Ancillary Jurisdiction Over Plaintiff's Claim Against a Non-Diverse Third-Party Defendant: *Kroger v. Owen Equipment & Erection Company*

In *Kroger v. Owen Equipment & Erection Company*[1] the United States Court of Appeals for the Eighth Circuit refused to follow "the great numerical majority of cases"[2] and held that no independent jurisdictional grounds are required for a federal district court to decide a plaintiff's state law claim against a non-diverse third-party defendant. The plaintiff in *Kroger* initially gained access to the federal court for resolution of her state law claim under a jurisdictional statute[3] that requires complete diversity of citizenship between all plaintiffs and defendants.[4] Plaintiff was a resident of Iowa and defendant was a Nebraska corporation. Defendant, as a third-party plaintiff, impleaded a third-party defendant pursuant to rule 14(a) of the Federal Rules of Civil Procedure, and plaintiff amended her complaint to assert a claim against the third-party defendant. Plaintiff was misled by the impleaded third party's answer into believing that the third party was not a resident of Iowa, plaintiff's state. Near the end of the trial, however, the third-party defendant revealed that it was a resident of plaintiff's state and moved for the trial court to dismiss plaintiff's claim against it for lack of diversity jurisdiction. The trial court rejected the motion for dismissal, and the court of appeals affirmed the trial court's decision, concluding that "[o]nce the court has before it all of the parties to the controversy, sharing common and interrelated facts, it has power in the jurisdictional sense to dispose of the case."[5]

The Eighth Circuit in *Kroger* thus became the first court of appeals to hold that the federal courts have ancillary jurisdiction over a plaintiff's claim against a non-diverse third-party defendant. Prior to *Kroger*, the Courts of Appeals of the Third, Fourth, Fifth, and Sixth Circuits had refused to hear a plaintiff's claim against a third-party defendant without independent jurisdictional grounds.[6] The United

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1. 558 F.2d 417 (8th Cir. 1977), *cert. granted*, 98 S. Ct. 715 (1978).
2. *Id.* at 422.
3. 28 U.S.C. § 1332 (1970).
4. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
5. 558 F.2d at 424.
6. *See* Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir. 1976), *cert. denied*, 429 U.S. 922 (1977); Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir. 1976), *cert. denied*, 429 U.S. 857 (1977); Parker v. W.W. Moore & Sons, 528 F.2d 764 (4th Cir. 1975); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972); McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960). However, in *Saalfrank*, *Rosario*, and *Parker*, the issue was not firmly resolved. The courts indicated that even if the general rule was that no independent grounds of jurisdiction were required, jurisdiction would have been denied as a matter of discretion.

States Supreme Court has granted certiorari in *Kroger* to resolve this conflict.[7]

This Case Comment will provide background material concerning the concept of ancillary jurisdiction in order to facilitate a proper understanding of the *Kroger* case. *Kroger* will also be analyzed in light of the United States Supreme Court's most recent discussion of ancillary jurisdiction in *Aldinger v. Howard*[8] to show that the Eighth Circuit's holding in *Kroger* is not inconsistent with that decision. Finally, the reasons upon which courts have relied in the past in denying ancillary jurisdiction over plaintiffs' claims against third-party defendants will be analyzed. The inconsistencies inherent in the reasoning of those courts support the argument that the *Kroger* decision was well reasoned and should be affirmed by the United States Supreme Court.

I. THE CONCEPT OF ANCILLARY JURISDICTION

Article III of the United States Constitution confers jurisdiction upon the federal courts and limits this federal judicial power to the cases and controversies enumerated therein.[9] Ancillary jurisdiction is a judicially developed concept based on the premise that a federal court has the jurisdictional power to resolve all disputes involved in an article III case or controversy, including matters over which the court would not have jurisdiction were they independently presented. Thus, when a district court has valid federal question or diversity jurisdiction over a principal action and ancillary jurisdiction is found to exist, the court is empowered to resolve state law disputes that are related to the primary claim, regardless of the citizenship of the parties, the amount in controversy, or any other federal jurisdictional requirement.[10]

Ancillary jurisdiction becomes an issue when additional parties are impleaded pursuant to rule 14(a) of the Federal Rules of Civil Procedure.[11] Rule 14(a) provides: "At any time after commencement

7. 98 S. Ct. 715 (1978).

8. 427 U.S. 1 (1976).

9. Article III, section 2 provides:

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

10. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 9, at 21 (3d ed. 1976).

11. Other Federal Rules of Civil Procedure present additional possibilities for the exercise of ancillary jurisdiction. *See generally* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3523, at 66-70 (1975) [hereinafter cited as C. WRIGHT, A. MILLER, & E. COOPER]. It has been held that federal courts have ancillary jurisdiction over compulsory counterclaims under rule 13(a), *see, e.g.*, Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d

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."[12] The third-party defendant can then assert any claim arising out of the same transaction that he has against either the plaintiff or the defendant, and the plaintiff can assert any claim arising out of the same transaction that he has against the third-party defendant.[13] Rule 14(a), however, does not indicate whether independent jurisdictional grounds are required for these claims.[14] Thus, the courts have been forced to determine whether third-party claims raised under rule 14(a) can properly be decided by a federal court when no independent jurisdictional grounds for the claims are present. The issue has arisen in three situations.

