Supplemental Jurisdiction Notes

I. General Discussion of SJ

A. When is supplemental jurisdiction necessary or unnecessary? We don't ever need supplemental jurisdiction if there's an independent basis of original jurisdiction for a case to be in federal court.

Examples:

P v. D
(TX) (TX)
→ federal claim

This one's easy:
28 USC §1331 is an independent basis of original jurisdiction (SMJ)

P v. D
(TX) (OK)
→ $100K

Also easy:
28 USC §1332(a) is an independent basis of original jurisdiction (SMJ)

B. Every claim asserted in federal court must have its own source of ~~original~~ jurisdiction to satisfy the federal constitutional and statutory subject matter jurisdiction requirements

Examples:

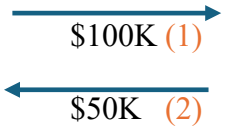
P v. D
(TX) (OK)
→ $100K (1)
← $100K (2)

(1) No problem here. 28 USC §1332(a) is an independent basis of SMJ.

(2) D's Rule 13 counterclaim against P? Also, no problem. Again, 28 USC §1332(a) is an independent basis of SMJ for D's cc.

But what about this example?

P v. D
(TX) (OK)



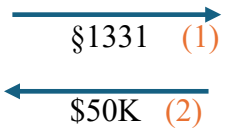
(1) 28 USC §1332(a) is an independent basis of SMJ.

(2) D's Rule 13 counterclaim against P? There's no original SMJ over this claim. Why not?

C. What if we have at least one claim that comes within the court's original jurisdiction but we also have a claim that does not have an independent basis of original jurisdiction to be in federal court? In this situation, we must consider whether the claim over which the court does not have original jurisdiction can be heard in federal court as an exercise of the court's supplemental jurisdiction.

Example:

P v. D
(TX) (OK)



Do we have an anchor claim (that is, at least one claim that comes within the court's original jurisdiction)? Of course. That's Claim (1) [P's claim against D]. 28 USC §1331 is an independent basis of original jurisdiction as to that claim.

Do we have a claim that doesn't have an independent basis of original jurisdiction to be in federal court? Again, yes. That's Claim (2) [D's cc against P]. It's not a federal question claim; and it is for less than the minimum AIC for §1332.

Thus, the only way that Claim (2) can be heard in the same federal case is if it comes within the court's supplemental jurisdiction.

D. What does it mean to come within the federal court's supplemental jurisdiction? The answer requires that we consider both the constitutional and statutory aspects to supplemental jurisdiction.

1. The constitutionality of supplemental jurisdiction: *UMW v. Gibbs*

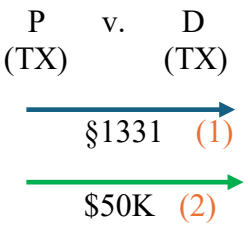
As you know, federal courts are courts of limited jurisdiction. So how can a federal court hear a claim that doesn't come within one of the limited grants of original jurisdiction given to it by the Constitution and Congress?

The Court answered that question (at least partly) in *UMW v. Gibbs*:

> "Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under (the) Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"

CM at 344.

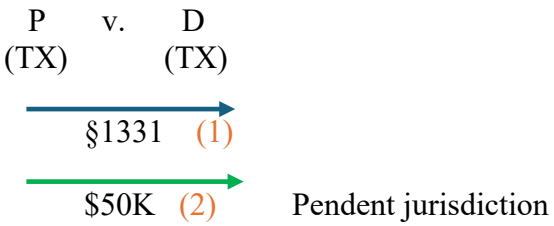
To illustrate, here's the example that *Gibbs* was talking about:



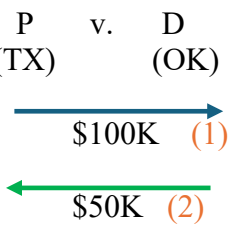
We'll come back to what "a close enough relationship" means, but let's first finish with why *Gibbs* thought it was constitutional to exercise jurisdiction in the example above over Claim (2). The key idea is in the word that I've highlighted in green: "case." Where does that word come from? Can you now articulate *Gibbs*' rationale for why it's constitutional for the court to exercise what the Court called "pendent" jurisdiction (and what today we refer to as "supplemental" jurisdiction over Claim (2)?

Note that the quote above from *Gibbs*, strictly speaking, is only saying that it would be constitutional to exercise jurisdiction in the specific example above—that is, where the anchor claim arises under section §1331 and the plaintiff wants to assert a second claim against the same defendant over which the court does not have a basis of original jurisdiction to hear. But, as we'll see, the Court later confirmed that it would also be constitutional to exercise jurisdiction over claims lacking an independent original source of jurisdiction in a number of other contexts as well. There were two common law doctrines that were invoked: "pendent" and "ancillary" jurisdiction.

