

# The Forgotten Proviso of § 1367(b) (And Why We Forgot)

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Professors Rowe, Burbank, and Mengler, who helped draft 28 U.S.C. § 1367 in 1990, their chief antagonists, Professors Freer and Arthur,<sup>1</sup> and five additional kibitzers<sup>2</sup> destroyed most of a mid-sized forest in an initial ten-article donnybrook about the statute. Now the prestigious panel convened by the Civil Procedure Section of the Association of American Law Schools (“AALS”) in January 1998, including three of the original despoilers, surely finished the job.<sup>3</sup> Among them, these eleven law professors have left nothing new for anyone to say about supplemental jurisdiction.

I will therefore revisit an old problem, or set of problems, originally identified by Professor Freer, and the old solution, originally proposed by Professor Rowe and his colleagues, to gauge whether the solution worked, and, if it did not, to discuss why it failed.

Both the problems and the proffered solution were posed by § 1367(b), which seemingly denied plaintiffs in diversity-only cases the supplemental jurisdiction so generously extended by § 1367(a) to all claims that are part of the same case or controversy as a jurisdictionally independent claim. Subsection 1367(b) provides:

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*

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1. See Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991); Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991) [hereinafter Rowe, et al., *Reply*]; Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991) [hereinafter *Grasping at Burnt Straws*]; Thomas D. Rowe, Jr. et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991); Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007 (1991).

2. See Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3 (1992); Rochelle Cooper Dreyfuss, *The Debate Over § 1367: Defining the Power to Define Federal Judicial Power*, 41 EMORY L.J. 13 (1992); Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31 (1992); Wendy Collins Perdue, *The New Supplemental Jurisdiction Statute—Flawed But Fixable*, 41 EMORY L.J. 69 (1992); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85 (1992).

3. I have not had the benefit of their written presentations, but am confident that they are not pithy.

*such claims would be inconsistent with the jurisdictional requirements of section 1332.*<sup>4</sup>

According to the House report which accompanied the supplemental-jurisdiction bill, this subsection was intended to prevent a sneaky plaintiff from evading the jurisdictional requirements of 28 U.S.C. § 1332 in a diversity-only case “by the simple expedient of naming initially only those defendants whose joinder satisfies section 1332’s requirements and later adding claims not within original jurisdiction against other defendants who have intervened or been joined on a supplemental basis.”<sup>5</sup>

But left unqualified, § 1367(b) would have prevented even plaintiffs who are claimed against from asserting essentially defensive counterclaims, cross-claims, or third-party claims against nondiverse parties. When a plaintiff is claimed against, supplemental jurisdiction can be justified to give her a fair opportunity to defend herself fully in the federal forum. Her opportunity to evade the complete diversity requirement is also “more attenuated” because it depends on the double contingency that a nondiverse party will be joined by an original defendant and will then claim against the plaintiff.<sup>6</sup> As a result, pre-§ 1367 cases routinely extended ancillary jurisdiction for plaintiffs’ defensive claims against nondiverse parties, according to Professor Freer.<sup>7</sup> Hence one problem that he identified with § 1367(b): its seemingly inadvertent prohibition of supplemental jurisdiction for plaintiffs’ defensive claims.<sup>8</sup>

If, however, the plaintiff in a defensive posture should not usually be regarded as sneaky—that is, as one who pleads her case artfully from the outset to evade the jurisdictional requirements of § 1332—then the plaintiff who is dragged into federal court because the defendant removed the case on diversity-only grounds should not usually be so regarded either. After all, she chose the state court to hear her case and can usually count even less on the defendant to remove the case to federal court than a plaintiff in federal court can count on being claimed against by a later-joined nondiverse party.<sup>9</sup> And so Professor Freer identified

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4. 28 U.S.C. § 1367(b) (1994) (emphasis added).

5. H.R. REP. NO. 101-734, at 29 (1990). The report explained that the subsection thus “implement[ed] the principal rationale of *Owen Equipment & Erection Co. v. Kroger*,” 435 U.S. 365 (1978), which had refused on “sneaky plaintiff” grounds to extend ancillary or pendent party jurisdiction to a plaintiff’s claim against a nondiverse party who had been impleaded by the original defendant.

6. Moore, *supra* note 2, at 55.

7. Freer, *supra* note 1, at 464 n.104 (citing cases); see also Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 945-46 (1992); Darren J. Gold, Note, *Supplemental Jurisdiction Over Claims by Plaintiffs in Diversity Cases: Making Sense of 28 U.S.C. § 1367(b)*, 93 MICH. L. REV. 2133, 2165 n.134 (1995).

