiction in his pleadings,[73] or in a stipulation,[74] or perhaps even where the party attempting to raise the defense has been grossly negligent in failing to disclose facts negating the existence of jurisdiction.[75] If the court had adopted the jurisdiction by estoppel rule as the *ratio decidendi,* the same result could have been achieved without reliance on *Gibbs*, ancillary jurisdiction, or *Murphy*. The court concluded at the beginning of the opinion that Owen's answer to the plaintiff's amended complaint was so misleading as to amount to an admission.[76] The jurisdiction by estoppel rule simply would have deprived Owen of the opportunity to disprove what had been admitted

67. *See* Di Frischia v. New York Cent. R.R., 279 F.2d 141 (3d Cir. 1960); Greenbaum v. United States, 360 F. Supp. 784 (E.D. Pa. 1973); Klee v. Pittsburgh & W. V. Ry., 22 F.R.D. 252 (W.D. Pa. 1958).

68. Stephens, *Estoppel to Deny Federal Jurisdiction–Klee and Di Frischia Break Ground,* 68 DICK. L. REV. 39 (1963).

69. 351 F.2d 163 (9th Cir. 1965). For a critical discussion of *Murphy* see 38 U. COLO. L. REV. 420 (1966).

70. 558 F.2d at 427.

71. Not only was this dictum unnecessary, it also appears unsound. In the *Gibbs* opinion the court made it clear that "the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation." 383 U.S. at 727.

72. 279 F.2d 141 (3d Cir. 1960). *See* Stephens, *supra* note 68; Note, *Federal Procedure—Jurisdiction Conferred By Stipulation,* 15 U. MIAMI L. REV. 315 (1961); Note, *Federal Court Allowance of Tardy Disproof of Diversity Held to be Abuse of Discretion,* 7 UTAH L. REV. 258 (1960).

73. Klee v. Pittsburgh & W. V. Ry., 22 F.R.D. 252 (W.D. Pa. 1958).

74. Di Frischia v. New York Cent. R.R., 279 F.2d 141 (3d Cir. 1960).

75. *See* Greenbaum v. United States, 360 F. Supp. 784 (E.D. Pa. 1973).

76. 558 F.2d at 419.

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in the pleadings.[77] Although it quoted at length from *Di Frischia* and commentators supporting the jurisdiction by estoppel approach, the court did not make it clear whether it relied on jurisdiction by estoppel as an alternative ground for its decision. It appears likely that the court's reference to *Di Frischia* was merely to illustrate a point—judicial fairness.[78]

The dissent suggested, as an alternative to jurisdiction by estoppel, that cases such as this could be dealt with by assessing costs and reasonable attorney's fees against the offending party.[79] Of course if the dissent is wrong about the operation of Iowa's statute of limitations "saving" statute,[80] it would be of little consolation to the plaintiff that she had been awarded costs, but deprived of a $234,000 judgment.

The *Kroger* court may have been in error on two counts. The first was in failing to give greater consideration to the concept of jurisdiction by estoppel. Although this doctrine has been criticized and has received little following, at least it would have met the problem directly and avoided all discussion of ancillary jurisdiction. In addition the court may have been able to fashion a sufficiently restrictive jurisdiction by estoppel rule to prevent the rule's future abuse, rather than establishing a broad ancillary jurisdiction rule which may be subject to abuse in situations far removed from the facts in *Kroger*. The second error may have been in relying solely on *Gibbs* in analyzing whether ancillary jurisdiction could be applied properly to a plaintiff's claim against a third-party defendant. Because *Gibbs* only mapped the boundaries of article III jurisdiction, the *Kroger* court failed to take into account congressional limitations on jurisdiction as required by *Aldinger*. If this inquiry had been made, the court may have discovered that section 1332 precludes the exercise of ancillary jurisdiction in this case.

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77. Before the jurisdiction by estoppel rule could have been applied, the court would have had to make a determination whether the plaintiff's claim against Owen was in fact barred by the statute of limitations. In all three cases applying the jurisdiction by estoppel rule, the plaintiff would have been deprived of his cause of action by the dismissal. It is unlikely that anything less than that type of hardship would justify the application of the doctrine.

78. The court may have avoided resting the decision on jurisdiction by estoppel because of the factual distinctions between *Kroger* and *Di Frischia*. In *Di Frischia* it was clear that the defendant knew diversity was lacking because counsel had filed a motion to dismiss and then shortly thereafter filed a stipulation admitting diversity. In *Kroger*, on the other hand, it is not clear if Owen was aware of the lack of diversity. This distinction, however, would not seem ample to support a contrary result. The plaintiff had alleged unequivocally that Owen's principal place of business was in Nebraska. In responding to the plaintiff's complaint, Owen had at its disposal all the facts needed to determine whether there was any reason to question the diversity averment. *See* Greenbaum v. United States, 360 F. Supp. 784 (E.D. Pa. 1973).

79. 558 F.2d at 432.

80. IOWA CODE § 614.10 (1977).