Examples:



Pendent jurisdiction



Ancillary jurisdiction

2. The statutory aspect of supplemental jurisdiction

And so this was the state of the world until 1990. That is, until 1990 the federal courts exercised these common law doctrines of "pendent" and "ancillary" jurisdiction to hear claims that did not come within a grant of original jurisdiction but were closely enough related to a claim that did.

Query: We've emphasized before that the constitutional subject matter jurisdiction heads are not self-executing, meaning that just because it is constitutional does not mean that the courts have power to hear a case. Why, then, did the Court allow for exercises of pendent and ancillary jurisdiction solely because it found them to be constitutional (but before Congress had acted to reach up into Article III section 2 and give it statutorily to the federal courts)?

The answer seems to be that the Court thought this kind of extended jurisdiction was proper as long as Congress had not prohibited it:

> "In *Finley*, we nonetheless reaffirmed and rationalized *Gibbs* and its progeny by inferring from it the interpretive principle that, in cases involving supplemental jurisdiction over additional claims between parties properly in federal court, the jurisdictional statutes should be read broadly, on the assumption that in this context Congress intended to authorize courts to exercise their full Article III power to dispose of an 'entire action before the court [which] comprises but one constitutional 'case.'"

Exxon Mobil v. Allapattah Services (citing *Finley v. United States*, 490 US 545, 548 (1989)) [CM at 350]. The term "supplemental jurisdiction" in the quote above comes from the statute that Congress finally enacted in 1990—and it's to that statute that we now turn our attention.

28 U.S.C. §1367(a)

1. This is the grant of the type of jurisdiction the Court in *Gibbs* (and other cases) used to call "pendent" or "ancillary" jurisdiction and found to be constitutional. The statute uses the term "supplemental" to replace the prior terms "pendent" and "ancillary."

2. The statute is meant to track the idea articulated in *Gibbs* that if a claim that was not within the court's original jurisdiction had "a close enough relationship" to an anchor claim—that is, a claim that was within the court's original jurisdiction—then the two can be heard together if the two arose from a "common nucleus of operative fact." Thus, "so related" as it is used in section §1367(a) is meant to be the same as "common nucleus of operative fact" as *Gibbs* used that phrase.

A. But what does "so related" and "common nucleus of operative fact" mean? How are they applied by courts? Below are some quotes from commentators and courts (the bold highlights are mine):

From Wright & Miller, Federal Practice & Procedure (section 3567.1):

In practice, § 1367(a) **requires only that the jurisdiction-invoking claim and the supplemental claim have some loose factual connection**. This standard is broad and fact-specific, and should be applied with a pragmatic appreciation of the efficiency promoted by supplemental jurisdiction. …

On the other hand, of course, the standard is not without limit. For example, **a mere causal relationship between the two claims may not suffice**. Likewise, the fact that claims arise from an employment relationship will not necessarily mean that they are sufficiently related to support supplemental jurisdiction. In Lyon v. Whisman, the court rejected supplemental jurisdiction over state-law claims for failure to pay a bonus entirely or timely. Those claims were joined to an underlying Fair Labor Standards Act claim for failure to pay overtime wages. The court found that the only common element in the claims—the employment relationship—was insufficient to satisfy § 1367(a).

From an Eleventh Circuit case:

Generally, claims arise out of a common nucleus of operative fact when they "**involve the same witnesses, presentation of the same evidence, and determination of the same, or very similar, facts**." Palmer v. Hosp. Auth. of Randolph Cty., 22 F.3d 1559, 1563–64 (11th Cir. 1994); see also Lyndonville Sav. Bank & Trust Co. v. Lussier, 211 F.3d 697, 704 (2d Cir. 2000) (a sufficient relationship will be found if "**the facts underlying the federal and state claims substantially overlap[ ] ... or where presentation of the federal claim necessarily b[rings] the facts underlying the state claim before the court**"). However, state-law claims that only "relate generally" to federal claims through a broader dispute and do not share any operative facts are insufficient for supplemental jurisdiction. Chelsea Condo. Unit Owners Ass'n v. 1815 A St., Condo. Grp., LLC, 468 F.Supp.2d 136, 141 (D.D.C. 2007).

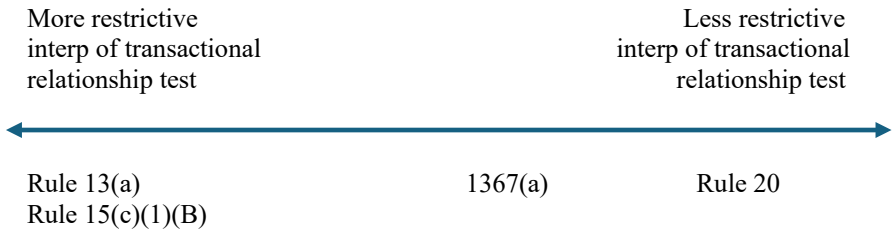
From a Seventh Circuit case:

In Baer v. First Options of Chicago, Inc., 72 F.3d 1294, 1298-1301 (7th Cir.1995), we concluded that § 1367 has extended the scope of supplemental jurisdiction, as the statute's language says, to the limits of Article III — which means that **"[a] loose factual connection between the claims**" can be enough, quoting from Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir.1995).

