Preserving Pendent Claims Subject to Special Limitation Periods in Missouri after the Judicial Improvements Act of 1990

Rosel Rodriguez Pine
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_Hill v. John Chezik Imports_1

28 U.S.C. § 1367(d)_2_

I. INTRODUCTION

On June 2, 1986, Jill Hill was fired from her clerical job at the John Chezik Honda dealership in St. Louis. The next day she filed sex discrimination charges with the Equal Employment Opportunity Commission and the Missouri Human Rights Commission.3 Although Hill pursued those charges through two administrative investigations and four subsequent judicial proceedings, she never had the chance to present the substance of her grievance to a court. Her federal and state discrimination claims were ultimately barred by their respective statutes of limitation.4

Hill was two weeks late in filing her Title VII discrimination claim.5 The federal trial and appellate courts refused to toll this claim's period of limitation on equitable grounds,6 which would have excused her delay in filing, and dismissed her pendent state-law claims for lack of diversity. Hill then refiled those pendent claims (the discrimination claim and several tort claims) in state court.7 Although the state-law discrimination claim had expired, Hill requested that its limitation period be equitably tolled during the time the federal suit was pending.8

The state trial and appellate courts, however, rejected her request as contrary to established Missouri law.9 Consequently, this state-law claim also

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1. 797 S.W.2d 528 (Mo. Ct. App. 1990) [hereinafter _Hill II_].
3. _Hill II_, 797 S.W.2d at 529.
4. Id. at 529-30.
5. Id. at 529.
6. Id. Equitable tolling is discussed _infra_ notes 64-67 and accompanying text.
7. _Hill II_, 797 S.W.2d at 529.
8. Id. at 530.
9. Id. at 530-31.
was time barred although Hill had originally filed it on time in the federal district court.\textsuperscript{10} The state courts additionally found that Hill's tort claims against her employer were preempted by the Workers' Compensation Act.\textsuperscript{11} After four years of litigation, Hill had established only the dubious right to proceed with a single tort claim against a fellow employee.\textsuperscript{12} For all practical purposes, she had lost her opportunity for meaningful redress.

Two months after Hill's discrimination claims were finally laid to rest, Congress came to the rescue by enacting the Judicial Improvements Act of 1990.\textsuperscript{13} One section of the Act codifies the authority of federal courts to hear pendent and ancillary claims, collectively termed "supplemental jurisdiction."\textsuperscript{14} This section also tolls the limitation period of supplemental claims while they are pending in federal district court and for thirty days after the claims are dismissed.\textsuperscript{15} Thus, this tolling provision preserves expired pendent claims like Hill's when a federal court declines to exercise supplemental jurisdiction.

The catch is that in Missouri this provision is likely to be challenged as an unconstitutional infringement on the state's power to determine the jurisdiction of its own courts when it is applied to a claim governed by a "special" statute of limitation, such as Hill's discrimination claim. Nevertheless, the tolling provision is likely to survive as a valid preemption of state law. It is also likely to create certain unintended consequences for both plaintiffs and federal courts sitting in Missouri.

\begin{enumerate}
\item Id.
\item Id. at 531.
\item Id.
\item "Supplemental jurisdiction" encompasses two mechanisms for bootstrapping jurisdictionally insufficient claims into federal court, by joining them to a jurisdictionally proper claim. "Pendent jurisdiction" allows a plaintiff to join a state-law claim, which does not meet diversity requirements, to a related federal question claim arising from the same facts. Pendent "claim" jurisdiction exists when the plaintiff brings both a federal-law claim and a state-law claim against a single nondiverse defendant. Pendent "party" jurisdiction occurs when the plaintiff's federal-law and state-law claims are brought against two different nondiverse defendants as part of the same action. "Ancillary jurisdiction" permits the joinder of jurisdictionally insufficient claims by or against additional parties after the filing of plaintiff's (jurisdictionally proper) complaint. See Mengler, Burbank & Rowe, Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction, 74 JUDICATURE 213, 214 (1991).
\end{enumerate}
This Comment explains why Missouri’s limitation doctrine prevented tolling the limitation period of Hill’s state-law claim while it remained in federal court under pendent jurisdiction. This is an issue of first impression in the state. The Comment then explores the difficulties that are likely to arise when the new supplemental jurisdiction tolling provision is invoked by plaintiffs in Missouri.

II. THE DECISION

A. The Facts

Jill E. Hill, a clerk at an automobile dealership operated by defendant John Chezik Imports, was fired by her supervisor, defendant Dean Thanas, on June 2, 1986.16 On June 3, 1986, she filed charges with the Equal Employment Opportunity Commission (EEOC)17 and with the Missouri Human Rights Commission (MHRC),18 claiming that during the fourteen months of her employment she had been harassed repeatedly by Thanas and finally was fired when she refused his sexual advances. Hill also alleged that John Chezik Imports was aware of the situation but did not take corrective action.19

The EEOC sent Hill a Right to Sue letter by certified mail on August 25, 1987.20 This letter was accepted at her old address on September 2, 1987, but never reached her.21 At Hill’s request, the EEOC mailed her a confirmation letter on September 24th.22 On December 16, 1987, Hill filed suit against John Chezik Imports and Thanas in the Federal District Court for the Eastern District of Missouri.23 The suit contained a Title VII discrimination claim and three pendent state-law claims alleging, respectively, employment discrimination, negligent or intentional infliction of emotional distress, and negligent retention of a dangerous employee.24

The lawsuit was filed 83 days after Hill received actual notice of her right to sue from the EEOC, but 105 days after she received constructive

16. Hill II, 797 S.W.2d at 529.
18. Hill II, 797 S.W.2d at 529.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id. at 529.
notice by receipt of the letter at her last known address. Thus, Hill filed suit 15 days past the expiration of the Title VII ninety-day limitation period. The district court dismissed Hill’s federal claim as untimely.