A. *Defendant's claim against third-party defendant*

The courts uniformly hold that no independent grounds of jurisdiction are required for the defendant to implead a third-party under rule 14(a).[15] Thus, if the plaintiff's claim is properly before the court the defendant may implead anyone not a party to the action who may be liable to him, even if the claim is based on state law, no diversity of citizenship exists between the parties, and the amount in controversy requirement is not met. The justification for this rule is that, because the defendant has been brought involuntarily into a federal forum, he should be allowed to resolve in that court all disputes related to the plaintiff's claim against him.[16]

1193 (10th Cir. 1974), and over additional parties joined thereto under rule 13(h), *see, e.g.*, H.L. Peterson Co. v. Applewhite, 383 F.2d 430 (5th Cir. 1967). On the other hand, permissive counterclaims under rule 13(b), *see, e.g.*, Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), and additional parties thereto, *see, e.g.*, Non-Ferrous Metals, Inc. v. Saramar Aluminum Co., 25 F.R.D. 102 (N.D. Ohio 1960), require independent jurisdictional grounds. Ancillary jurisdiction has been recognized in interpleader proceedings under rule 22. *See, e.g.*, Walmac Co. v. Isaacs, 220 F.2d 108 (1st Cir. 1955). Intervention as of right under rule 24(a) has also been held to come within the ancillary jurisdiction of the federal courts. *See, e.g.*, Lenz v. Wagner, 240 F.2d 666 (5th Cir. 1957). However, no ancillary jurisdiction has generally been held to exist over permissive intervention under rule 24(b). *See, e.g.*, Houghen v. Merkel, 47 F.R.D. 528 (D. Minn. 1969).

12. FED. R. CIV. P. 14(a).

13. *Id.*

14. It is clear, however, that rule 14(a) itself does not extend the jurisdiction of the federal courts. FED. R. CIV. P. 82 provides: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."

15. *See, e.g.*, LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969); H.L. Peterson Co. v. Applewhite, 383 F.2d 430 (5th Cir. 1967); Stemler v. Burke, 344 F.2d 393 (6th Cir. 1965); Huggins v. Graves, 337 F.2d 486 (6th Cir. 1964); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3rd Cir. 1962); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

16. *See, e.g.*, Revere Copper and Brass, Inc. v. Aetna Cas. and Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970).

B. *Third-party defendant's claim against plaintiff*

Although some courts in the past have required independent jurisdictional grounds for a third-party defendant's claim against the plaintiff,[17] the overwhelming majority of courts today do not.[18] Again, the justification is that the impleaded third party is brought involuntarily into the federal court and should be given the opportunity to have all issues related to the plaintiff's claim adjudicated in one forum.[19]

C. *Plaintiff's claim against third-party defendant*

Although some district courts have held that independent jurisdictional grounds are not required,[20] every court of appeals before *Kroger* that decided the issue refused to allow the plaintiff to maintain a claim against the third-party defendant without independent jurisdictional grounds.[21] Several commentators, however, have argued that the courts should allow a plaintiff to maintain a claim against a non-diverse third-party defendant.[22] The *Kroger* court was the first court at the appellate level to do so.

II. THE *Kroger* CASE

A. *The Facts*

The plaintiff, Geraldine Kroger, brought a wrongful death action against the Omaha Public Power District for the death of her husband,

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17. *See, e.g.*, James King & Son, Inc. v. Indemnity Ins. Co., 178 F. Supp. 146 (S.D.N.Y. 1959); Shverha v. Maryland Gas Co., 110 F. Supp. 173 (E.D. Pa. 1953).

18. *See, e.g.*, Mayer Paving and Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Revere Copper and Brass, Inc. v. Aetna Cas. and Sur. Co., 426 F.2d 709 (5th Cir. 1970); Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486 (D. Neb. 1965); Heintz & Co. v. Provident Tradesmens Bank and Trust Co., 30 F.R.D. 171 (E.D. Pa. 1962).

19. *See, e.g.*, Revere Copper and Brass, Inc. v. Aetna Cas. and Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970).

20. *See, e.g.*, Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D. Kan. 1975); CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975); Spearing v. Manhattan Oil Transp. Corp., 375 F. Supp. 764 (S.D.N.Y. 1974); Davis v. United States, 350 F. Supp. 206 (E.D. Mich. 1972); Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968); Olson v. United States, 38 F.R.D. 489 (D. Neb. 1965). *But see* Mickelic v. United States Postal Serv., 367 F. Supp. 1036 (W.D. Pa. 1973); Joseph v. Chrysler Corp., 61 F.R.D. 347 (W.D. Pa. 1973); Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398 (W.D. Pa. 1969); Ayoub v. Helm's Express, Inc., 300 F. Supp. 473 (W.D. Pa. 1969); Palumbo v. Western Md. Ry., 271 F. Supp. 361 (D. Md. 1967).

21. *See* Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir. 1976), *cert. denied*, 429 U.S. 922 (1977); Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir. 1976), *cert. denied*, 429 U.S. 857 (1977); Parker v. W.W. Moore & Sons, 528 F.2d 764 (4th Cir. 1975); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972); McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960).

22. *See* 3 MOORE'S FEDERAL PRACTICE ¶ 14.27, at 14-565 (2d ed. 1974) [hereinafter cited as MOORE'S]; Baker, *Toward A Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759 (1972); Note, *Rule 14(a) and Ancillary Jurisdiction: Plaintiff's Claim*

a workman who was electrocuted when the boom of a crane came in contact with electric power lines.[23] Omaha Public Power District impleaded Owen Equipment & Erection Company [hereinafter referred to as Owen] as a third-party defendant.[24]

The district court had diversity jurisdiction over plaintiff, an Iowa citizen, and defendant, a Nebraska corporation.[25] Because Owen was incorporated in the state of Nebraska, plaintiff had reason to believe that diversity existed between her and Owen, the third-party defendant.[26] Kroger therefore amended her complaint to state a claim against Owen.[27] In her amended complaint, plaintiff alleged that Owen was "a Nebraska corporation with its principal place of business in Nebraska."[28] Owen's principal place of business was actually in Iowa, but in its answer Owen did not deny outright that its principal place of business was in Nebraska. Instead it used a qualified general denial; it admitted that Owen was a "corporation organized and existing under the Laws of the State of Nebraska" and "denied each and every other allegation contained in said Amended Complaint."[29]

This use of a qualified general denial misled plaintiff into believing that Owen was a resident of Nebraska only and thus was in violation of Federal Rule of Civil Procedure 8(b), which provides: "When 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 deny only the remainder."[30] In other words, if a party intends to admit only part of an averment, he should not attempt to controvert the remainder by a general denial at the end of his answer, but should make a special denial so that the plaintiff knows exactly what is being admitted and what is being denied.[31] To comply with this rule, Owen should have admitted that it was a Nebraska corporation but specifically denied that its principal place of business was in Nebraska.