From a Second Circuit case:

"We have routinely upheld the exercise of pendent jurisdiction **where the facts underlying the federal and state claims substantially overlapped**, or where the presentation of the federal claim necessarily brought the facts underlying the state claim before the court."

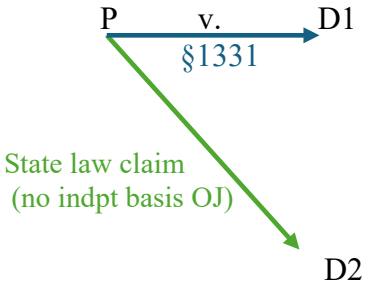
B. May also be useful to include a spectrum of transactional relationship tests:



Query: If a counterclaim would be deemed compulsory under Rule 13(a), do you think it would necessarily satisfy section §1367(a)?

Query: Do you think that a counterclaim deemed to be permissive under Rule 13(b) could satisfy section §1367(a)?

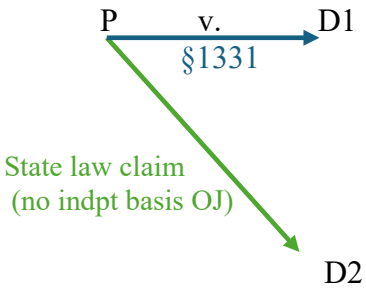
3. The last sentence of section §1367(a) makes clear that supplemental jurisdiction includes claims involving additional parties. Example:



In *Finley* (decided in 1989), the Court had refused to recognize "pendent jurisdiction" over the state law claim. Congress's enactment of §1367 in 1990, thus, changed the result in *Finley* for future cases.

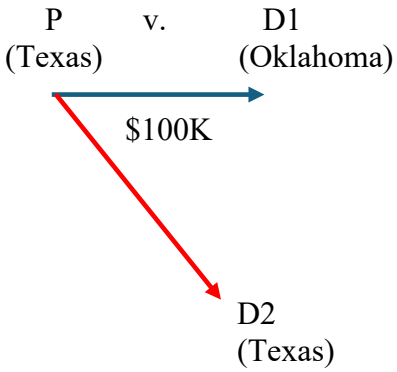
4. But don't forget that *Allapattah* says that in "order for a federal court to invoke supplemental jurisdiction, it must first have original jurisdiction over at least one claim in the action" and that incomplete diversity "destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere." ~~CM 376~~. This is what the Court meant by the contamination theory and its statement that "the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum." ~~CM 384~~.

A. We never have to worry about contamination theory when the anchor claim is §1331.

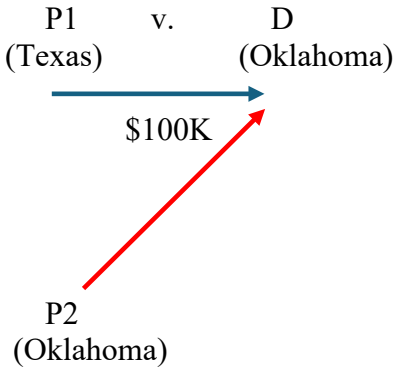


B. But it gets more complicated when we are talking about diversity jurisdiction.

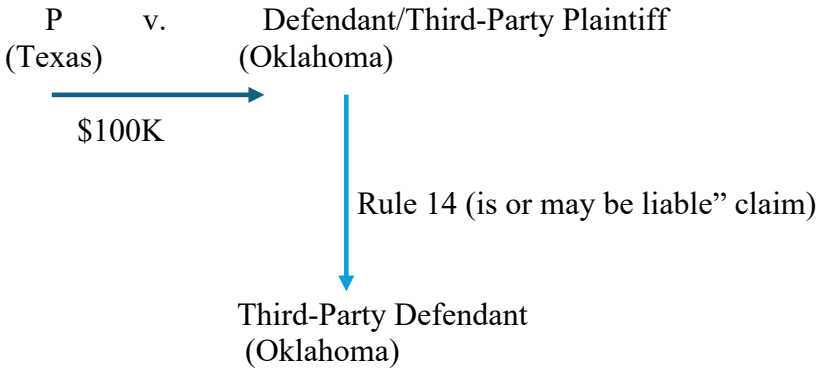
-We know that there can't be supplemental jurisdiction over P's claim against D2 because there's no original jurisdiction: D2's presence contaminates complete diversity