The Eighth Circuit Court of Appeals affirmed, holding that although Title VII’s limitation period is subject to equitable tolling, that remedy should be reserved for circumstances beyond the plaintiff’s control. In this case, the court noted Hill could have informed the EEOC of her new address, and she still had ample time to file suit when she actually learned that the Right to Sue letter had been issued. The Eighth Circuit did not address the district court’s discretionary dismissal, without prejudice, of Hill’s state-law claims based on the loss of pendent jurisdiction.

On September 23, 1987, Hill received a separate Notice of Right to Sue from the MHRC giving her ninety days to file suit under the Missouri Human Rights Act (MHRA). Her state-law claims were filed in federal court as part of the first lawsuit 84 days from the date of this notice. These claims were refiled in state circuit court on June 21, 1988, four days after the dismissal of the federal action. Although, two years and nineteen days had elapsed from the date of the Notice of Right to Sue, disregarding the time that the federal lawsuit was pending would reduce this period to only 87 days.

The state court refused to toll the statute of limitations. It dismissed the discrimination claim because the filing was not within ninety days of the issuance of the MHRC’s Notice of Right to Sue, and it held that all the tort claims were preempted by the Missouri Workers’ Compensation Act.

The Missouri Court of Appeals, Eastern District, affirmed the circuit court’s dismissal of the state-law discrimination claim. The court of appeals rejected Hill’s contention that the statute of limitation of the MHRA was equitably tolled while her claim was pending in federal court, citing "well

25. Id.
27. Hill I, 869 F.2d at 1123.
28. Id. at 1123-24 (citing Zipes v. Trans World Airlines, 455 U.S. 385, 398 (1982) (Title VII filing period is not a jurisdictional prerequisite but is subject to waiver and tolling when equity so requires)).
29. Id. at 1124.
30. Hill II, 797 S.W.2d at 529.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
settled" Missouri precedents holding that statutes of limitation may be tolled only by specific exceptions enacted by the legislature.36

The court also found that Hill did not come within a judicially-created "litigation exception" to statutes of limitation because the pendency of her federal proceeding had not prevented her from filing a parallel suit in state court.37 Rejecting Hill's arguments grounded on considerations of judicial economy, convenience, and fairness, the court suggested instead that her "state action could have been pending, but stayed, until the outcome of the federal action."38

Finally, the court of appeals affirmed the preemption by the Workers' Compensation Act of Hill's tort claims against her employer, but reversed the dismissal of her intentional infliction of emotional distress claim against her supervisor, holding that the Workers' Compensation Act does not bar a suit against a co-employee for an intentional tort.39

B. The General/Special Statute of Limitation Distinction

Missouri is one of a minority of states still observing the common law distinction which holds that a "true" or "general" statute of limitation "extinguishes only the right to enforce the remedy and not the substantive right itself,"40 however, a "special" statute of limitation—i.e., one contained within a statute that creates a new right not existing at common law—extinguishes the right itself; "the theory being that the lawmaking body which has the power to create the right may affix the conditions under which it is to be enforced ...."41 In effect, although the cases themselves do not use the term, in Missouri a special statute of limitation is equivalent to a substantive limitation upon the right granted by the statute.

It is difficult to perceive an underlying rationale for the typically short duration of special limitation periods and the inflexibility with which they are treated in Missouri law. The state supreme court traced the genesis of the

36. Id. (citing Langendoerfer v. Hazel, 601 S.W.2d 290 (Mo. Ct. App. 1980); Neal v. Laclede Gas Co., 517 S.W.2d 716, 719 (Mo. Ct. App. 1974)).
37. Id. at 529. This exception may be invoked by a plaintiff who has been prevented from filing suit by the pendency of an earlier proceeding not "provoked, induced, or promoted" by the plaintiff herself. Follmer's Mkt. v. Comprehensive Accounting Serv., 608 S.W.2d 457, 460 (Mo. Ct. App. 1980).
38. Hill II, 797 S.W.2d at 529.
39. Id. at 529-30 (citing Hollrah v. Freidrich, 634 S.W.2d 221, 223 (Mo. Ct. App. 1982)).
distinction to the need to determine whether a forum’s limitation statutes would govern a specially limited statutory right created by a foreign jurisdiction.\textsuperscript{42} More recently, one commentator concluded that

the multiplicity of limitation periods for different types of claims ha[s] little to do with the realization of the articulated goals. Rather, the choice of a particular limitation period for a cause of action is either arbitrary or the result of legislative favoritism for certain parties and claims.\textsuperscript{43}

This disfavored status of special limitation periods was codified in Missouri as early as 1835.\textsuperscript{44} The statute has survived 146 years virtually unchanged.\textsuperscript{45}

\textbf{C. Preclusion of Statutory and Constitutional Tolling}

Chapter 516 contains Missouri’s general statutes of limitation for traditional common law actions such as fraud, breach of contract, real property actions, professional malpractice, and so forth.\textsuperscript{46} It also lists the circumstances under which the general statutes of limitation may be tolled, including among others disability of the plaintiff, absence of the defendant, fraud or concealment of the cause of action, stay by injunction, and nonsuit of an earlier action.\textsuperscript{47} Thus, the effect of section 516.300 is to deny the protection of the statutory tolling provisions to legislative causes of action that were unknown to the common law.

Since Civil War times, courts in Missouri have maintained that statutes of limitation are favored in the law and that courts are powerless to expand the exceptions prescribed by the legislature.\textsuperscript{48} In obedience to the restrictions

\textsuperscript{42} Wentz v. Price Candy Co., 352 Mo. 1, 5, 175 S.W.2d 852, 854 (1943) (quoting J. STORY, CONFLICT OF LAWS, § 582 (1841)). The court did not pursue the clear implication that this original purpose might not justify maintaining such a distinction within the forum’s own laws.