8. See Freer, *supra* note 1, at 482-84.

9. See McLaughlin, *supra* note 7, at 951. Thus, Professor McLaughlin observed that in removed actions, “the chances are remote that a plaintiff would attempt to manipulate federal court jurisdiction by filing in state court with the hope that the defendant will then remove to federal court and join additional parties to the action.” *Id.*

another problem with § 1367(b): its failure clearly to exempt removed cases from its ban on the listed plaintiffs' claims.<sup>10</sup>

Professor Freer was also troubled that § 1367(b) prohibited the exercise of supplemental jurisdiction over claims by plaintiff intervenors of right under Rule 24(a).<sup>11</sup> Because such an intervenor usually by definition has "an interest [in the action] . . . [and] is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest,"<sup>12</sup> § 1367(b)'s apparent proscription of jurisdiction for his claim denied him the opportunity for full protection in the federal action.

But Professor Rowe and his colleagues offered a solution to these problems which, they promised, would secure "the benefits of the lower case law development" and avoid such "statutory rigidity."<sup>13</sup> They added the "Proviso" at the end of § 1367(b) (italicized above), qualifying the proscriptions on the listed plaintiffs' claims. The Proviso indicated that the proscriptions would apply only "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." They predicted that "[s]ympathetic attention to that language, in light of the expressed congressional intent 'to implement the principal rationale of *Kroger*,' should provide a sensible answer to" the problem of jurisdiction for plaintiff's defensive claims that Professor Freer had identified.<sup>14</sup> The Proviso also theoretically provided a solution for the problem of plaintiffs' claims in removed actions. Because the possibility of plaintiff's evasion of the requirements of § 1332 is attenuated in a removed action, a federal court could exercise supplemental jurisdiction over his otherwise § 1367(b)-proscribed claims on the theory that it would not be inconsistent with the complete diversity requirement of § 1332.<sup>15</sup> Finally, although Professor Rowe and his colleagues did not suggest (or apparently intend) that the Proviso could be applied to rescue the plaintiff intervenor of right, nothing on its face precluded such an application.

Of course, the Proviso did not actually say any of this. It only vested an apparent measure of discretion in the courts to decide the jurisdictional issue in diversity-only cases on a claim-by-claim basis. Commentators were duly critical: the Proviso was "one of the most confusing aspects of the statute";<sup>16</sup> its choice of language was "unfortunate" and would "perpetuate[] the doubt about the proper

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10. Freer, *supra* note 1, at 485.

11. *Id.* at 477.

12. FED. R. CIV. P. 24(a).

13. Rowe et al., *Reply*, *supra* note 1, at 959; see also David D. Siegel, *Practice Commentary*, 28 U.S.C.A. § 1367, at 829, 834 (1994) ("The last clause of subdivision (b) of § 1367 may offer the courts some leeway in avoiding an overly rigid construction of the subdivision.").

14. Rowe et al., *Reply*, *supra* note 1, at 960. Moreover, the Proviso offered the same solution to another problem with § 1367(b): its apparent application to alienage cases under §§ 1332(a) (2)-(4). Professor Rowe and his colleagues assumed that, qualified by the Proviso, § 1367(b) would not "lock in the complete diversity rule for alienage cases," but would simply "leave[] the situation as it stood before." *Id.* at 955.

15. See *id.* at 960 n.90.

16. Dreyfuss, *supra* note 2, at 23.

scope of the complete diversity requirement";<sup>17</sup> and the lenient interpretations urged by the draftsmen were "not compelled by the statute and require[] the courts to read the statute creatively."<sup>18</sup> But at least its ambiguity would not make things worse for a non-sneaky plaintiff.<sup>19</sup>

Both the problems and a statutory solution were thus adequately identified by the first wave of commentators. But, as Professor Freer remarked, "the proof of this statute is in the application."<sup>20</sup> Has the solution offered by the Proviso worked?

### I. HAS THE SOLUTION WORKED?

Seven years after enactment of the statute, I could find *no* case in which a court applied the Proviso to allow supplemental jurisdiction over an otherwise § 1367(b)-proscribed claim. What is more, only four decisions even discuss the Proviso, three of them invoking it *against* supplemental jurisdiction, and the fourth merely quoting, without applying, Professor Siegel's practice commentary that the Proviso might be applied to allow supplemental jurisdiction.<sup>21</sup>

In *Guaranteed Systems, Inc. v. American National Can Co.*,<sup>22</sup> the defendant in a state court action had removed the case to federal court on diversity-only grounds and then counterclaimed against the plaintiff, prompting plaintiff to assert a third-party claim against a nondiverse third-party defendant. This, then, was not only a classic defensive claim by the original plaintiff, but a defensive claim in an action that he had originally filed in state court. The fact was not lost on the court:

Essentially, Plaintiff acts as a defendant to [the original defendant's] claim when it impleads [the nondiverse third-party defendant] for indemnity. . . . Plaintiff cannot be said to have tried to evade the requirements of the diversity statute when it first filed in state court and then impleaded [the third-party defendant] only in response to [the original defendant's] counterclaim.<sup>23</sup>

Yet, far from invoking the Proviso to find supplemental jurisdiction for this claim and thus rescue the concededly non-sneaky plaintiff, the court reluctantly read it to prohibit supplemental jurisdiction whenever "the plaintiff and the other party are non-diverse."<sup>24</sup> In fact, the court complained that,

[i]f it were not bound by the plain terms of the statute, the court would be swayed by the interests of justice and efficiency to construe Plaintiff's claim

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17. Moore, *supra* note 2, at 44.