-And just as surely, we know that there can't be supplemental jurisdiction over P2's claim against D for the same reason: P2's presence in the case contaminates complete diversity

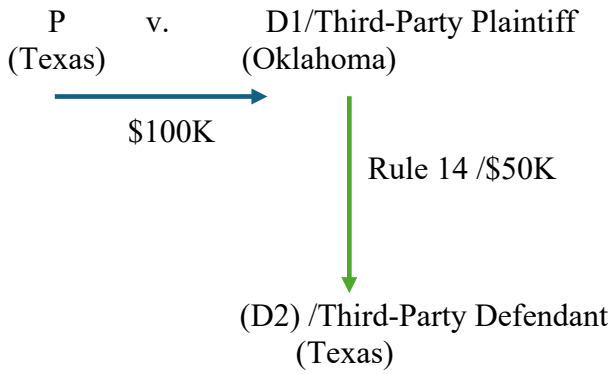


But what about this situation. Does the TPD, who is nondiverse as to the TPP (but not as to the original P) contaminate original jurisdiction under §1332?



Although perhaps one could read *Allapattah* as saying that the presence of nondiverse TPD contaminates OJ under §1332, that isn't how courts typically have read it. Partly, that's because before *Allapattah*, in *Kroger*, the Court distinguished what had been known as ancillary jurisdiction, which covered claims "by a defendant party haled in to court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court." *Kroger*, 537 U.S. 365, 377 (1978).

But then what about this situation? We know for sure that P could not originally assert a claim against a nondiverse TPD. That's Kroger and is now an exception to SJ listed in §1367(b) ("claim by a plaintiff against a person made a party under Rule 14"). But does the assertion of a claim by TPD, who is nondiverse to P, contaminate original jurisdiction under 1332?



[Just for the moment, leave aside the §1367(b) aspect to this. Instead, just think about whether *Allapattah*'s contamination theory would apply if nondiverse TPD asserts a claim against P. Remember that if TPD's claim against P contaminates any source of original jurisdiction under §1332, then we never even reach §1367.]

Assuming we do have a basis of original jurisdiction under §1332, then it is time to consider §1367(b).

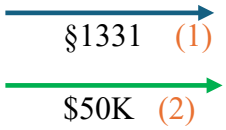
28 U.S.C. §1367(b)

1. While §1367(a) broadly recognizes supplemental jurisdiction, §1367(b) sets limits on how far supplemental jurisdiction can go.

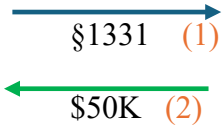
2. Section 1367(b)'s limitations on supplemental jurisdiction only apply when the source of original jurisdiction is diversity (§1332).

Examples:

P v. D
(TX) (TX)



P v. D
(TX) (TX)

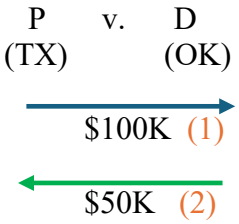


Rule 13(a) cc

Section 1367(b) is irrelevant in both of these examples because the source of original jurisdiction is §1331, not §1332.

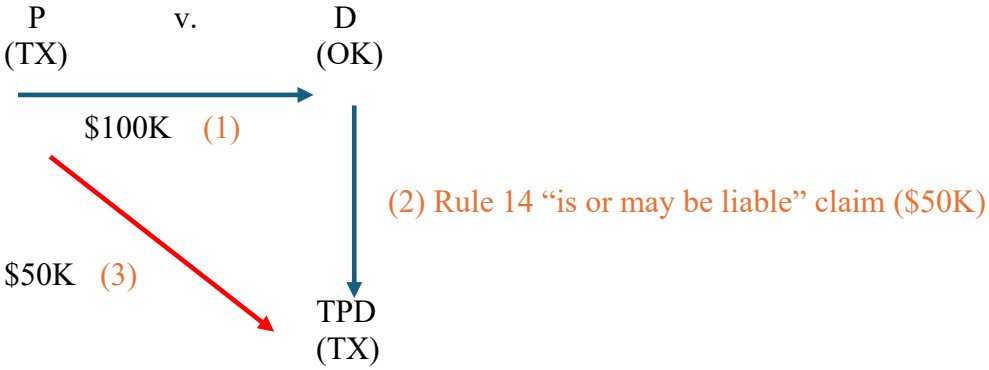
3. Section 1367(b)'s limitations on supplemental jurisdiction only apply to claims asserted by plaintiffs

Example:



Section 1367(b) must now be considered because the source of original jurisdiction over Claim (1) is §1332. However, the claim in green is not a claim by a "plaintiff." What is it? We call it a claim by the defendant, who also goes by the name "counter-plaintiff." Thus, the limitations that Congress imposed in §1367(b) on the exercise of supplemental jurisdiction are inapplicable in this situation. As long as Claim 2 is "so related" to Claim 1 (within the meaning of §1367(a)), the court has supplemental jurisdiction to hear Claim 2.