Against Non-Diverse Third-Party Defendant, 33 WASH. & LEE L. REV. 796 (1976); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971).

23. Plaintiff also joined another defendant, Paxton & Vierling Steel Company, which was later dismissed because of a jurisdictional defect. 558 F.2d at 429.

24. *See* FED. R. CIV. P. 14(a).

25. *See* 28 U.S.C. § 1332 (1970).

26. A corporation is deemed to be a resident of both its state of incorporation and its principal place of business. 28 U.S.C. § 1332(c) (1970).

27. *See* FED. R. CIV. P. 14(a).

28. 558 F.2d at 419.

29. *Id.*

30. FED. R. CIV. P. 8(b).

31. *See* Kirby v. Turner-Day & Woolworth Handle Co., 50 F. Supp. 469 (E.D. Tenn. 1943); 2A MOORE'S, *supra* note 22, ¶ 8.23 at 1828 (1975); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1266, at 284 (1969) [hereinafter cited as C. WRIGHT & A. MILLER]. The Eighth Circuit, however, did not rely upon Owen's procedural violation in reaching its decision. The court held that there was jurisdictional *power* to hear plaintiff's claim against the third-party defendant, not that the third-party defendant's procedural violation prevented it from challenging the jurisdiction of the court. *See* text accompanying notes 54-56 *infra*.

Omaha Public Power District moved for summary judgment against the plaintiff. Summary judgment was granted, and Omaha Public Power District was dismissed from the action. Shortly thereafter, Owen's motion for summary judgment against the plaintiff was denied, and the case went to trial with Kroger and Owen being the only parties to the action.[32]

Near the end of the trial, Owen's secretary testified that the corporation's principal place of business was in Iowa, not Nebraska. Later that same afternoon, Owen challenged the jurisdiction of the court, stating that there was no diversity of citizenship between the parties. The court was convinced that Owen had intentionally withheld its jurisdictional challenge until the end of the trial and that Owen had purposely concealed the fact that its principal place of business was in Iowa.[33] The district court rejected the challenge to its jurisdiction, holding that it had discretion under *United Mine Workers v. Gibbs*[34] to exercise its judicial power over Kroger's claim against Owen.[35] The trial was completed and the plaintiff was awarded a jury verdict of $234,756.[36] Defendant appealed, challenging the jurisdiction of the federal district court.

B. *The Holding*

The issue before the court of appeals was whether independent jurisdictional grounds were required to maintain plaintiff's state law claim against a non-diverse third-party defendant. The court began its analysis with a discussion of *United Mine Workers v. Gibbs*.[37] In that case, the United States Supreme Court held that federal courts have the jurisdictional power to hear a state claim arising out of the same facts as a federal claim between two parties already properly before the court.[38] Prior to *Gibbs*, the test, as established in *Hurn v. Oursler*,[39] had been that a state claim was within the pendent jurisdiction of a federal court if "two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question . . . [but not] where two separate and distinct causes of action are alleged, one only of which is federal in character."[40] The Supreme Court in *Gibbs* discarded the *Hurn* test and held that jurisdictional

32. 558 F.2d at 429.

33. *Id.* at 419.

34. 383 U.S. 715 (1966).

35. 558 F.2d at 419.

36. *Id.* at 418.

37. 383 U.S. 715 (1966).

38. *Id.* at 725. The plaintiff in *Gibbs* brought suit in a federal district court alleging a violation of § 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1970), and joined a state claim for malicious interference with contract rights.

39. 289 U.S. 238 (1933).

40. *Id.* at 246.

power exists whenever the state and federal claims "derive from a common nucleus of operative fact,"[41] so that if "considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding."[42] *Gibbs* established a power/discretion test of jurisdiction: if federal and state claims arise out of the same "nucleus of operative fact," the court has power in a jurisdictional sense to hear the state claim but must still decide whether it should hear the state claim as a matter of discretion.[43] Some factors that the Supreme Court considered relevant in exercising this discretion were "judicial economy" and "fairness and convenience to the litigants."[44]

The *Kroger* court based its decision upon *Gibbs* although the jurisdictional issues presented by *Gibbs* and *Kroger* were not identical. Pendent jurisdiction is the term used to describe the situation presented by *Gibbs*, in which the plaintiff sought to join a state claim with a federal claim against a particular defendant.[45] *Kroger* dealt with ancillary jurisdiction and differed from *Gibbs* because it was concerned not with an additional claim between two parties, but with an additional party impleaded in the action pursuant to rule 14(a) of the Federal Rules of Civil Procedure.

The difference between ancillary and pendent jurisdiction has not been clearly articulated by the courts. Both doctrines deal with the question whether article III of the Constitution confers upon the federal courts jurisdiction over an *entire* case or controversy, including state claims over which a federal court would not have jurisdiction if they were independently presented. The best way to distinguish between the doctrines may be to describe rather than to define them. The term pendent jurisdiction is used to describe only the power of a federal court to adjudicate both federal and state claims that a plaintiff has against a particular defendant.[46] Ancillary jurisdiction, on the other hand, is a broader concept encompassing all other situations in which federal jurisdiction is exercised over a state claim closely related to a claim that is properly before a district court.[47] Thus, ancillary jurisdiction is the term used to describe the power a district court may have over state law counterclaims and cross-claims under rule 13 of the Federal Rules of Civil Procedure, third-party proceed-

41. 383 U.S. at 725.

