Lect 28

Intervention – when a non-party enters the lawsuit without a member of the lawsuit bringing him in

start with intervention of right

standard is similar to that of a necessary party

***Rule 24. Intervention*** *(a) Intervention of Right.  On timely motion, the court must permit anyone to intervene who:  
    (1) is given an unconditional right to intervene by a federal statute; or  
    (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.*

1) African-Americans who have been refused employment by a fire department are suing the city for racial discrimination in hiring. They are asking for preferential treatment in hiring by the fire department as a remedy for past discrimination. May the white firefighters (or white applicants to the fire department) who would be affected by this relief intervene of right? Would there be any conditions on their intervention?

- they can intervene of right for the same reason that they are a necessary party

- only real difference is that they have to show that the fire department will not adequately represent their interests, but that is probably true

- BUT probably would not have all the rights of a party

- like a party they can introduce evidence, have lawyer present arguments etc., but only concerning the constitutionality of the remedy requested

- and unlike a party probably cannot thwart settlement

Problem – what if they do not intervene?

* could they subsequently bring suit in a separate action?
* if they can’t it will violate their due process rights (their rights are adjudicated w/o participation)
  + if they can, possible unfairness to fire department (may be whipsawed) or to African-Americans
* may make sense to have rule that says that if they knew (or maybe if they should have known or got Mullane notice) and failed to intervene then they will be precluded
* something like this has been created by federal statute for civil rights actions
  + 42 U.S.C. § 2000e-2(n) (don’t need to know the details)
* but some states are moving toward a common law doctrine that is similar: if a third party is a necessary party-intervenor of right, has notice of the action, and fails to intervene, then will be bound by the proceedings
* IMPORTANT: this is a cutting-edge doctrine and if it is recognized applies ONLY if the third party is a necessary party-intervenor of right
  + this is an exception to the rule that you cannot be bound by proceedings in which you did not participate
* P wants to build a dump in some wetlands
* The Army Corp of Engineers refuses to issue a permit
* P sues the Army Corp of Engineers
* May people who live by the wetlands intervene on the side of the government?

- have proper interest (not having dump smells on property)

- gov’t arguably does not represents those interests

- once again, may be limited in role as parties – there is a worry about private citizens hijacking the governmental suit

- often the intervenors’ role is very limited – only to pursue appeal if the government loses and chooses not to appeal

24(b) permissive intervention

**(b) Permissive Intervention.  
    (1) In General. On timely motion, the court may permit anyone to intervene who:  
        (A) is given a conditional right to intervene by a federal statute; or  
        (B) has a claim or defense that shares with the main action a common question of law or fact.  
. . .**

- one question of law or fact in common

- but must weigh efficiency of intervention against prejudice to current parties

- delay, confusion, and discord

- generally permissive internvention is rare

Supplemental Jurisdiction

- efficiency to bringing certain related causes of action together in federal court

- allowed and sometimes required under joinder rules

- but that doesn’t create SMJ on its own

P NY sues D NY under federal securities law

P joins under R 18(a) a related state law fraud claim (required by claim preclusion)

D impleads insurer (NY) for state law insurance contract claim

D also brings compulsory CC for breach of contract (P didn’t pay all the money he owes)

* there are good reasons to allow all these actions to be brought in federal court with the federal securities law claim, even though they don’t have their own source of SMJ

How to justify this?

It is constitutional because they are part of the same constitutional case or controversy as the federal action

U.S. Const. Article III. Section. 2.   
  
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** 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.

historically such a form of SMJ was divided into pendent and ancillary (nothing really rides on the distinction anymore)

- pendent

- generally applies to someone bringing an action that has federal SMJ who add causes of action to it that arises from a common nucleus of operative fact as the federal SMJ action

- pendent *party* jurisdiction is pendent jurisdiction that adds new parties

ancillary

- includes two case

1) actions brought by someone other than the plaintiff that lack their own source of federal SMJ but have a common core (or nucleus) of operative fact with the action that does  
(compulsory counterclaims, crossclaims)  
 - 2) joined cause of action, although not really arising out of the common nucleus of operative fact, asserts legal rights that were activated by the cause of action that has an independent source of federal SMJ actions  
- impleader  
- supplementary proceedings to effectuate P’s judgment

- e.g. P sues D under federal law, gets a judgment. The proceedings are continued to effectuate the judgment by attaching the D’s property. The action to effectuate the judgment is under state law and if the parties are not diverse there will be no SMJ for it on its own. It is simply a state law action to collect a debt. BUT it has ancillary jurisdiction.