Here's one more example. It's important to consider this one because it seems to be behind Congress's thinking—at least in large part—in enacting the §1367(b) limitations. The example is based on *Kroger*, 437 U.S. 365 (1978):



(1) – *Kroger* recognized that there was no problem exercising jurisdiction over this claim because it has an independent basis of original jurisdiction (§1332)
(2) – As noted earlier, *Kroger* recognized that there was no problem exercising jurisdiction over this claim because, as a Rule 14 claim, it necessary will arise from the "common nucleus of operative fact" as the P's claim against D. Today, we would also say that there's no problem because §1367(b) doesn't apply
(3) – *Kroger* held that there should not be ancillary jurisdiction over this claim because it potentially could allow the P to do an end run around the complete diversity rule. Today, it's clearly prohibited by §1367(b) because this claim is a claim by a P against a person made a party under Rule 14.

4. Finally, I want to mention now (but we'll come back to it later) that there's uncertainty about how to read the last proviso of section 1367(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) … when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."

But before we discuss the last proviso of §1367(b), let's finish walking through the rest of the statute.

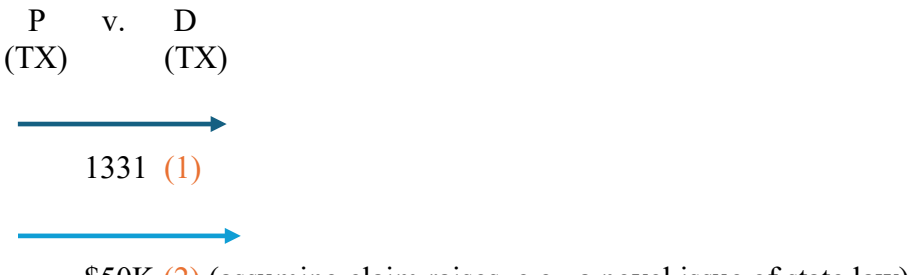
28 U.S.C. §1367(c)

1. Even if a claim comes within the grant of supplemental jurisdiction in §1367(a) and is not otherwise prohibited by §1367(b), Congress has given the courts discretion courts must still decide whether to exercise their discretion not to exercise supplemental jurisdiction under §1367(c). As the statutory section reads:

> (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.

2. The majority view among courts is that unless one of the §1367(c) factors are met, the court must exercise supplemental jurisdiction—that it does not have discretion to decline jurisdiction.

3. What is clear is that if a court exercises its discretion and declines supplemental jurisdiction, it only dismisses the claim that lacks an independent basis of original jurisdiction; the jurisdiction-invoking claim (the anchor claim, as I call it) can remain.



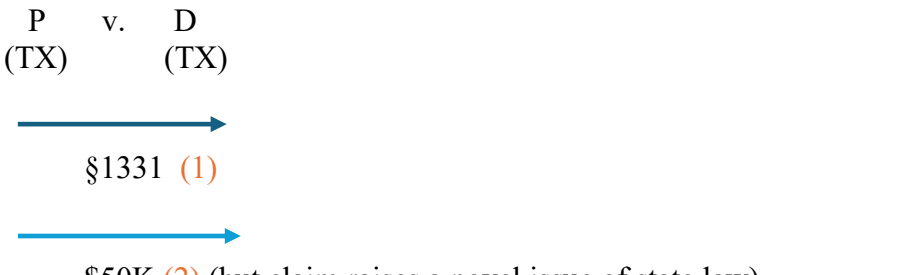
Although a court might have supplemental jurisdiction under §1367(a) [assuming that Claims (1) and (2) are "so related"], if it declines to exercise that jurisdiction, e.g., because the state law claim raises a novel issue of state law, then it just dismisses the state law claim; the §1331 federal question claim can remain in federal court.

Of course, the P is free to dismiss the §1331 claim and file both in state court (assuming the statute of limitations has not run).

[Note that talking about the statute of limitations would take us into a discussion of §1367(d)'s tolling provision, but that's going into more detail than I want to cover in this class. But I will mention that a fairly recent USSCT case addressed the meaning of §1367(d) and held that §1367(d) should be read broadly as a "stop-the-clock" type of tolling provision. *See Artis v. District of Columbia*, 138 S. Ct. 594 (2018).]

Example:

Let's say the P files suit 75 days before SOL expires



If the p refiles the state law claim in state court 50 days after §1367(c) dismissal, what result? Under *Artis*, it would be timely.

Putting it all together: how to approach a supplemental jurisdictional problem:

Step 1: Search for original jurisdiction. Examine each claim to see if it has a source of original jurisdiction

Step 1A: For federal question claims, you have to do the regular FQ analysis

- Does the claim pass the *Bell v. Hood* test? [Reminder: the P's federal claim will support jurisdiction under §1331 unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is **wholly insubstantial and frivolous**." *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)].