42. *Id.*

43. *Id.* at 725-26.

44. *Id.* at 726.

45. *See* 6 C. WRIGHT & A. MILLER, *supra* note 31, § 1588, at 807 (1971).

46. When the defendant has a state law claim against the plaintiff, *i.e.*, a counterclaim, the court's power to hear the claim is described as ancillary jurisdiction. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 11, § 3523, at 66.

47. 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 11, § 3523, at 66-70.

ings under rule 14, interpleader proceedings under rule 22, and intervention under rule 24.[48]

The court in *Kroger* was faced with the question whether the *Gibbs* rationale should be limited to cases raising the issue of pendent jurisdiction or whether it should also be applied to delineate the scope of the ancillary jurisdiction of the federal courts. The Supreme Court's reasoning in *Gibbs* did not appear to be limited to the pendent jurisdiction doctrine but rather stated that jurisdictional power exists whenever multiple claims "derive from a common nucleus of operative facts."[49] Furthermore, in *Aldinger v. Howard*,[50] the United States Supreme Court questioned the utility of distinguishing between pendent and ancillary jurisdiction:

> Given the complexities of the many manifestations of federal jurisdiction, together with the countless factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any "principled" differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences.[51]

In discussing whether the *Gibbs* rationale should be applied to the jurisdictional question in *Kroger*, the court of appeals quoted Professor Moore's interpretation of *Gibbs*:

> Properly 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. . . .
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> . . . *United Mine Workers* can authorize an independent relaxation of the rule against ancillary jurisdiction over plaintiff's amended claims against the third-party defendant.[52]

The court of appeals concluded that the solution to the issue presented in *Kroger* was clearly outlined by the power/discretion test of *Gibbs*.[53]

1. *The Question of Power*

The Eighth Circuit gave two justifications for determining that *Kroger* fell within the framework of the *Gibbs* test of jurisdictional power. First, Kroger's claim against Owen arose out of the core of "operative facts" giving rise to both the plaintiff's claims against the defendant and the defendant's claim against the third-party defendant.[54] Second, the court pointed out that, because independent

48. *Id.*
49. 383 U.S. at 725.
50. 427 U.S. 1 (1976).
51. *Id.* at 13.
52. 3 MOORE'S, *supra* note 22, ¶ 14.27, at 14-569-70 (footnotes omitted).
53. 558 F.2d at 424.
54. *Id.*

jurisdictional grounds are not generally required for a defendant's claim against a third-party defendant or the latter's claim against the plaintiff, courts frequently adjudicate ancillary claims having no independent jurisdictional basis.[55] Because "[a]ll parties were before the court . . . it is both paradoxical and anomalous to hold in this situation that, although Kroger can go against [Omaha Public Power District] which can go against Owen and Owen may proceed against Kroger, Kroger cannot proceed against Owen."[56]

2. *The Exercise of Discretion*

Once the issue of judicial power was resolved, the court of appeals found no abuse of the lower court's discretion in deciding to exercise that power.[57] The *Gibbs* discretionary factors of "judicial economy, convenience, and fairness to the litigants"[58] were clearly present in *Kroger.* The proceeding in the case had already lasted for over three years, and judicial economy and convenience to the litigants would certainly not be served by requiring the action to be relitigated in state court.[59] As to the matter of fairness, the court stated: "By subtle and adroit pleading the defendant has gained a substantial advantage. If the trial goes well, it can keep the jurisdictional point hidden. If the trial seems to be going badly or, indeed, if it loses on the merits, . . . it can even then challenge jurisdiction . . . ."[60]

The facts of *Kroger* presented the Eighth Circuit with an additional issue concerning the district court's exercise of discretion. Owen contended that the dismissal from the action of Omaha Public Power District, whose place of residence had originally conferred diversity jurisdiction on the court, limited the district court's discretion to retain ancillary jurisdiction.[61] The court of appeals stated that the dismissal of the original claim was a factor that should be considered by the court in deciding whether to hear the case as a matter of discretion.[62] But "if there has been a substantial commitment of the court's or litigant's resources prior to the termination of the main claim, dismissal of the rule 14 claim [would] run counter to the rationale justifying ancillary jurisdiction and third-party practice."[63]

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55. *Id.* at 422.

56. *Id.* at 424.

57. *Id.* at 425-27.

58. 383 U.S. at 726.

59. The court stated: "The satisfaction here of the first two factors requires no exegesis." 558 F.2d at 425.

60. *Id.* at 427.

61. *Id.* at 426.