\textsuperscript{43} Wani, Borrowing Statutes, Statutes of Limitations and Modern Choice of Law, 57 UMKC L. Rev. 681, 688 (1989).

\textsuperscript{44} Mo. Rev. Stat. Limitation, Art. III, § 10 (1835).


\textsuperscript{46} Mo. Rev. Stat. §§ 516.010-.140 (1986).

\textsuperscript{47} Id. §§ 516.150-.370.

\textsuperscript{48} See e.g., Shelby County v. Bragg, 135 Mo. 291, 300, 36 S.W. 600, 602
imposed by section 516.300, Missouri courts repeatedly have held that the running of a special statute of limitation cannot be tolled due to a plaintiff’s disability, a defendant’s fraud or concealment, or any other reason not contained within the statute itself, even in cases of severe hardship.49

The Missouri Court of Appeals, Southern District, held that because a civil rights ordinance creates a right not known to the common law, its limitation period "must be strictly followed or . . . the right itself is

(1896) (statutes of limitation are favored in the law, and party seeking to avoid them must come strictly under some exception); Hoester v. Sammelmann, 101 Mo. 619, 624, 14 S.W. 728, 730 (1890) (courts cannot extend statutory exceptions to statutes of limitation); Richardson v. Harrison, 36 Mo. 96, 100 (1865) (party must affirmatively show an exception to the statute of limitation). But see Finney v. Estes, 9 Mo. 227, 229 (1845) (literal construction may give way to general principles of justice where cause of action did not accrue until after statute of limitation had expired).

In later cases, Missouri courts have defeated statutory limitation periods under narrowly defined circumstances. See, e.g., Strahler v. St. Luke’s Hosp., 706 S.W.2d 7, 11-12 (Mo. 1986) (limitation period for medical malpractice actions, as applied to minors, violated their constitutional right to access to the courts); Knipmeyer v. Spiritas, 750 S.W.2d 489, 490 (Mo. Ct. App. 1988); Follmer’s Mkt. v. Comprehensive Accounting Serv., 608 S.W.2d 457, 460 (Mo. Ct. App. 1980); Ottenad v. Mount Hope Cemetery & Mausoleum Co., 176 S.W.2d 62, 64-65 (Mo. Ct. App. 1943) (period of limitation is tolled while a party is prevented from exercising a legal remedy by the pendency of legal proceedings which were not "provoked, induced, or promoted" by that party). It is noteworthy, however, that each of these cases involved a "general" limitation period. The claim in Strahler was subject to the medical malpractice statute of limitation: two years or until age twelve for minors under ten years of age. Mo. REV. STAT. § 516.105 (1986). See Strahler, 706 S.W.2d at 8. The claims in Knipmeyer and Follmer’s Market were subject to the five-year statute of limitation for contract actions. Mo. REV. STAT. § 516.120 (1986). See Knipmeyer, 750 S.W.2d at 490; Follmer’s Market, 608 S.W.2d at 459. The claim in Ottenad was subject to the ten-year limitation period for actions on an indebtedness. Mo. REV. STAT. § 516.110 (1986). See Ottenad, 176 S.W.2d at 64.

49. See, e.g., White v. State, 779 S.W.2d 571, 572 (Mo. 1989); DeRousse v. PPG Indus., 598 S.W.2d 106, 111-12 (Mo. 1980); Forehead v. Hall, 355 S.W.2d 940, 946 (Mo. 1962); Black v. City Nat'l Bank & Trust, 321 S.W.2d 477, 480 (Mo.), cert. denied, 360 U.S. 920 (1959); Frazee v. Partney, 314 S.W.2d 915, 919 (Mo. 1958); Woodruff v. Shores, 354 Mo. 742, 746-47, 190 S.W.2d 994, 996 (1945); State ex rel. Bier v. Bigger, 352 Mo. 502, 509, 178 S.W.2d 347, 350 (1944); Wentz v. Price Candy Co., 352 Mo. 1, 4, 175 S.W.2d 852, 854 (1943); Stowe v. Stowe, 140 Mo. 594, 605, 41 S.W. 951, 954 (1897); Bregant ex rel. Bregant v. Fink, 724 S.W.2d 337, 338 (Mo. Ct. App. 1987); Langendoerfer v. Hazel, Inc., 601 S.W.2d 290 (Mo. Ct. App. 1980); St. Louis-San Francisco Ry. v. Mayor’s Comm’n on Human Rights, 572 S.W.2d 492, 493 (Mo. Ct. App. 1978); Neal v. Laclede Gas Co., 517 S.W.2d 716, 719 (Mo. Ct. App. 1974).
extinguished. Thus, because the MHRA is a civil rights statute that contains its own limitation periods, it comes within the restrictions of section 516.300. The consequence of this characterization is that Hill’s MHRA-based discrimination claim could not be tolled by any mechanism recognized by Missouri law.

The Missouri Supreme Court recently held that neither the state constitution’s "open courts" guarantee nor due process considerations invalidated a ninety-day notice period (functionally akin to a special limitation period) that is "rationally related to a legitimate legislative concern." Thus, the MHRA’s ninety-day limitation period is presumed constitutionally valid, so long as it can be found to have been prompted by a "legitimate legislative concern."