- Does the federal issue arise as part of the **P's well-pleaded complaint**? [Reminder: normally, this will only be met when the P asserts a claim under federal law. But, very infrequently, there will be state law claims that still arise under §1331: either because the satisfy (1) the substantial federal question doctrine (discussed in *Grable*); or (2) the complete preemption doctrine (which we mentioned briefly, but you don't have to know well for class).

Step 1B: For diversity cases, we look for complete diversity under §1332(a) (though remember it's possible for Congress to require only minimal diversity); and we look for a sufficient AIC (which requires application of the "to a legal certainty" test from *St. Paul Mercury Co*. **And remember *Allapattah* instructs that in order for there to be a basis of original jurisdiction under §1332, there must be complete diversity between the P and any parties adverse to the plaintiff.** Which also leads to a reminder that there's another sub-step to take if the source of OJ is diversity: we have to ask if the second claim would divest the court of OJ because it would contaminate complete diversity. If it would, then that's it; no OJ and so no SJ. If not, keep going to 1367.

Step 2: Section 1367(a). Assuming that there is an anchor claim (that is, at least one claim for which the court has an independent basis of original jurisdiction), we next examine whether all other claims for which there is no independent basis of original jurisdiction are "so related" to the jurisdiction-invoking claim to come within §1367(a).*

* Probably useful to add that when the anchor claim is a federal question claim the second step is §1367(a), but that if the anchor claim's jurisdiction is based on §1332, then a more efficient second step would be to consider if any of the limitations in §1367(b) apply before doing the §1367(a) analysis. If Congress has withheld supplemental jurisdiction under §1367(b), then it doesn't matter that the claims are related under §1367(a).

Step 3: Section 1367(b). If the source of original jurisdiction for the anchor claim is diversity under §1332(a), then we must consider whether any of the limitations in §1367(b) prohibit the exercise of supplemental jurisdiction. There are basically two questions:

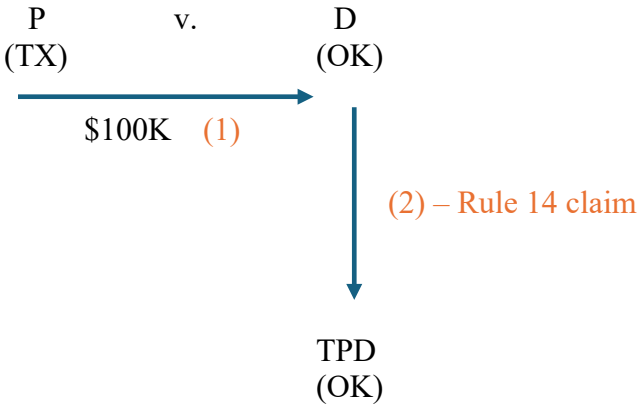
- Is the claim over which the court would need to exercise supplement jurisdiction a claim that's prohibited by §1367(b)?

- But what about the last proviso of §1367(b)?

Step 4: Section 1367(c). Finally, even if we satisfy §1367(a) and §1367(b) does not otherwise withhold supplemental jurisdiction, the court must decide whether to exercise its discretion to decline supplemental jurisdiction under §1367(c).

Working through the examples from the problems in the CM:

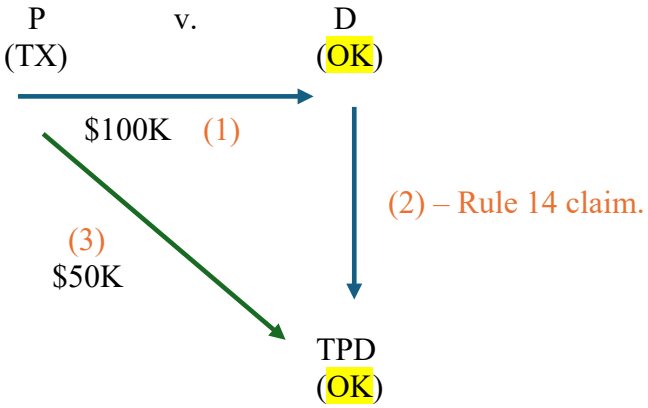
Question 1 (note: I'm breaking this question down into pieces so it's easier to discuss):



(1) – There's no problem exercising jurisdiction over this claim. Try to articulate why.

(2) – There's no problem exercising jurisdiction over this claim either. Try to articulate why.

Question 1 (here's the rest of it):



(3) – How do you analyze whether there is supplemental jurisdiction to hear this claim? This, finally, gives us the opportunity to discuss the last proviso of §1367(b). Here, again, is the relevant part of §1367(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) … when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."

One construction: the last phrase should be read to mean "when exercising supplemental jurisdiction over such claims would be inconsistent with the [complete diversity requirement] of §1332."