18. McLaughlin, *supra* note 7, at 951.

19. See Steinman, *supra* note 2, at 105 ("[T]he language need not (and I would say, 'should not') make it any *more* difficult to persuade a court to assert supplemental jurisdiction than it had been before § 1367.") (parenthetical and emphasis in original).

20. Freer, *supra* note 1, at 966.

21. See *Manhattan Fire & Marine Ins. v. Northwestern Reg'l Airport Comm'n*, No. 1:92 CV 576, 1993 U.S. Dist. LEXIS 6858 (W.D. Mich. Mar. 26, 1993).

22. 842 F. Supp. 855 (M.D.N.C. 1994).

23. *Id.* at 857.

24. *Id.* at 856.

as a claim by a *defendant* against a person made party under Rule 14 rather than a claim by a plaintiff, and thus to allow it to proceed under 28 U.S.C. § 1367(b)[]!<sup>25</sup>

Thus the solution to the problem of the plaintiffs' defensive claims in diversity-only or removed actions actually became part of the problem in this case.

On comparable facts, the plaintiff in *Chase Manhattan Bank, N.A. v. Aldridge*<sup>26</sup> got even less sympathy for his argument that the Proviso should be applied to permit supplemental jurisdiction over his defensive third-party claim against a nondiverse third-party defendant. The court found that the "plain language of § 1367(b) appears to prohibit" it from exercising such jurisdiction, and then added insult to injury by finding that "the extension of supplemental jurisdiction over the third-party claims would assuredly be 'inconsistent with the jurisdictional requirements of section 1332,'" quoting the Proviso.<sup>27</sup> This plaintiff had chosen the federal forum, unlike his counterpart in *Guaranteed Systems*, but the court gave no hint that it would have given the Proviso more generous application in a removed case; "there is no reason why the plaintiff should be permitted to bring this action against the third-party defendants when it would have been unable to assert a claim against them . . . directly."<sup>28</sup>

Finally, in *Lennox Industries, Inc. v. Yusti*, the court actually acknowledged that some commentators had suggested that the Proviso could be interpreted as prohibiting supplemental jurisdiction "only when [a Rule 24(a)] intervention [as a plaintiff] is filed in an attempt to evade jurisdictional requirements."<sup>29</sup> But it then purported to find a "consensus" in the cases and commentary for "a more restrictive interpretation; namely, that supplemental jurisdiction is *entirely* precluded over claims by parties intervening in (or joined to) the action as plaintiffs."<sup>30</sup> It therefore found that the intervention of a nondiverse party as a plaintiff would, without more, be inconsistent with the requirements of § 1332. *Lennox* seems to bear out Professor Moore's prediction that "most courts will probably view § 1367(b) as precluding supplemental jurisdiction *always* in the situations specified in the statute."<sup>31</sup>

At least in these cases the courts deigned to take notice of the Proviso, whether or not they misconstrued it. In other cases to which it should arguably apply, the courts ignored it altogether. In *AKE Sikeston Ltd. Partnership v. Weslock National, Inc.*<sup>32</sup> for example, the court refused to exercise supplemental

25. *Id.* at 857 (emphasis in original).

26. 906 F. Supp. 866 (S.D.N.Y. 1995).

27. *Id.* at 868-69.

28. *Id.* at 869. The court added, however, that it would not have allowed supplemental jurisdiction over the plaintiff's third-party claims in any case because it "would not serve the interests of justice and efficiency" in light of the fact that the plaintiff had commenced a protective state court action against the third-party defendants. *Id.*

29. 172 F.R.D. 617, 622 (D.P.R. 1997) (quoting McLaughlin, *supra* note 7, at 969).

30. *Id.* at 622-23 (emphasis added) (parenthetical in original); *see also* Liberty Mut. Group v. Hillman's Sheet Metal & Certified Welding, Inc., 168 F.R.D. 90, 92 (D. Me. 1996) ("[T]he plain language of § 1367(b), as revised in 1990 . . . calls into question whether district courts may ever exercise supplemental jurisdiction over any non-diverse plaintiff-intervenor.").