D. Unavailability of the Saving Statute

Most states have enacted a "saving statute" that permits a plaintiff who has suffered a "nonsuit" (generally, a dismissal of a timely filed lawsuit on procedural grounds) to refile the dismissed lawsuit in state court, even after the original period of limitation has run. Most such statutes give the

50. Mayor's Comm'n, 572 S.W.2d at 493.
52. Presumably, this rule would also preclude application of the Follmer's Market litigation exception considered by the court of appeals in Hill II. See also supra notes 37 & 48. The litigation exception is partially codified at Mo. Rev. Stat. § 516.260 (1986) (time for bringing suit is tolled while the suit is stayed by injunction). This is one of the tolling provisions disallowed for specially-limited claims by Mo. Rev. Stat. § 516.300 (1986).
53. Mo. Const. art. I, § 14 states: "[t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." For a case invalidating a general statute of limitation that violated this constitutional provision, see Strahler v. St. Luke's Hosp., 706 S.W.2d 7, 11-12 (Mo. 1986).
54. Findley v. City of Kansas City, 782 S.W.2d 393, 397-98 (Mo. 1990) (a legitimate legislative choice to limit a city’s liability validates the "harsh result" to persons who lose their claim for relief).
55. To illustrate, the legislative concern in Findley was a desire to limit liability claims against a municipality. Id.
plaintiff an additional period to refile, typically six months to a year,\(^57\) commencing on the date of the dismissal or its affirmance on appeal.\(^58\)

\footnotesize

Other statutes toll the original limitation period while a suit is pending between the parties. State saving statutes may also permit the filing of a new action in federal court after expiration of a state limitation period.

Missouri's saving statute allows a plaintiff in a timely filed action who suffers a nonsuit, or a reversal on appeal, to refile the claim in state court within one year of the nonsuit or reversal. This statute, however, applies only to claims subject to the general statutes of limitation found in Chapter 516. Specially-limited claims are excluded by section 516.300.

Therein lies the heart of Hill's dilemma: On the one hand, her state suit failed both limitation periods imposed by the MHRA because she filed it almost eight months after the Notice of Right to Sue was issued, and two


60. See, e.g., Griffen v. Big Spring Indep. School Dist., 706 F.2d 645, 651-52 (5th Cir.), cert. denied, 464 U.S. 1008 (1983) (dismissal by state court for failure to satisfy jurisdictional prerequisites preserved federal section 1983 action to vindicate the same rights under Texas "wrong court" statute); Ullom v. Midland Indus., 663 F. Supp. 491, 493 (S.D. Ind. 1987) (federal diversity suit filed in Indiana within five years of dismissal by Ohio state court for lack of personal jurisdiction was timely under Indiana's "Journey's Account Statute").

61. Mo. Rev. Stat. § 516.230 (1986). If the balance of the original limitation period is longer than one year, the saving statute will not be applied to shorten the time for filing suit. St. Louis Univ. Hosp. v. Belleville, 752 S.W.2d 481, 483 (Mo. Ct. App. 1988).

62. Mo. Rev. Stat. § 516.300 (1986). Missouri was one of only six states (along with Alabama, Hawaii, Maryland, Nebraska, and Pennsylvania) found by the Supreme Court to have no applicable saving or transfer statute that would preserve a federal suit timely filed in state court and later dismissed for improper venue—a factor in the Court's decision in Burnett v. New York Cent. R.R., 380 U.S. 424, 433 n.12 (1965), to permit equitable tolling of the Federal Employers' Liability Act under such circumstances.

63. The MHRA's limitation provision states as follows: Any action brought in court under this section shall be filed within ninety days from the date of the commission's notification letter to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party.

https://scholarship.law.missouri.edu/mlr/vol56/iss4/6
years and nineteen days after she was fired. On the other hand, she could not invoke the one-year saving provision because it does not apply to specially-limited claims. Therefore, her only remaining option was to plead for a change in Missouri limitation doctrine that would permit equitable tolling of her discrimination claim during the time it was properly filed and pending in federal court.

E. Rejection of Equitable Tolling

Following California’s lead, a number of states have adopted a judicial doctrine of "equitable tolling" which, in the absence of an applicable saving statute, preserves state-law claims that have expired during the pendency of prior litigation. Equitable tolling applies when an injured party reasonably and in good faith chooses to pursue one of several available legal remedies. It consists of a three-pronged test: (1) timely notice to the defendant by the filing of the first claim; (2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim.

The doctrine can be traced to a 1922 Supreme Court decision by Justice Holmes, held that when a defendant has notice that the plaintiff is trying to enforce a claim, "the reasons for the statute of limitations do not exist..." The Supreme Court has since made equitable tolling applicable to all federal statutes of limitation.


65. Collier, 142 Cal. App. 3d at 924, 191 Cal. Rptr. at 685.


67. Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) ("equitable doctrine is read into every federal statute of limitation"). See also Zipes v. Trans World Airlines, 455 U.S. 385, 398 (1982) (Title VII filing period is subject to waiver and equitable tolling); Burnett v. New York Cent. R.R., 380 U.S. 424, 434 (1965) (finding that Congress did not intend to deprive a plaintiff of his rights when the policy underlying a statute of limitation is satisfied).
A few states have declined to adopt equitable tolling. Hawaii does not recognize the doctrine and construes its statutes of limitation very strictly. The Eighth Circuit has refused to apply equitable tolling to claims grounded in Minnesota law "because Minnesota courts have repeatedly rejected it." Pennsylvania courts also do not recognize equitable tolling; however, state law makes an exception for federal cases dismissed for lack of jurisdiction. The District of Columbia reluctantly held itself bound by an earlier decision rejecting an argument "functionally identical" to equitable tolling, although two of the three division members believed the issue was worthy of en banc consideration.

Missouri law, as noted earlier, contains formidable doctrinal barriers to the adoption of equitable tolling, particularly in the case of special statutes of limitation. The Missouri Court of Appeals recognized those barriers in affirming the dismissal of Hill's discrimination claim. After acknowledging that "there is authority in other jurisdictions to support [Hill's] contentions," the court rejected her "policy arguments" favoring an outright acceptance of equitable tolling. The court noted that "Missouri law is well settled as to when a statute of limitations is tolled" and reiterated the need for strict compliance with specific statutory exceptions.