62. *Id.*

63. *Id.* at 426 n.36 (quoting 6 C. WRIGHT & A. MILLER, *supra* note 31, § 1444, at 234-37 (1971)). Other courts almost unanimously agree that ancillary jurisdiction survives even after

The court went on to state that whether or not the district court abused its discretion in its retention of the case, Owen's conduct in misleading the plaintiff as to its principal place of business estopped it from asserting abuse of discretion under the most elementary consideration of judicial fairness.[64]

III. THE EFFECT OF *Aldinger v. Howard*

The United States Supreme Court has been reluctant to define the limits of pendent and ancillary jurisdiction.[65] In *Aldinger v. Howard*,[66] the Court's most recent discussion of these doctrines, the factual situation and legal issues were clearly distinguishable from *Kroger*. Since *Aldinger* did tend to narrow the doctrines of pendent and ancillary jurisdiction, however, and because the dissent in *Kroger* argued that it was dispositive of that case,[67] an analysis of the possible effect of *Aldinger* is appropriate here.[68]

In *Aldinger*, the plaintiff, after having been discharged by the county treasurer from her job in his office,[69] brought suit against the treasurer and other county officers in a federal district court under 42 U.S.C. § 1983.[70] The plaintiff claimed that her discharge violated her federal constitutional rights, and jurisdiction over the federal claim was asserted under 28 U.S.C. § 1343(3).[71] The county was not a party

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the main claim has been settled. *See, e.g.*, United States v. United Pac. Ins. Co., 472 F.2d 792 (9th Cir.), *cert. denied*, 411 U.S. 982 (1973); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

64. 558 F.2d at 427. It should be noted that the court did not hold that the third-party defendant's conduct would prevent it from challenging the jurisdictional *power* of the district court; rather, the court stated that the third-party defendant's wrongdoing estopped it from asserting that the court abused its *discretion* in retaining jurisdiction.

65. *See, e.g.*, Moor v. County of Alameda, 411 U.S. 693 (1973), in which the Supreme Court stated:

> Whether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far-reaching implications. But we do not consider it appropriate to resolve this difficult issue in the present case, for we have concluded that even assuming, *arguendo*, the existence of power to hear the claim, the District Court, in exercise of its legitimate discretion, properly declined to join the claims against the County in these suits.

Id. at 715.

66. 427 U.S. 1 (1976).

67. 558 F.2d at 430 (Bright, J., dissenting).

68. For further discussions of this case, see Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127 (1977); Comment, *Supreme Court Says No to Pendent Parties—At Least This Time*, 38 U. PITT. L. REV. 395 (1976).

69. The plaintiff was informed by the county treasurer that "although her job performance was 'excellent,' she would be dismissed, effective two weeks hence, because she was allegedly living with [her] boy friend." 427 U.S. at 3.

70. 42 U.S.C. § 1983 (1970) provides:

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

71. 28 U.S.C. § 1343(3)(1970) provides in relevant part:

to the action. The plaintiff, however, sought to join with this federal claim a state claim against the county on a theory of vicarious liability arising out of the tortious conduct of the county officials.[72] The Supreme Court held that the district court did not have the judicial power to hear the claim against the county.[73]

Aldinger is distinguishable from *Kroger* in two important ways. First, in *Kroger* the plaintiff sought to assert a claim against a party that was already properly before the court;[74] whereas in *Aldinger*, the plaintiff sought to bring in an entirely new party.[75] The reasoning of *Aldinger* suggested that this difference could be determinative. Although declining to make any "sweeping pronouncement upon the existence of ancillary jurisdiction," the Court in *Aldinger* observed that "[i]f the new party sought to be impleaded is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if the parties already before the court are required to litigate a state law claim."[76] *Aldinger* is also distinguishable simply on the ground that it is a section 1983 case. The Court had already decided in *Moor v. County of Alameda*[77] that Congress, in enacting section 1983, had intended to exclude counties from the definition of "persons" upon whom liability could be imposed under section 1983.[78] Thus, granting ancillary jurisdiction in *Aldinger* would have allowed the plaintiff to circumvent the congressional exclusion in section 1983. The Court's holding was very narrow: "[W]e decide here only the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. *Other statutory grants and other alignments of parties and claims might call for a different result.*"[79]

In his dissenting opinion in *Kroger*, Judge Bright contended that the Supreme Court's pronouncements in *Aldinger* required the district court to dismiss Kroger's claim against Owen for lack of jurisdiction.[80]

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

72. 427 U.S. at 4-5.

73. *Id.* at 19.

74. 558 F.2d at 424.

75. 427 U.S. at 4-5.

76. *Id.* at 18.

77. 411 U.S. 693 (1973).

78. *Id.* at 707.

79. 427 U.S. at 18 (emphasis added).

80. 558 F.2d at 430 (Bright, J., dissenting).

His argument was that *Aldinger* precluded a federal court from asserting jurisdiction over a claim if Congress had either expressly or impliedly negated jurisdiction over the claim.[81] Therefore, Judge Bright argued, jurisdiction to adjudicate a claim between non-diverse parties must be denied in *Kroger* because 28 U.S.C. § 1332[82] expressly limits the parties to which diversity jurisdiction extends and has been interpreted by the courts to require complete diversity of citizenship between all plaintiffs and defendants.[83]

Judge Bright's dissent is unpersuasive for two reasons. First, the plaintiff in *Kroger* did not attempt to maintain an independent action against the non-diverse third-party defendant under section 1332. She did not assert that diversity jurisdiction existed; rather, she asked the district court to exercise ancillary jurisdiction over her claim. Section 1332 does not address matters of ancillary jurisdiction. Second, Judge Bright's approach would force federal courts to deny jurisdiction in situations in which the courts have uniformly held that jurisdiction exists. If section 1332 were held to limit diversity jurisdiction to cases in which diversity of citizenship existed between each plaintiff and each defendant, including third-party defendants, no defendant could implead a resident of either his or the plaintiff's state under rule 14(a), nor could a non-diverse third-party defendant maintain a claim against the plaintiff. The courts have not so held.[84]

In summary, the decision of *Aldinger v. Howard* provides little insight into the future of ancillary jurisdiction. It was dictated by "considerations of federalism which are unlikely to play a role in pendent party cases outside the context of a civil rights action brought in a federal forum against a state-created entity."[85] *Aldinger* does indicate that the Supreme Court sees some limits on the doctrine of ancillary jurisdiction. It clearly does not decide, however, nor does its reasoning dictate, that there must be independent jurisdictional grounds for a plaintiff to maintain a claim against a non-diverse third-party defendant.[86]

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81. *Id.* at 431.