31. Moore, *supra* note 2, at 48 (emphasis added).

32. 120 F.3d 820, 833 (8th Cir. 1997).

jurisdiction over the plaintiff's claim against a nondiverse party impleaded by the original defendant after the defendant had removed the action to federal court. The court quoted the first part of § 1367(b) in support of its decision, neatly excising the Proviso with an ellipsis.<sup>33</sup>

Nor has the commentary been kinder to the Proviso. On the AALS panel, Professor Freer still studiously ignored the Proviso when complaining that, read "literally," § 1367(b) disallows defensive plaintiffs' claims against nondiverse defendants. He does not explain why the Proviso is not also part of a literal reading. A leading treatise agrees, lamenting that "the statutory language [of § 1367(b)] ignores the possibility that a plaintiff might assert claims from a defensive posture"<sup>34</sup> and arguing that the prohibition of plaintiffs' cross-claims against nondiverse parties "makes no policy sense."<sup>35</sup> This analysis, of course, ignores the possibility that the Proviso can be deployed to treat these claims more sensibly.

In short, the solution that the Proviso offered to some of the problems that Professor Freer identified has either failed outright in the handful of decisions that have taken any notice of it at all, or has simply been forgotten in the rest.

## II. WHY HAS THE SOLUTION FAILED?

I will suggest three reasons why the solution presented by § 1367(b)'s Proviso has failed or been forgotten. First, such a small number of cases have presented the problems at which it is aimed that it turns out to be a solution still searching for a problem. Second, the plain meaning doctrine of statutory construction has overshadowed the Proviso's delegation of common lawmaking authority to the courts. Third, and most important, "the jurisdictional requirements of section 1332,"<sup>36</sup> which are the benchmarks set by the Proviso, have proven far more elusive than the draftsmen of § 1367 imagined.

### *A. The Small Number of Cases To Date*

The heated debate triggered by the passage of § 1367 implied that a large number of cases would be impacted by its alleged problems, justifying the hyperbole about the § 1367 "drafting disaster"<sup>37</sup> that attended the debate. My very rough estimate of the numbers, however, shows a different picture. Of approximately 185 cases reported on LEXIS at this writing that cite § 1367 or § 1367(b), or mention supplemental jurisdiction, almost 100 are not diversity-only cases or make only passing and miscellaneous references to the statute without presenting any issues relevant to this Comment. Approximately 30 involve the joinder of nondiverse or below-limit plaintiffs' claims under Rules 20 or 23—a problem of omission under the statute, to be sure, but not one that is addressed

33. *See id.*

34. 16 ROBERT C. CASAD ET AL., MOORE'S FEDERAL PRACTICE § 106.42[2], at 106-59 (3d ed. 1998).

35. *Id.* § 106.41, at 106-57 to 106-58.

36. 28 U.S.C. § 1367(b) (1994).

37. *Grasping at Burnt Straws*, *supra* note 1, at 972.

by § 1367(b) or its Proviso. Approximately forty were cases that were removed on diversity-only grounds, but only one of these apparently involved defensive claims by the plaintiff, and only one—*Guaranteed Systems*, already discussed—remarked on the fact of removal, and then promptly disregarded it in refusing to exercise jurisdiction over the plaintiff's defensive claim.<sup>38</sup> Another 20 or so involve the attempted joinder of party-plaintiffs under Rules 24(a) or 19(a). As noted above, courts might try to apply the Proviso in some of these cases, if they disregard the legislative intent to resolve the prior anomalies under these rules against supplemental jurisdiction (and here I am vastly over-simplifying), but they have not. Most of the few remaining cases involved supplemental jurisdiction over defendants' claims that is clearly permitted by the statute and, again, does not implicate the Proviso. We are left with fewer than half a dozen cases that involve plaintiffs' claims against parties who are joined under Rule 14 and one clearly wrong case finding no supplemental jurisdiction for a defendant's claim against parties joined under Rule 13(h) to the *defendant's* counterclaim.<sup>39</sup>

Now, some could take issue with how I have classified some of these cases, and others could take more time and care than I have to get more accurate figures. But even conceding a few cases either way under the theory of "good enough for commentator's work," the results are revealing. Leaving to one side the removed cases and those involving Rules 19(a) or 24(a) plaintiff-joinder, the courts have had few reported occasions to apply the Proviso to exercise supplemental jurisdiction over an otherwise § 1367(b)-proscribed claim. Of course we cannot know how many joinder opportunities were foregone by lawyers who read § 1367(b) restrictively, but given its ambiguity and the problematical nature of such a reading (according to Professor Rowe and his colleagues), it is unlikely that many plaintiff's lawyers would have been deterred from testing the statute.