The court of appeals extended those same arguments to rebuff Hill's attempt to justify the specific application of equitable tolling to her discrimination claim through legislative intent analysis. In fact, the Missouri General

73. Id. at 49. The third judge, however, vehemently rejected individualized equitable scrutiny of plaintiff filing errors, arguing that it would defeat the legislative purpose expressed in limitation statutes, would demand time-consuming and inequitable determinations, and would result in prejudice to defendants. Id. at 54-57 (Farrell, J., concurring).
74. No state that recognizes the general/special limitation distinction has accepted equitable tolling. See sources cited supra notes 45, 64.
75. Hill II, 797 S.W.2d at 530-31.
76. Id. at 530.
Assembly has invited legislative intent analysis by directing that the MHRA "shall be construed to accomplish the purposes thereof" and that "any law inconsistent with any provision of [the MHRA] shall not apply." The MHRA limitation provision itself contains an equitable tolling exception. Further, the Missouri Supreme Court has characterized the MHRA as a remedial statute that is to be "liberally construed in line with its purpose."

Thus, Missouri's special limitation doctrine could conceivably accommodate equitable tolling of the MHRA's limitation periods, in keeping with the express legislative purpose of the statute itself and the state supreme court's interpretation. If equitable tolling is read into the statute that creates a specially-limited claim, then its application to that claim does not violate the strict letter of section 516.300, which merely requires that the claim be brought within the time limited in the statute itself. The Hill II court was unwilling to take this step. The new supplemental jurisdiction statute makes it unnecessary—but only if the claim is first filed in federal court.

III. THE STATUTE

A. Pendent Jurisdiction before the 1990 Act

The modern source of the supplemental jurisdiction of federal courts over pendent state-law claims is United Mine Workers v. Gibbs. The Gibbs test gave federal courts jurisdiction over an entire action whenever the federal-
law and state-law claims derived from a "common nucleus of operative fact" and ordinarily would be expected to be tried in a single proceeding. This "doctrine of discretion" permitted federal courts to decline pendent jurisdiction, by dismissing the action without prejudice, whenever the factors of judicial economy, convenience, fairness, and comity indicated that a case properly belonged in state court—as when all the federal-law claims had dropped out of the lawsuit.

In affirming the power of federal courts to remand a previously-removed case back to state court, as an alternative to outright dismissal, the Supreme Court in Carnegie-Mellon University v. Cohill expressly acted to protect plaintiffs whose state-law claims would otherwise be barred by the expiration of a statute of limitation during the pendency of the federal action. The Court feared that requiring the dismissal of removed cases would discourage plaintiffs from joining relatively weak federal-law claims to their state-law claims because the combination of removal, subsequent dismissal, and expiration might bar the state-law claims altogether.

Hill II vindicated the Supreme Court's concern over the loss of timely filed state-law causes of action after a trip through the federal courts. A plaintiff who had timely acted to protect her rights in a court of competent jurisdiction was penalized for a discretionary decision of the federal court, over which she had no control. The solution crafted by the Court in Cohill would not help in this instance, because in the absence of congressional authority the federal courts could not "remand" to the state court system a case that had not yet been filed there.

The Supreme Court does not encourage the retention of expired pendent claims by federal courts. Nevertheless, many district courts have given consideration to the availability of a saving statute when determining whether

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84. Id. at 725. These parameters are derived from article III of the Constitution, which requires a "justiciable case or controversy" as a condition of federal court jurisdiction. Id. (citing U.S. CONST. art. III, § 2, cl. 1). Similarly, section 1367 demands that the jurisdictionally sufficient claims and the supplemental claims "form part of the same case or controversy under article III of the United States Constitution." Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310(a), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 5089, 5113.

85. Gibbs, 383 U.S. at 726.
87. "This consequence may work injustice to the plaintiff: although he has brought his suit in timely manner, he is time-barred from pressing his case." Id. at 351-52.
88. Id. at 352 n.9.
89. See Gibbs, 383 U.S. at 726.
90. See Cohill, 484 U.S. at 352-53 n.10.
to dismiss such claims. But the district court in *Hill I* apparently did not consider this factor in dismissing Hill's federal suit, and the issue was not brought up on appeal before the Eighth Circuit. After *Hill II*, the federal district courts sitting in Missouri might have been reluctant to dismiss time-barred pendent claims. Alternatively, they might have refused from the outset to exercise jurisdiction over pendent claims likely to expire during the pendency of a federal lawsuit.

Under *Hill II*, Missouri plaintiffs with parallel federal and specially-limited state claims were left to choose among abandoning a weak federal claim, forgoing the federal forum, or filing two separate lawsuits. The latter option, suggested by the Missouri Court of Appeals in *Hill II*, would impose an intolerable burden on plaintiffs seeking to enforce a federal right:

> [F]orcing a plaintiff to litigate his or her case in both federal and state courts impairs the ability of the federal court to grant full relief . . . and "imparts a fundamental bias against utilization of the federal forum owing to the deterrent effect imposed by the needless requirement of duplicate litigation."

None of the alternatives listed above was entirely satisfactory to either the plaintiffs or the federal courts stuck with expired pendent claims. Congress' elegant solution was the tolling provision of the supplemental jurisdiction statute.

**B. Pendent Jurisdiction under the 1990 Act**

In October 1990, Congress enacted the Federal Courts Study Committee Implementation Act of 1990 (Act). The Act implemented the "noncontroversial" recommendations of the Federal Courts Study Committee, established by Congress to recommend improvements to the federal court system. These
recommendations included proposals to reform the federal courts' workload, structure and administration, and to reform the relationship between the state and federal court systems.96

In accordance with the Committee's recommendation, section 310 of the Act97 codified the supplemental jurisdiction of federal courts, essentially by


97. This section will be codified at 28 U.S.C. § 1367 and will state:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominate over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after
affirming the doctrines of pendent claim and ancillary-claim jurisdiction as enunciated by the Supreme Court in *Gibbs* and its progeny. In addition, this section filled a gap in the jurisdictional authority of the federal courts by expressly granting them the power to hear pendent party claims, thus overruling *Finley v. United States*.