82. 28 U.S.C. § 1332 (1970).

83. 558 F.2d at 431 (Bright, J., dissenting). *See also* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

84. *See* notes 15-19 *supra* and accompanying text.

85. Comment, *Supreme Court Says No to Pendent Parties—At Least This Time*, 38 U. PITT. L. REV. 395, 396 (1976).

86. The Court in *Aldinger*, 427 U.S. at 15, did quote Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1976), which denied ancillary jurisdiction over a plaintiff's claim against a non-diverse third-party defendant, but only for the proposition that efficiency and avoidance of multiplicity of suits are not the only considerations in deciding whether ancillary jurisdiction exists.

IV. CRITIQUE

A. *Reasoning of Courts Denying Ancillary Jurisdiction*

Before *Kroger*, every court of appeals deciding the issue refused to allow the plaintiff to maintain a claim against the third-party defendant without independent jurisdictional grounds.[87] In order to properly evaluate the decision in *Kroger*, it is necessary to examine the reasoning given by the courts that have denied jurisdiction over plaintiffs' claims against third-party defendants.

1. *Direct/Indirect Argument*

Some courts have reasoned that since the plaintiff could not sue a non-diverse party directly, he should not be allowed to do so by an indirect route.[88] Professor Moore's simple answer to this is "why not?"[89] It was the defendant's choice, not the plaintiff's, to bring the third-party defendant into federal court. In many cases the plaintiff could not have anticipated that the third party would be impleaded, and even if he had so anticipated, the plaintiff took the chance that the defendant would not do so.[90]

2. *Collusion*

The courts have also contended that denying jurisdiction over a plaintiff's claim against a non-diverse third-party defendant prevents the possibility of collusion between a plaintiff and a defendant in obtaining federal jurisdiction over a party who would not otherwise be within the court's reach.[91] The court in *Kroger* answered this argument by stating that 28 U.S.C. § 1359,[92] which provides that "[a] district court shall not have jurisdiction of a civil action in which any party . . . has been improperly or collusively made or joined to invoke the jurisdiction of such court," is adequate protection against

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87. *See* Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir. 1976), *cert. denied*, 429 U.S. 922 (1977); Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir. 1976), *cert. denied*, 429 U.S. 857 (1977); Parker v. W.W. Moore & Sons, 528 F.2d 764 (4th Cir. 1975); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972); McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960).

88. *See* Fawvor v. Texaco, Inc., 546 F.2d 636, 641 (5th Cir. 1977); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893 (4th Cir. 1972); McPherson v. Hoffman, 275 F.2d 466, 470 (6th Cir. 1960); Palumbo v. Western Md. Ry. Co., 271 F. Supp. 361, 362 (D. Md. 1967).

89. 3 MOORE'S, *supra* note 22, ¶ 14.27, at 14-570. A discussion of Professor Moore's reasoning is especially appropriate in this Case Comment because the court in *Kroger* relied heavily on his treatise and basically adopted his reasoning as its own. *See* 558 F.2d at 419 n.25.

90. *See* 3 MOORE'S, *supra* note 22, ¶ 14.27, at 14-570-71.

91. *See* Fawvor v. Texaco, Inc., 546 F.2d 636, 641 (5th Cir. 1977); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893 (4th Cir. 1972); Heintz & Co. v. Provident Tradesmens Bank and Trust Co., 30 F.R.D. 171, 174 (E.D. Pa. 1962) (dictum).

92. 28 U.S.C. § 1359 (1970).

the specter of collusion.[93] The court further stated that "[f]ears of collusion do not justify a wholesale denial of jurisdiction."[94] The possibility of collusion is a poor justification for adopting an absolute rule concerning jurisdictional power, because if collusion is present, the court can refuse to assert ancillary jurisdiction as a matter of discretion.[95]

Furthermore, the possibility of collusion was reduced by the 1947 amendment to rule 14(a) of the Federal Rules of Civil Procedure. The earlier rule allowed the defendant to implead any party who may have been liable to the defendant, *to the plaintiff*, or to both.[96] Thus, if ancillary jurisdiction were found to exist under the earlier rule, a plaintiff could collusively circumvent the diversity requirement by suing a cooperative resident of another state on a false claim, with the understanding that the defendant would implead a third party from plaintiff's state on the ground that the third party might be liable to the plaintiff. Under the amended rule, because the defendant can bring in only a party who is liable to him, the chance for collusion is diminished.[97]

3. *Assumption in Allowing Jurisdiction Over the Defendant's Claim Against the Third-Party Defendant*

Several courts have asserted that the rule allowing a defendant to bring in a third-party defendant from the plaintiff's state (thereby destroying complete diversity) proceeds on the assumption that the plaintiff is seeking no relief against the third-party defendant.[98] According to this argument, ancillary jurisdiction exists over the third-party plaintiff's claim because there is still diversity between the parties to each controversy in the action, *i.e.*, there is diversity between the plaintiff and the defendant and between the third-party plaintiff and the third-party defendant. Ancillary jurisdiction, how-

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93. 558 F.2d at 423 n.25 (citing 3 MOORE'S, *supra* note 22, ¶ 14.27, at 14-571). *See also* Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 702 (D. Kan. 1975).

94. 558 F.2d at 423 n.25 (citing 3 MOORE'S, *supra* note 22, ¶ 14.27, at 14-571). *See also* Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 702 (D. Kan. 1975); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265, 275 (1971) (A "knee-jerk" denial of ancillary jurisdiction in all cases merely because of the fear of collusion is an inadequate response to the central jurisdictional question.).

95. *See* text accompanying note 43 *supra*.

96. *See* 3 MOORE'S, *supra* note 22, ¶ 14.01, at 14-37.