These very crude estimates suggest that Professor Rowe was essentially correct when he speculated that plaintiffs' defensive claims "have probably come up far more on law school exams than in reported decisions."<sup>40</sup> He could have said the same of removed cases more generally. Subsection 1367(b)'s Proviso, therefore, has not been applied in the manner suggested by its draftsmen chiefly because it has not been needed very much. Short of being applied generally to rescue all removed plaintiffs or persons proposed to be joined as plaintiffs under Rules 19 or 24, which was apparently not the intent of the statute, the Proviso is a solution still searching for a problem.

### *B. The Overshadowing Effect of Plain Meaning Construction*

In the fullest discussion to date of supplemental jurisdiction over plaintiff's defensive claims, a court stressed that the "plain language" of § 1367(b)'s

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38. *Guaranteed Sys., Inc. v. American Nat'l Can Co.*, 842 F. Supp. 855 (M.D.N.C. 1994).

39. *See Mayatextil, S.A. v. Liztex U.S.A., Inc.*, No. 92 Civ. 4528 (LJF), 1993 U.S. Dist. LEXIS 6527 (S.D.N.Y. May 18, 1993).

40. Rowe et al., *Reply*, *supra* note 1, at 959.

limitation prohibited it from exercising jurisdiction.<sup>41</sup> But, of course, the Proviso is also part of the subsection's plain language. Indeed, it seems to be inseverable because it makes the limitations of the subsection apply only when supplemental jurisdiction would be inconsistent with the jurisdictional requirements of § 1332. It may be that the physical placement of the Proviso is partly to blame, lost, as it is, at the end of a more precise listing of proscribed claims.<sup>42</sup> But neither plain language construction, nor the physical order of the plain language, can justify ignoring the Proviso.

Perhaps the real interpretational problem is applying plain meaning to a delegation of lawmaking authority to the courts. Plain meaning construction arguably works best, and is most attractive, when applied to concrete, absolute and precise terms, like the listed proscriptions of § 1367(b). Such terms seemingly have plain meaning. The Proviso, on the other hand, simply delegates interpretation to the courts. As one commentator has explained, it could have said

that district courts shall not exercise supplemental jurisdiction when extending jurisdiction would *violate* section 1332's requirements. Instead, by providing that federal courts should determine whether the simultaneous exercises of supplemental and diversity jurisdictions are *inconsistent*, Congress directs federal courts not to focus upon section 1332's literal requirements, but to examine whether the exercise of supplemental jurisdiction would encourage plaintiffs' evasion of those requirements.<sup>43</sup>

This understanding of the Proviso's operation is consistent with the assertion by Professor Rowe and his colleagues that it was intended to deal flexibly with requirements that were themselves "a product of judicial interpretation."<sup>44</sup>

The rule of plain meaning construction has been touted as the antithesis of lawmaking by judges.<sup>45</sup> It therefore co-exists at best uneasily with a statutory proviso that vests something like common law authority in the courts. In these circumstances, the "plainer" meaning of the listed proscriptions of § 1367(b) is

41. See *Chase Manhattan Bank, N.A. v. Aldridge*, 906 F. Supp. 866, 868 (S.D.N.Y. 1995); *accord* *Liberty Mut. Group v. Hillman's Sheet Metal & Certified Welding, Inc.*, 168 F.R.D. 90, 92 (D. Me. 1996) (stressing the "plain language" proscription). Of the 185 cases uncovered in a LEXIS search for § 1367(b) and supplemental jurisdiction at this writing, no fewer than 20 invoke the "plain language" of the subsection in making their jurisdictional determination.

42. Professor Steinman suggested that it might have more bite if it preceded the listing. Steinman, *supra* note 2, at 107 n.86.

43. Ellen S. Mouchawar, Note, *The Congressional Resurrection of Supplemental Jurisdiction in the Post-Finley Era*, 42 HASTINGS L.J. 1611, 1659-60 (1991) (each emphasis in original).

44. Rowe et al., *Reply*, *supra* note 1, at 954.

45. See Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 97 (1984) (noting that "plain meaning" statutory construction permits a court to command obedience by invoking the authority of the legislature: "[t]he judge's authority to compel obedience comes from th[e] external decision [of the legislators who wrote the plain language], not from the judge's own desires"). Judge Easterbrook adds, however, apropos of the Proviso, that "[w]hen a judge issues a ruling under the authorization of a statute or proviso entitling a judge to invent a common law on the subject . . . , the court's claim to obedience is as strong as if the judge were enforcing a 'plain' statute." *Id.* Arguably, the few courts that have considered the Proviso to date have overlooked Judge Easterbrook's addendum.



likely to overshadow the murkier and anachronistic assignment of decisional authority to the courts by the Proviso. No wonder that some district courts, transfixed by the plain meaning of the proscriptions, miss or misinterpret the Proviso.