Section 1367(d) tolls the limitation period of any supplemental claims dismissed when the federal court declines to exercise supplemental jurisdiction, together with the limitation period of any other claims in the same action voluntarily dismissed by the plaintiff thereafter. All such claims are tolled while they are pending in federal court and for thirty days after their dismissal, unless state law provides for a longer tolling period. The utility of this provision is succinctly explained in the legislative history:

The purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court. It also eliminates a possible disincentive from such a gap in tolling when a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim.

Thus, the tolling provision is designed to correct the situation envisioned by the Supreme Court in *Cohill* and presented in Missouri by *Hill II*. The statute, however, comes four years too late to help Hill: it applies to civil
actions commenced in federal court on or after December 1, 1990, the effective date of the Act.\textsuperscript{104}

C. Federal Preemption of State Law

The source of Congress' power to preempt state law is the supremacy clause contained in article VI of the constitution.\textsuperscript{105} State law is preempted by the existence of (1) explicit preemptive language in the federal statute; (2) a pervasive scheme of federal regulation evidencing congressional intent to occupy an entire field; or (3) an actual conflict with federal law, as when compliance with both federal and state law is impossible, or when state law stands as an obstacle to the objectives of Congress.\textsuperscript{106} The power granted to the federal government by the supremacy clause is complemented by and in tension with the rights guaranteed to the states and the people by the tenth amendment.\textsuperscript{107}

The language of section 1367(d) leaves no doubt that Congress intended to supersede state law where necessary to preserve expired supplemental claims: "The period of limitations . . . shall be tolled . . . unless State law provides for a longer tolling period."\textsuperscript{108} In the ordinary case, that determination of congressional intent would end the inquiry;\textsuperscript{109} however, because this particular statute purports to preserve the right to enforce state-created rights in the state courts, a closer examination is in order. In this regard the Supreme Court stated


\textsuperscript{105} The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.


\textsuperscript{107} The tenth amendment states as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.


\textsuperscript{109} Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (footnote omitted) ("If the intent of Congress is clear, that is the end of the matter, for the Court . . . must give effect to the unambiguously expressed intent of Congress.")
[f]ederal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.110

Accordingly, state courts may not refuse to enforce a federal right without a "valid excuse."111 A violation of or disagreement with federal law does not constitute such an excuse.112 Thus, the Supreme Court has found federal preemption of procedural rules that would produce different outcomes for federal-question litigation based solely on whether the claim is asserted in state or federal court.113

Similarly, the Court has held that the Supremacy Clause is violated by a pretextual ouster of jurisdiction, such as when state law prevents a court of general jurisdiction, which is otherwise competent to hear similar types of actions grounded in state law, from adjudicating a substantive federal right.114 States cannot evade the Supremacy Clause simply by removing jurisdiction to hear the federal action from otherwise competent courts. The fact that a state rule is denominated "jurisdictional" is irrelevant "if the rule

111. Howlett, 110 S. Ct. at 2439.
112. Id. at 2440.
113. Id. at 2442-44; Felder v. Casey, 487 U.S. 131, 138 (1987) (although a state may establish rules of procedure for its courts, those rules may not be outcome-determinative for federal rights based solely on whether they are asserted in state or federal court); Martínez v. California, 444 U.S. 277, 284 (1979) (state law may not immunize parties subject to § 1983 liability under federal law); cf. Sun Oil Co. v. Wortman, 486 U.S. 717, 726-27 (1987) (in the context of Erie jurisprudence, the goal is "to establish . . . substantial uniformity of predictable outcome" between cases tried in federal and state court).
114. Howlett, 110 S. Ct. at 2444-45; Federal Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 759-61 (1981) (state commission had jurisdiction to entertain claims analogous to those granted by federal law); Testa v. Katt, 330 U.S. 386, 394 (1946) (state courts had adequate jurisdiction under established local law to adjudicate federal action where they would enforce the same type of claim arising under state law); Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 56-59 (1911) (Federal Employers’ Liability Act may be enforced as of right in state courts whose jurisdiction is appropriate to the occasion); cf. Claflin v. Houseman, 93 U.S. 130, 136-37 (1872) (the state and federal courts together form one system of jurisprudence, and are not foreign to each other but belong to the same country).
does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect.115

But the Supreme Court treads lightly when a state court declines jurisdiction because of a "neutral" rule of judicial administration—i.e., one that does not discriminate against federal causes of action.116 The reason is the traditionally "great latitude" possessed by states to "establish the structure and jurisdiction of their own courts."117

Thus, the Supreme Court has excused a refusal of jurisdiction on three occasions: (1) where a state statute permitted dismissal of both federal and state claims when all the parties were nonresidents; (2) where a municipal court (a court of limited jurisdiction) was found to be without power to hear a Federal Employers' Liability Act (FELA) claim arising outside its territory; and (3) where a state was found to apply the doctrine of forum non conveniens impartially so as to not discriminate against FELA suits.118

D. Preemption by the Tolling Provision

The three cases noted above contain several common threads. First, the disputed issue in each case was an attempt to enforce a substantive federal right in an unwilling state court. It is not immediately apparent, however, whether section 1367(d) does create a substantive federal right. The scant legislative history on the point suggests that Congress was concerned with eliminating disincentives to the use of federal courts by plaintiffs.119 Perhaps such plaintiffs have been granted an expectation that using the federal courts will not result in the loss of parallel state causes of action. If so, this "right" is qualitatively different from other substantive federal rights, in that it can only be enforced by maintaining an action in state court. This is a second point of departure from prior cases. A third difference is that none of the cases cited involved an outright attempt by Congress to create jurisdiction in contravention of state law.120