Problem

P (NY) sues D1 (NJ) for brawl

- P joins D2 (NY) under R 20(a)

- same const’l case or controversy

BUT allowing pendent jurisdiction would eviscerate 1332’s requirement of complete diversity

P could use pendent jurisdiction to circumvent the complete diversity requirement – we don’t want that

- SO: just because pendent/ancillary jurisdiction may be constitutionally allowed does not mean it is *statutorily* allowed

- in the past courts had to look to the particular statute providing jurisdiction for the core claim to see whether allowing pendent/ancillary jurisdiction was compatible with the purpose of that statute

NOW the statutory question is answered by 28 USC 1367 (supplemental jurisdiction statute) which was passed in response to the Finley case

28 U.S.C. § 1367. - Supplemental jurisdiction

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

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

Examples

P (NY) sues D (NY) under federal securities law in federal court  
P joins under R 18(a) a state law fraud claim against D   
D impleads insurer I (NY) for state law contract claim  
D also brings compulsory counterclaim for breach of contract (P didn’t pay all the money he owes under the securities contract)

ALL have supplemental jurisdiction

they satisfy 1367(a) because they are all part of the same constitutional case or controversy as the federal action

* and none of the exceptions in 1367(b) apply because the court has original jurisdiction under 1331, not 1332

What if the D is granted a directed verdict on the federal securities action? What if the D gets the federal securities action dismissed for failure to state a claim?

Must the court dismiss the actions with supplemental jurisdiction?

NO – the constitutional case or controversy remains

PROBLEM:

- P(NY) and D(NY) wish to litigate their state law battery action in federal court before their friend, federal judge X, who is willing.  
- How to overcome the problem of SMJ?  
- P sues D in federal court claiming that D’s hitting him was a violation of federal securities law  
- P joins to the federal action a state law battery action  
- When the federal securities law action is dismissed for failure to state a claim, there is still SMJ for the battery action  
- should this work...?

- NO – in this case, where the federal action is being used to simply gin up federal SMJ for an essentially state law case, the court must dismiss the federal securities action *for lack of SMJ*, not failure to state a claim

– when it is dismissed for lack of SMJ, then the court must dismiss the state law actions

- the fact that a court has supplemental jurisdiction for an action does not mean, however, that it must take the action:

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -  
(1) the claim raises a novel or complex issue of State law,  
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,  
(3) the district court has dismissed all claims over which it has original jurisdiction, or  
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

So if the federal securities action is dismissed early on, the federal court has a good reason to dismiss the supplemental actions (although it is not obligated to do so)

NOTE: If the supplemental action is dismissed under 1367(c) it can be refiled in state court without worrying about the state statute of limitations:

1367(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Is 1367(d) constitutional? This is federal regulation of state court procedure (highly unusual). Why is that allowed? The SCt upheld it on the ground that the purpose was protecting federal jurisdiction. Without it, plaintiffs would be unwilling to sue in federal court for worry that the state actions dismissed under 1367(c) would be barred forever.

NOTE: 1367(d) does not apply if the state action is dismissed for lack of SMJ – it applies only to actions that have supplemental jurisdiction but are nevertheless dismissed discretionarily

A (NY) sues B(NY) under federal securities laws   
  
A joins state common law fraud claim against C (NY), an auditor for B who was also responsible for the fraud - is this allowed under Fed Rules?

- Yes under R 20(a)

- is there constitutional power to take the action against C?

- yes –same constitutional case or controversy

- But before 1367, the SCt had held that pendent party jurisdiction was not statutorily allowed

- they said this in Finley v. United States (US 1989) and Aldinger v. Howard (US 1976) which involved the jurisdictional statutes giving federal courts SMJ for actions against the US and civil rights actions, but it would appear that they would have said the same thing about actions in federal court under 1331 too

Congress didn’t like this so it passed 1367

Basically was intended to abrogate Finley and Aldinger, but keep the rest of the law on pendent and ancillary jurisdiction the same

* But the statute was misdrafted

examples of 1367 in action

let’s start with examples where it works:

A (Cal.) sues E (Nev.) (B’s employer) under state law for a battery committed by B (Cal.)   
- E impleads B   
- B then brings a suit against A on the harm done to B in their fight

does the action by B against A have supplemental jur?

Yes

* first step, it is part of the same constitutional cause or controversy as A v. E
* second step, because A v. E has original jurisdiction only under 1332, we must worry about whether the exceptions in 1367(b) apply
* but they don’t: all the exceptions involve actions by plaintiffs and B v. A isn’t an action by a plaintiff

- Pre-1367 ancillary jurisdiction was allowed in such a scenario under Revere Copper & Brass v. Aetna

- after all, B is not using ancillary jurisdiction to circumvent the requirements of complete diversity – he didn’t even want to have a suit in federal court in the first place

- and the same thing is true under 1367

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Imagine instead that it was A that joined an action against B

That is like Owen Equip & Erection Co v. Kroger, where pre-1367 the SCt held that pendent jurisdiction should not be allowed

* A(Cal) might sue an employer(Nev.) under diversity, knowing E would implead B(Cal.) and then join an action against B,
  + that would be a way to use pendent jurisdiction to get a state law action between two Californians into federal court
* and supplemental jurisdiction is not allowed under 1367 too
* first step, A v. B is part of the same constitutional cause or controversy as A v. E
* second step, because A v. E has original jurisdiction only under 1332, we must worry about whether the exceptions in 1367(b) apply
* and they do: this is a claim by a plaintiff against someone made a party under R 14 when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332 (the parties are not diverse)