*C. The Uncertainty of "the Requirements of Section 1332"*

The most likely explanation for the failure or disregard of the Proviso, however, is uncertainty about the meaning of "inconsistent with the jurisdictional requirements of section 1332."<sup>46</sup> There is a broad consensus that the law of diversity jurisdiction "is filled with irrational and logically indefensible rules,"<sup>47</sup> forming a "crazyquilt combination of sometimes vague and cryptic statutory directives and judge-made doctrines that may or may not coincide with each other or the preexisting statutory framework."<sup>48</sup>

In the crazyquilt of diversity jurisdiction, "the jurisdictional requirements of section 1332" can refer to at least three different requirements, which I will discuss below in turn. The most obvious are the requirements for complete diversity, read into the statute since *Strawbridge v. Curtiss*,<sup>49</sup> and an amount in controversy in excess of \$75,000. A third, more subtle requirement is the flexible application of the other requirements to allow fair and efficient packaging of claims in diversity-only actions. This requirement—which appears to have been all but lost in the post-§ 1367 cases—may well tip the balance in favor of exercising supplemental jurisdiction for many otherwise § 1367(b)-proscribed claims. After all, Professor McLaughlin reminds us, "[t]he final phrase has no added meaning unless it was intended as a qualification of the general proscription against supplemental jurisdiction for claims by plaintiffs."<sup>50</sup>

1. Complete Diversity

Professor Rowe explained that the requirement of § 1332 that he and his colleagues had in mind was complete diversity: they intended only to prohibit the exercise of supplemental jurisdiction "when that exercise would permit ready circumvention of the complete diversity requirement."<sup>51</sup> Most of the courts have agreed, reading the rule of complete diversity as the sole object of § 1367(b)'s

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46. 28 U.S.C. § 1367(b) (1994).

47. Chemerinsky, *supra* note 2, at 5.

48. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1769 (1992).

49. 7 U.S. (3 Cranch) 267 (1806).

50. McLaughlin, *supra* note 7, at 948. More accurately, since the subsection has no *general* proscription on such claims but only a proscription of listed claims, the Proviso has no meaning except as a qualification on this more limited proscription.

51. Rowe et al., *Reply*, *supra* note 1, at 953.

proscriptions in general<sup>52</sup> or of the Proviso in particular.<sup>53</sup> There are at least three problems with this reading of § 1367(b).

First, the Proviso's cross-reference to "the jurisdictional requirements of 28 U.S.C. § 1332" cannot mean *just* complete diversity<sup>54</sup> because that makes the Proviso superfluous. A party in a diversity-only case does not need supplemental jurisdiction *unless* the opposing party is nondiverse (or the supplemental claim is below-limit).<sup>55</sup> The Proviso's reference to the "jurisdictional requirements of section 1332" therefore necessarily means something other than complete diversity on the supplemental claim. The inquiry is necessarily not just whether the supplemental claim violates the requirements of the statute—which it does by definition—but rather whether it is "inconsistent" with them, as noted above.

Second, the complete diversity rule is itself, in the view of many commentators, "incoherent, irrational, and indefensible," as one put it in oral remarks to the panel.<sup>56</sup> Because the complete diversity requirement is itself "in no way consistent with the underlying legitimate purposes of the diversity jurisdiction," Professor Redish reminds us that, "it makes no sense to shape supplemental jurisdiction in a manner designed to protect the complete diversity requirement."<sup>57</sup> The Proviso, then, is ambiguous about whether it measures inconsistency against the irrational complete diversity rule, or, more broadly, against the diversity statute itself. The two are not congruent.

Third, the subsection does not plainly state that its intent is only to prevent the sneaky plaintiff from evading the complete diversity rule. Its silence permitted the court in *Lennox Industries* to reject the sneaky-plaintiff interpretation of the subsection in favor of an absolute proscription of the listed plaintiff's claims. Moreover, had the subsection more plainly targeted the sneaky plaintiff, the court might still have been at a loss to identify him confidently.<sup>58</sup> Even the plaintiff asserting a "defensive" claim, after all, may have framed his initial action to invite a claim that would present the opportunity for claiming against a nondiverse party. Often only circumstantial evidence of subjective intent would distinguish the sneaky defensive plaintiff from the non-sneaky. Neither § 1367(b) nor its legislative history provide any guidance to the courts in drawing this distinction. The alternative, however, to ad hoc line-drawing is categorical classification, which may explain why the subsection's categorical proscription on plaintiff's claims against certain defendants has been enforced so often in disregard of the qualifier added by the Proviso.

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52. See *Shanaghan v. Cahill*, 58 F.3d 106, 111 (4th Cir. 1995) (stating that § 1367(b) "speaks only to preventing attempts by plaintiffs to circumvent complete diversity").

53. See *Mutual Life Ins. Co. v. Adams*, 972 F. Supp. 1386, 1392 (N.D. Ala. 1997) ("The [Proviso] clearly refers to the doctrine of complete diversity.")