If "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332" means that you can't exercise supplemental jurisdiction over any claim if it would destroy complete diversity **or if it doesn't have a sufficient amount in controversy**, then how does §1367(b) have any meaning at all? As Professors Wright & Miller put it in their Federal Practice and Procedure treatise (section 3567.2): "This clause is curious. Indeed, at one level, it seems meaningless. After all, if the claim was consistent with the requirements of §1332, there would be no need for supplemental jurisdiction; the claim would invoke diversity of citizenship jurisdiction. Clearly, then, it must be referring to the requirements of diversity for the underlying dispute, and not this single claim."

In other words, it may be that the best reading of the last proviso is that by "jurisdictional requirements of §1332" Congress just meant the "complete

diversity" requirements of §1332. That's a plausible reading. It's certainly consistent with the Court's only concern in *Kroger*—that the P was trying to do an end run around the complete diversity requirement. For all of these reasons, this is the interpretation I favor. But note that there are plenty of courts that have not read it this way. (e.g., they would not allow a P to assert a less-than-$75K claim against a diverse Rule 14 TPD).

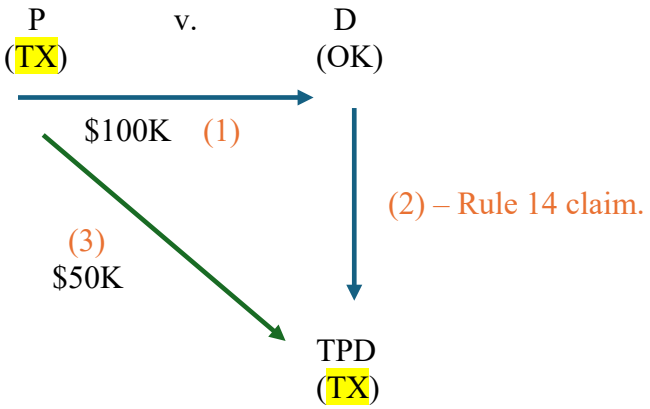
Other construction: the last phrase imposes no additional requirements

But there's another possibility: that the last phrase wasn't meant to have independent meaning (i.e., wasn't meant to impose additional requirements)—it was just meant to clarify why Congress was prohibiting supplemental jurisdiction over the various claims. As in, what Congress meant when it said "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332" was something like this: *We're prohibiting supplemental jurisdiction in the various situations listed above because we think exercising supplemental jurisdiction in those situations would be inconsistent with what we intended in §1332*.

On this reading, there would be no supplemental jurisdiction over a less-than-$75K claim by a P against a diverse Rule 14 TPD.

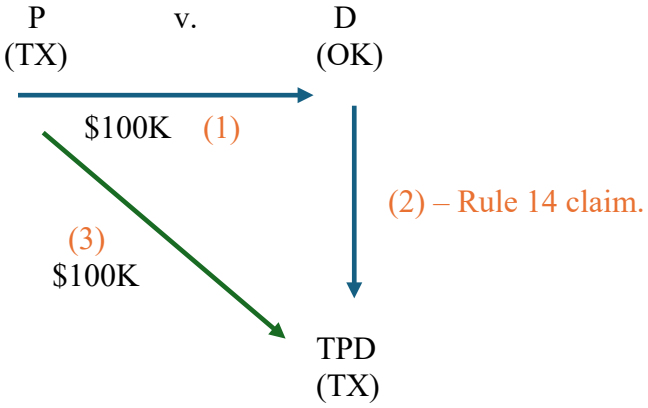
As I say, my view is that this reading is far more strained, but it certainly is another possibility—and one that a great many courts have adopted.

Question 2:



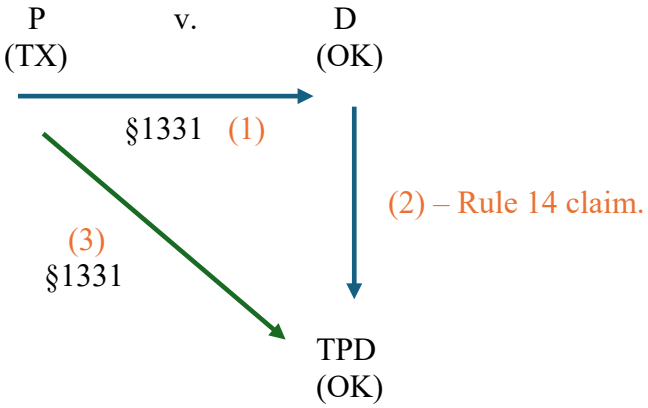
(3) – How do you analyze whether there is supplemental jurisdiction to hear this claim? Note that on either construction of the last proviso of §1367(b), the answer is the same.