97. Professor Moore felt that the 1947 amendment to rule 14 made such a significant reduction in the chance for collusion that in the second edition of his treatise, MOORE'S FEDERAL PRACTICE, he changed his earlier position announced in the first edition, which was written before the rule was amended, and urged that no independent jurisdiction be required for a plaintiff's claim against a non-diverse third-party defendant. 3 MOORE'S, *supra* note 22, ¶ 14.27, at 14-565-74.

98. *See* Fawvor v. Texaco, Inc., 546 F.2d 636, 641 (5th Cir. 1977); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (4th Cir. 1972).

ever, has been found to exist over a third-party plaintiff's claim when there is no diversity between the third-party plaintiff and the third-party defendant.[99] The courts are therefore taking an inconsistent position when they state that ancillary jurisdiction over rule 14(a) claims is granted only because diversity will be maintained between the parties to each claim in a case.

The *Kroger* court stated that the denial of ancillary jurisdiction over claims against non-diverse third-party defendants "rests on an overly narrow view of ancillary jurisdiction."[100] The exercise of ancillary jurisdiction over a defendant's claim against a third-party defendant has a stronger justification than the fact that the plaintiff may not seek relief from the third-party defendant. The defendant was brought involuntarily into the forum, and judicial economy as well as convenience to the litigants dictates that the defendant be able to adjudicate all disputes connected with the plaintiff's claim against him in one action.

4. *Reduction of Litigation Based on State Law in the Federal Courts*

Another argument against the result in *Kroger* is that the federal dockets are so overcrowded that the federal courts should not reach out for litigation based upon state law.[101] Professor Moore's answer is "that under co-operative federalism the federal courts have a higher duty to end all court congestion, not just that of the federal courts."[102] The essential purposes of both ancillary jurisdiction and rule 14 are to avoid multiplicity of suits and to determine the rights of all parties in one action.[103] In light of the crowded dockets of all courts today, it is unwise for any court to force two parties who are already before the court to adjudicate an additional claim arising from the same set of facts in an entirely different forum. Furthermore, if a plaintiff's third-party claim would substantially lengthen and complicate the litigation in a particular case, the court could in its discretion refuse to retain jurisdiction.[104]

Courts denying jurisdiction have also contended that the efficiency sought so avidly by a plaintiff attempting to maintain a claim against

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99. *See* Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959); 3 MOORE'S, *supra* note 22, ¶ 14.26, at 14-527.

100. 558 F.2d at 423 n.25 (quoting in part from 3 MOORE'S, *supra* note 22, ¶ 14.27, at 14-571-72).

101. *See* Fawvor v. Texaco, Inc., 546 F.2d 636, 641 (5th Cir. 1977); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (4th Cir. 1972); Ayoub v. Helm's Express, Inc., 300 F. Supp. 473, 474 (W.D. Pa. 1969).

102. 3 MOORE'S, *supra* note 22, ¶ 14-27, at 14-572.

103. *See* Buresch v. American LaFrance, 290 F. Supp. 265, 267 (W.D. Pa. 1968); Olson v. United States, 38 F.R.D. 489, 492 (D. Neb. 1965).

104. *See* text accompanying notes 43-44 *supra*.

a third-party defendant in federal court would have been available without question if the plaintiff had simply sued both the defendant and third-party defendant in state court.[105] This argument, however, assumes that the plaintiff anticipated that the third party would be impleaded. Moreover, the possible availability of a more convenient forum in state court should not bar federal jurisdiction in all cases, but should instead be a factor for the district court to consider in exercising its discretion.[106]

5. *Rule 82*

Some courts have argued that allowing ancillary jurisdiction over a plaintiff's claim against a non-diverse third party would violate rule 82 of the Federal Rules of Civil Procedure.[107] Rule 82 states: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."[108] The use of ancillary jurisdiction to broaden the scope of an action that is already properly before the court, however, should not be considered an extension of federal court jurisdiction.[109] The court already has jurisdictional power over the parties and the disputed factual situation. Ancillary jurisdiction would simply allow the court to hear an additional claim in an action over which the court already has jurisdiction. Furthermore, if rule 82 does require independent jurisdiction for a plaintiff's claim against a third-party defendant, it would also prevent a federal court from hearing the other rule 14(a) claims, *i.e.*, a defendant's claim against a third-party defendant and the latter's claim against the plaintiff. Federal courts have, however, held that ancillary jurisdiction exists over these rule 14(a) claims.[110]

In summary, courts denying ancillary jurisdiction over a plaintiff's

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105. *See* Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (4th Cir. 1972); Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398, 1399 (W.D. Pa. 1969); Ayoub v. Helm's Express, Inc., 300 F. Supp. 473, 474 (W.D. Pa. 1969).

106. Although the plaintiff in *Kroger* could have originally sued all of the parties in state court, she had no reason to do so because she was led to believe that diversity existed between her and Owen. By the time Owen finally challenged the jurisdiction of the district court there was some question whether the plaintiff's state remedy was still available or whether it was barred by the statute of limitations. 558 F.2d at 420. The district court stated that the plaintiff's state remedy had been barred by the statute of limitations. *Id.* The majority of the court of appeals declined to express an opinion on the matter because it had not been briefed by either party. *Id.* at 420 n.5. The dissenting opinion of the court of appeals, however, indicated that the remedy had not been barred, *id.* at 432 n.42 (Bright, J., dissenting), and quoted IOWA CODE ANN. § 614.10 (West 1946): "If after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first."

107. *See, e.g.*, Fawvor v. Texaco, Inc., 546 F.2d 636, 639 (5th Cir. 1977).

108. FED. R. CIV. P. 82.

109. *See* Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697, 703 (D. Kan. 1975).