54. See *Guaranteed Sys., Inc. v. American Nat'l Can Co.*, 842 F. Supp. 855, 856 (M.D.N.C. 1994).

55. See, e.g., *Perdue*, *supra* note 2, at 75; *Gold*, *supra* note 7, at 2152.

56. Roger H. Trangsrud, Remarks at the AALS Section on Civil Procedure, Symposium on a Reappraisal of the Supplemental-Jurisdiction Statute: Title 28 U.S.C. § 1367 (Jan. 9, 1998).

57. Redish, *supra* note 48, at 1819.

58. See *Gold*, *supra* note 7, at 2157.

## 2. Amount in Controversy

In finding that § 1367(b) addresses the complete diversity requirement of § 1332, the Court of Appeals for the Fourth Circuit added that nothing in the subsection precludes the exercise of supplemental jurisdiction for below-limit claims.<sup>59</sup> Thus, it would presumably find the subsection's proscription inapplicable to the plaintiff's impleader of a diverse third-party defendant on a below-limit claim.<sup>60</sup> Some commentators agree, asserting that every claim subject to the subsection "necessarily involves a claim against a nondiverse party,"<sup>61</sup> thus ignoring the possibility of a diverse below-limit claim.

If this is true, however, it certainly is not compelled or supported by the plain language of the statute. The Proviso looks to "the jurisdictional requirements of section 1332," which plainly include the amount in controversy. Indeed, if anything, this requirement is plainer than the complete diversity requirement, which is only a judicial gloss on the "citizens of different states" language of § 1332.<sup>62</sup> In *Pellegrino v. Pesch*,<sup>63</sup> the court therefore refused, because it "would be inconsistent with § 1332's jurisdictional requirements" to exercise supplemental jurisdiction over the plaintiff's below-limit claim against a diverse defendant joined under Rule 20(a) with a diverse defendant against whom other claims in the aggregate satisfied the amount in controversy requirement.

But this requirement presents the same interpretative problems presented by the complete diversity requirement. The Proviso's reference cannot simply mean that every supplemental claim must satisfy the amount in controversy requirement because then the Proviso would be superfluous. Moreover, the amount in controversy requirement arguably embraces at least some part of the pre-§ 1367 case law on aggregation of claims, which, for example, permitted aggregation of claims against a single defendant in *Pellegrino* to satisfy the amount, but did not permit aggregation *between* defendants. Although one commentator finds the rules of aggregation "fixed and unassailable" in urging their application in § 1367(b),<sup>64</sup> the better view is that they have "evolved haphazardly and with little reasoning" and "serve no apparent policy."<sup>65</sup> If this is an accurate view of them, the amount in controversy requirement again presents the question whether the

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59. See *Shanaghan v. Cahill*, 58 F.3d 106, 111 (4th Cir. 1995).

60. See also *Corporate Resources, Inc. v. Southeast Suburban Ambulatory Surgical Ctr., Inc.*, 774 F. Supp. 503 (N.D. Ill. 1991) (exercising supplemental jurisdiction over a plaintiff's below-limit claim against an original co-defendant without discussing § 1367(b)).

61. Gold, *supra* note 7, at 2152.

62. See 16 CASAD ET AL., *supra* note 34, § 106.45[3], at 106-70. Most commentators have agreed that the subsection addresses the amount in controversy requirement of § 1332, as well as complete diversity. See Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1, 41 (1992); McLaughlin, *supra* note 7, at 970; Laura L. Hirschfeld, *The \$50,000 Question: Does Supplemental Jurisdiction Extend to Claims Between Diverse Parties Which Do Not Meet § 1332's Amount-in-Controversy Requirement?*, 68 TEMP. L. REV. 107, 139 (1995).

63. No. 91-C-4967, 1992 U.S. Dist. LEXIS 9507, at \*18-19 (N.D. Ill. June 26, 1992).

64. Hirschfeld, *supra* note 62, at 135.

65. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 36, at 209 (5th ed. 1994).

Proviso measures consistency of supplemental jurisdiction over a below-limit claim against the illogical case law of aggregation, or against some broader and presumably more coherent policy of § 1332. Because some courts and commentators have ignored the amount in controversy requirement altogether in considering the Proviso, it has also been left unclear whether the “sneaky plaintiff” test was intended to apply to below-limit claims as well as to claims against nondiverse parties. If it was, we have the same practical problems in applying it to the former that we have in applying it to the latter.