On the other hand, some factors mitigate in favor of allowing Missouri courts to refuse jurisdiction. Section 516.300 is unquestionably a "neutral"

115. Howlett, 110 S. Ct. at 2445-46.
116. Id. at 2440-42.
117. Id. at 2441.
118. Id. at 2442 (citing, respectively, Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377 (1929); Herb v. Pitcairn, 324 U.S. 117 (1945); Missouri ex rel. Southern R.R. Co. v. Mayfield, 340 U.S. 1 (1950)).
119. See supra notes 100-101 and accompanying text.
120. In fact, prior cases emphasize that states cannot be required to create a court competent to hear every federal right. Howlett, 110 S. Ct. at 2441; cf. cases cited supra note 113.
rule of judicial administration that extinguishes the subject matter jurisdiction of Missouri courts to hear specially-limited claims. The state statute antedates the federal one by nearly a century-and-a-half, and it has been applied impartially to cases filed in both state and federal courts. 121

Further, Missouri cases make it clear that section 516.300 is a true jurisdictional limitation on the power of Missouri courts to decide specially-limited claims, 122 one that "reflects the concerns of power ... over the subject matter that jurisdictional rules are designed to protect." 123 Thus, all of the factors that in the past have led the Supreme Court to excuse a refusal of jurisdiction are present in the facts of Hill II. 124

As the above discussion suggests, the fact that the tolling provision is a mandate to state courts rather than an independent grant of an individual right turns the reasoning used by the Court in prior cases inside out. But the incontrovertible fact remains that Congress acted expressly to preempt state law, to preserve claims that would otherwise be lost, to promote free access to the federal court system, and perhaps also to relieve plaintiffs of the burden of duplicative filings. 125 Further, congressional action under the Supremacy Clause carries a strong presumption of validity. 126

In addition, the Full Faith and Credit Clause obligates states to enforce a judgment recovered in another state that they might not have entertained as an original cause of action. 127 States can do no less under the Supremacy Clause. 128 Accordingly, Supremacy Clause jurisprudence will likely stretch to accommodate the imposition of the tolling provision on Missouri courts.

121. Indeed, 28 U.S.C. § 1367(d) (1988) itself would produce outcome-determinative results based solely on whether the plaintiff first filed suit in federal court. Plaintiffs who suffered a nonsuit in state court would not be allowed to refile after the expiration of a special statute of limitation, whereas plaintiffs who suffered a nonsuit in federal court could refile under section 1367(d). On the other hand, because the section 1367(d) "right" does not arise at all unless the plaintiff files suit in federal court, perhaps the plight of the state plaintiff is not a proper concern for a federal court determining the constitutionality of the tolling provision.


123. Howlett, 110 S. Ct. at 2445-46.

124. See supra note 117 and accompanying text.

125. See supra text accompanying notes 93 & 101.


128. Id. at 2446.
There is no indication in the legislative history that Congress considered the issues raised by preemption in this context.\textsuperscript{129} Section 1367(d) is not found in the Report of the Federal Courts Study Commission, which forms the basis of the Federal Courts Act.\textsuperscript{130} Its source is a 1969 American Law Institute study of state and federal jurisdiction.\textsuperscript{131}

This study concluded that directing a state court to entertain a cause barred by the state's own law would not constitute an "invalid exercise of federal power."\textsuperscript{132} This conclusion was grounded on an analysis of \textit{Claflin} and \textit{Testa},\textsuperscript{133} and drew an analogy to the removal statute,\textsuperscript{134} which deprives state courts of jurisdiction even of a non-removable case until and unless the issue is decided and the case is remanded by the federal court.\textsuperscript{135} This analogy, however, is not quite on point in that section 1367(d) tends to \textit{grant} jurisdiction to, not remove jurisdiction from, a state court.

\textbf{E. Compliance with the Tolling Provision}

In the event that section 1367(d) preempts Missouri's special limitation doctrine, the question becomes how the state courts may comply with the federal mandate in the absence of a conforming legislative amendment to section 516.300.

A recent decision by the Oklahoma Supreme Court is instructive. That court found itself trapped between the defendants' federal right to interlocutory appeal of an order denying their request for qualified immunity, and a state statute barring the court from considering the interlocutory appeal.\textsuperscript{136} The court concluded that "[t]he Supremacy Clause does not create jurisdiction in a state appellate court where none otherwise exists."\textsuperscript{137} It then determined

\begin{enumerate}
  \item \textsuperscript{130} See \textit{REPORT OF THE FEDERAL COURTS STUDY COMMITTEE} 47-48, 556-68 (April 2, 1990).
  \item \textsuperscript{131} A.L.I., \textit{STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS} 65, § 1386(bc) (1969). Interestingly, § 1386 recommended a parallel thirty-day tolling provision for exclusive federal claims mistakenly filed in state court. \textit{Id.} at 65. The stated purpose was to deprive defendants of an incentive to delay raising jurisdictional complaints until after expiration of the cause of action. \textit{Id.} at 373-74.
  \item \textsuperscript{132} \textit{Id.} at 453 (Memorandum E).
  \item \textsuperscript{133} \textit{See supra} note 113.
  \item \textsuperscript{134} 28 U.S.C. § 1446(e) (1948).
  \item \textsuperscript{135} A.L.I., \textit{STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS} 455-57 (1969).
  \item \textsuperscript{136} McLin \textit{v.} Trimble, 795 P.2d 1035, 1038-39 (Okla. 1990).
\end{enumerate}
that the order denying qualified immunity is reviewable on the merits prior to trial "by an original action in this court properly presenting the claim."\textsuperscript{138} Thus, the court found that it could not entertain an appeal from the order of the trial court, but it could, and must, hear an action demanding review of the order of the trial court.\textsuperscript{139}

In Missouri, the corresponding conflicting demands are an express federal mandate to the state courts to hear a particular class of claims, versus a state statute and decisional law holding that the courts have no subject matter jurisdiction over these claims. Applying the Oklahoma rule, plaintiffs would need to file an action in state court demanding that the court enforce their substantive federal right. But that federal right, if one has been created by section 1367(d), itself consists of the right to file an action in state court.