110. *See* notes 15-19 *supra* and accompanying text.

claim against a non-diverse third-party fail to give a persuasive reason why a plaintiff's claim against a third-party defendant is distinguishable from other third-party claims under rule 14(a) over which ancillary jurisdiction is routinely granted. Moreover, none of the courts explain why their justifications for refusing to hear a plaintiff's claim against a non-diverse third-party defendant should not more properly be factors for the district court to consider as a matter of discretion. The *Kroger* test, as well as its predecessor in *Gibbs*, is a power/discretion test and leaves the court free to consider any factors militating against the assertion of ancillary jurisdiction over a plaintiff's claim against a third-party defendant.

B. *The Kroger Reasoning*

The court of appeals in *Kroger* gave two justifications for holding that the district court had jurisdictional power over plaintiff's claim against the third-party defendant. First, all of the parties to the controversy were already before the court, and second, the claim had common and interrelated facts with the rest of the action.[111] Certainly in terms of "convenience and fairness to litigants,"[112] a case meeting these requirements should be heard in one judicial proceeding. *Kroger* demonstrates the optimum factual situation in which a court should exercise its ancillary jurisdictional power. The trial was almost completed, and considerations of judicial economy, fairness, and convenience to the litigants certainly dictated that the court continue to hear the case and allow the jury to decide its outcome.[113] Here, instead of a collusive plaintiff trying to "do indirectly what he could not do directly," there was an innocent plaintiff and a third-party defendant who by "subtle and adroit pleading . . . [had] gained a substantial advantage."[114] If the trial went well, the third-party defendant could keep the jurisdictional point hidden. If the trial went badly or if it lost on the merits, the third-party defendant could then assert a jurisdictional challenge.[115]

In fact, because the third-party defendant in *Kroger* challenged the jurisdiction of the court late in the trial after misleading the plaintiff as to its place of residence, the question arises whether the reasoning of the Eighth Circuit would be applicable to a case in which nondiversity between the plaintiff and the third-party defendant was known at the time the third-party claim was made. The court's refusal to accept the third-party defendant's attack on its jurisdiction

111. 558 F.2d at 424. *See* text accompanying notes 54-56 *supra.*
112. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).
113. *See* text accompanying notes 57-60 *supra.*
114. 558 F.2d at 427.
115. *Id.*

could be interpreted to be an application of the estoppel doctrine. The Eight Circuit's reasoning, however, does not support the notion that *Kroger* should be limited to its facts. The court expressly based its holding upon *Gibbs*, which dealt with the jurisdictional power of the federal courts and not with the ability of a litigant to challenge that power.[116] The *Kroger* court did not hold that the third-party defendant's conduct prevented it from challenging the jurisdictional *power* of the district court; rather, the court stated that the third-party defendant's wrongdoing estopped it from asserting that the court abused its *discretion* in retaining jurisdiction.[117]

V. CONCLUSION

The United States Supreme Court, in deciding whether to affirm or reverse the Eighth Circuit in *Kroger*, must deal with the relationship between claims brought under rule 14(a) of the Federal Rules of Civil Procedure and the contours of the cases and controversies over which jurisdictional power is conferred upon the federal courts by article III of the Constitution.[118] The Supreme Court has never expressly decided the issue whether ancillary jurisdiction exists over any of the rule 14(a) claims. That federal judicial power exists over a defendant's claim against a third-party defendant without independent jurisdictional grounds, however, is so well established in the lower courts[119] and so desirable as a practical matter,[120] that it is unlikely that the Supreme Court will decide that the federal courts have never had jurisdiction over these claims. Justice Brennan in his dissenting opinion in *Aldinger v. Howard* indicated that although the Court refused to recognize pendent-party jurisdiction on the facts of *Aldinger*, the Court would not reach the "absurd result" of denying that jurisdiction existed over a defendant's claim against a third-party defendant.[121]

If the federal courts clearly have ancillary jurisdiction over a defendant's claim against a third-party defendant without independent jurisdictional grounds, then the Court should recognize that federal jurisdiction also exists over the other two rule 14(a) claims, *i.e.*, the

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116. *See* text accompanying notes 37-44 *supra.*

117. 558 F.2d at 427.

118. *See* text accompanying notes 9-10 *supra.*

119. *See, e.g.*, LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969); H.L. Peterson Co. v. Applewhite, 383 F.2d 430 (5th Cir. 1967); Stemler v. Burke, 344 F.2d 393 (6th Cir. 1965); Huggins v. Graves, 337 F.2d 486 (6th Cir. 1964); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3rd Cir. 1962); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

120. *See* text accompanying note 16 *supra.*

121. *See* 427 U.S. at 22 n.2 (Brennan, J., dissenting).

third-party defendant's claim against the plaintiff, and the plaintiff's claim against the third-party defendant.

The court of appeals in *Kroger*, indicated that as a matter of judicial power there is no distinction between the three types of claims arising under rule 14(a). The power of a district court to hear any of the rule 14(a) claims when both parties to it are citizens of the same state must be derived from the close relationship between that claim and the controversy that is already properly before the court. If ancillary jurisdiction exists over any of the rule 14(a) claims, it must exist over all of them.

Rule 14(a) provides that if the defendant brings a third-party defendant into federal court, the plaintiff may assert any claim he has against that third party that arises from the same transaction as the plaintiff's claim against the defendant.[122] In this situation, all of the parties are already properly before the court and the additional claim is based on the same facts as the principal claim. A federal court acquires jurisdiction over an entire controversy that is properly before it and should be able to resolve all disputes between the parties to that controversy that arise from the same factual occurrence, including a plaintiff's claim against a third-party defendant.

Kathleen E. McKay

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122. FED. R. CIV. P. 14(a).

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