### 3. Fairness and Efficiency

In *Guaranteed Systems*, the court lamented that the plain terms of § 1367(b) prevented it from serving “the interests of justice and efficiency”<sup>66</sup> by exercising supplemental jurisdiction over the removed plaintiff’s defensive third-party claim against a nondiverse party. This lament assumed not only that the complete diversity requirement was absolute, but also that it was the sole relevant requirement of § 1332 (the claims were all above-limit). The assumption ignores another made by the Supreme Court in *Kroger*: “that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction.”<sup>67</sup> In other words, the complete diversity and amount in controversy requirements are themselves softened by a third “practical” requirement of flexibility—flexibility to achieve fairness and justice (“to protect legal rights”), as well as efficiency (to “effectively . . . resolve an entire, logically entwined lawsuit”).<sup>68</sup>

Of course, the efficiency goal of this flexibility was partly codified in § 1367(a), which authorizes supplemental jurisdiction over all claims in the same case or controversy with an independent claim, and partly in § 1367(c), which effectively gives the court discretion to refuse to exercise supplemental jurisdiction when it would be just as efficient for a state court to hear the supplemental claim. But Professor Siegel also saw the goal of efficiency at work in the Proviso:

If the situation is one in which the court can be convinced that the exercise of supplemental jurisdiction would not undermine the complete-diversity requirement of § 1332, and that the exercise would expedite the disposition of the case while the rejection of supplemental jurisdiction would not spare the federal court all that much, especially where the claims already before the court rest on a firm jurisdictional foundation and would have to remain for adjudication even if the added claim should be rejected, the final clause of subsection (b) should afford the court a tool with which to sustain supplemental jurisdiction of the added claim. It would certainly contribute to a more economical use of the time of both the federal and state courts, a

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66. *Guaranteed Sys., Inc. v. American Nat’l Can Co.*, 842 F. Supp. 855, 857 (M.D.N.C. 1994).

67. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978).

68. *Id.*

motive that also lies behind the pendent and ancillary doctrines that are now embraced under “supplemental” jurisdiction.<sup>69</sup>

More significantly, the fairness goal of flexibility should also be read into the Proviso of § 1367(b). In fact, this requirement may help to explain what more is needed, beyond the inevitable incomplete diversity or insufficient amount in controversy, to make exercise of supplemental jurisdiction over a claim identified in § 1367(b) inconsistent with the jurisdictional requirements of § 1332. The answer suggested by *Kroger*'s assumption is that the exercise of supplemental jurisdiction over a plaintiff's nondiverse or below-limit claim against a listed defendant is inconsistent with § 1332's jurisdictional requirements when it is not necessary to achieve fairness to the plaintiff.<sup>70</sup>

Of course, with this answer and a dollar the overburdened federal judge could buy a cup of coffee. Whether the exercise of jurisdiction is necessary to permit fair and efficient packaging of the action is an unavoidably ad hoc and sometimes subjective inquiry. The pre-§ 1367 case law may serve as one reference point, but it may itself be too ambiguous and inconsistent to lend much consistency to the inquiry.<sup>71</sup>

On the other hand, why flinch at vesting—or leaving—some discretion in the courts to achieve fairness and efficiency in actions that satisfy the constitutional case or controversy requirement? As Professor Dreyfuss reasoned,

Since the judiciary has the expertise and information needed to assess the effect on the parties of deciding only parts of their dispute, it is in the best position to know what reach it needs in order to assure that justice is done. Since the judiciary also understands how the docket would suffer under a broad construction of jurisdiction, it is well positioned to weigh the costs and benefits of extending this authority.<sup>72</sup>

Subsection 1367(b) is perhaps best seen as a flexible proscription on the probably few plaintiffs or plaintiff-intervenors who try to play fast and loose with the complete diversity or amount in controversy requirements of the diversity statute, leaving the courts considerable leeway in identifying such sneaky plaintiffs circumstantially and in packaging the claims of the remaining plaintiffs fairly and efficiently in diversity-only actions.

#### CONCLUSION

When the manifold jurisdictional requirements of § 1332 are understood, § 1367(b)'s Proviso appears to be a laudable attempt to soften the “plain language” rigidity of the subsection's proscriptions without locking the federal courts into the prior case law of ancillary and pendent party jurisdiction or attempting to

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69. Siegel, *supra* note 13, at 834.

70. Indeed, an early draft of the supplemental-jurisdiction statute actually authorized supplemental jurisdiction “if necessary to prevent substantial prejudice to a party or third party.” 1 FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 563-68 (1990).

71. See, e.g., Shay S. Scott, Comment, *Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 72 OR. L. REV. 695, 725 (1993); Wolf, *supra* note 62, at 43.

72. Dreyfuss, *supra* note 2, at 23-24.

anticipate every possible joinder scenario. Its apparent failure to date may be nothing more than validation of Professor Rowe's prediction that most of the problems that Professor Freer identified—for which the Proviso was tailored—would be rare. It may, however, also raise a caution about attempts to vest common lawmaking authority in the courts in an age of plain language statutory construction. Ultimately, however, its failure probably chiefly reflects the impracticality of asking the federal courts to exercise a flexible and sensible supplemental jurisdiction by referring them generically to a body of law that is neither.