Thus the analysis leads to the absurd situation in which a plaintiff with an expired, specially-limited, dismissed pendent claim might need to file an original proceeding in state court to enforce her federally-created right to have the state court entertain an original proceeding on that same claim, which was created and extinguished by state law but revived by federal law.

A much cleaner solution is the legislative modification of section 516.300 so that the protection of the one-year saving statute is extended to all specially-limited state-law claims.\textsuperscript{140} This action would not only obviate the need for the potentially tortuous process of establishing the constitutionality of the tolling provision, but it would also extend the equal protection of the law to all holders of specially-limited claims in the state.

IV. CONCLUSION

The decision in Hill II left Missouri plaintiffs who held parallel federal and specially-limited pendent claims with unpleasant choices. Their state-law claims were subject to discretionary dismissal by the federal courts and would not be preserved by state law if they expired during the pendency of a federal suit. Plaintiffs in this situation were forced to choose among filing a protective duplicate suit in state court at the outset of litigation; forgoing the federal forum for resolution of their federal-law claims; or abandoning one set of claims entirely.

Federal district courts sitting in Missouri also were faced with the certain knowledge that a class of expired pendent claims would be lost to plaintiffs.

\textsuperscript{138} Id. at 1040 (emphasis in original).
\textsuperscript{139} Id.
\textsuperscript{140} For example, the statute could read as follows: "The provisions of sections 516.101 to 516.220 and 516.240 to 516.370 shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute." The saving statute is Mo. Rev. Stat. § 516.230 (1986).
if dismissed for lack of pendent jurisdiction. These courts might have felt compelled to retain and decide expired state-law claims to compensate for the absence of any state remedy; or they might have begun routinely refusing pendent jurisdiction as a defensive tactic.

The supplemental jurisdiction tolling provision, enacted as part of the Judicial Improvements Act of 1990, clarified the situation, at least for the federal district courts in the state, which may now rely on clear-cut guidelines for the dismissal of pendent claims. Holders of specially-limited claims, however, will have no such assurances until the constitutionality of the new statute is decided.

The tolling provision is likely to be upheld as a valid exercise of Congress’ preemptive power under the Supremacy Clause. Once its constitutionality is settled, section 1367(d) will protect specially-limited claims from sudden death by jurisdictional irregularity. The holders of such claims surely will find it prudent to attach any federal claim that meets the minimum relatedness and substantiality requirements to gain entry into the federal court system. These plaintiffs will take advantage of an "inverse Cohill" situation in which state-law claims might be extended after a trip through the federal courts. The "jurisdictional wager" necessitated by current Missouri limitation doctrine will become a sure bet for those fortunate plaintiffs with a colorable federal question claim—either the federal court will resolve their entire case, or their state-law claims will be released with a new life to be refilled in state court.

The wholly undesired result might be an increase in the number of federal court cases filed in Missouri, and in the other eight states that lack a saving statute or deny it to specially-limited claims. It is possible that a

141. But note the caveat in Gibbs:

[R]ecognition of a federal court’s wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant’s effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed. United Mine Workers v. Gibbs, 338 U.S. 715, 727 (1966). A federal court faced with a frivolous federal claim might impose Rule 11 sanctions on the plaintiff, his attorney, or both. FED. R. CIV. P. 11.


143. The Civil Justice Reform Act of 1990 (Title I of the Judicial Improvements Act) and the Federal Judgeship Act of 1990 (Title II of the Act), enacted concurrently with the Federal Courts Study Committee Implementation Act, were intended to address the high costs and delays of civil litigation, and the lack of resources in the federal courts. S. REP. No. 416, P.L. 101-650, 101st Cong., 2d Sess. (1991), reprinted in 1991 U.S. CODE CONG. & ADMIN. NEWS 6802, 6804. Any factor that tends to increase the caseload of the federal courts runs counter to these goals.
substantial number of plaintiffs whose claims would have been discouraged or barred by the decision in Hill II now may avoid the strictures of Missouri limitation doctrine by first filing suit in the federal court system.\textsuperscript{144}

Uniformity can be restored simply by making the saving statute available to all plaintiffs—whether they hold generally-limited or specially-limited claims. In fact, since the doctrinal foundation for the distinction between general and special limitations in Missouri law will begin to crumble once any modification of the statute is undertaken, it should then become possible to contemplate the outright repeal of section 516.300. Then \textit{all} the protections of the statutory tolling provisions may be extended equally to all claim holders, regardless of the derivation of their respective causes of action.

\textbf{ROSEL RODRÍGUEZ PINE}

\textsuperscript{144} To illustrate the range of claims potentially affected, a cursory review of the Missouri statutes reveals special statutes of limitation for anti-trust actions (Mo. Rev. Stat. § 416.131 (1986)), collection of delinquent city taxes (\textit{id.} §§ 92.720-.730), actions for discriminatory denial of credit (\textit{id.} § 314.115), wrongful death actions (\textit{id.} § 537.100), actions for discriminatory housing practices (\textit{id.} §§ 213.120,.127), actions for excess interest on small loans (\textit{id.} § 408.150), usury actions (\textit{id.} § 408.030), and equal pay for women actions (\textit{id.} § 290.450). Any of these actions could be filed pendent to a federal-law claim. A more comprehensive listing can be found in J. DEVINE, \textit{MISSOURI CIVIL PLEADING AND PRACTICE} § 7-2 (1986).