Question 3:



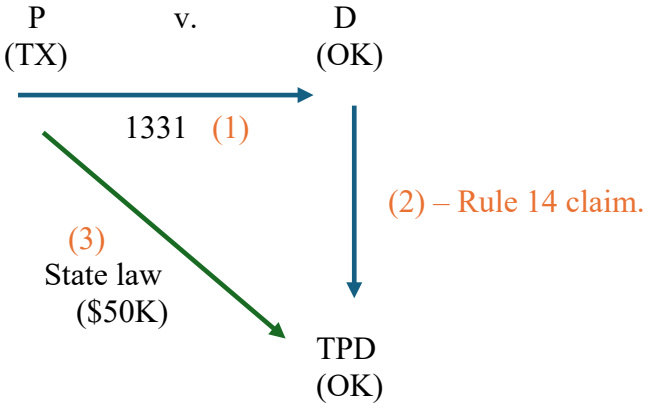
Does your answer change if P's claim against T in this fact pattern is for $100K?

Question 4:



Can all claims be adjudicated in the same federal action?

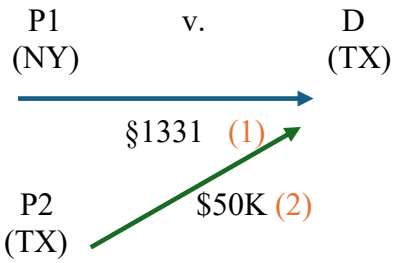
Question 5:



Can Claim 3 now be adjudicated in the same federal action?

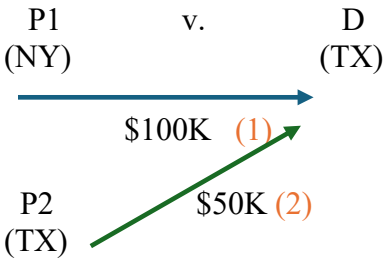
Additional:

Question 6:



Can all claims be adjudicated in the same federal action?

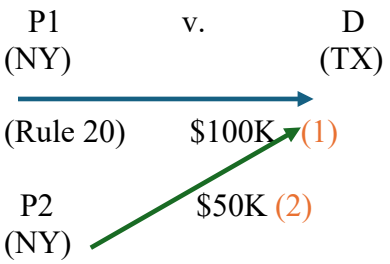
Question 7



Can all claims be adjudicated in the same federal action?

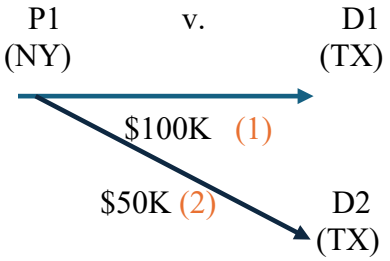
What if the second claim actually was a 1331 claim?

Question 8



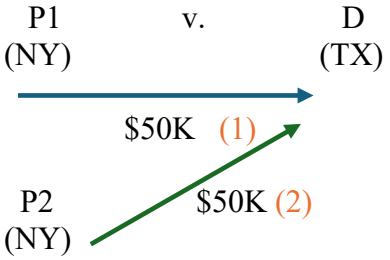
Can all claims be adjudicated in the same federal action?

Question 9



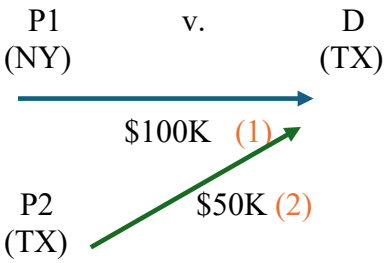
Can all claims be adjudicated in the same federal action?

Question 10



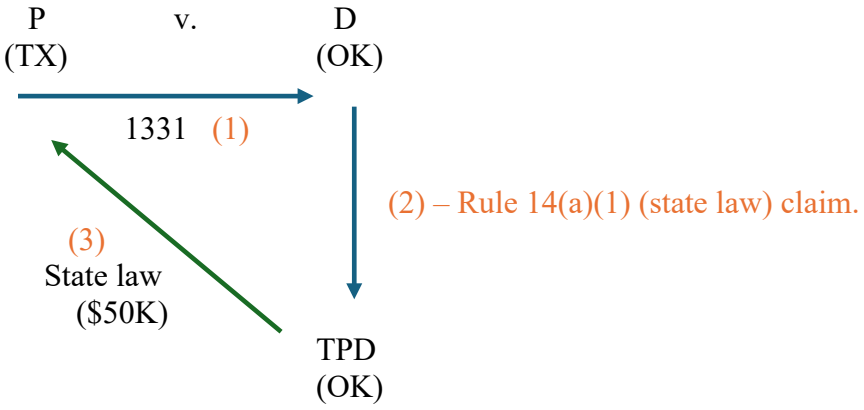
Can all claims be adjudicated in the same federal action?

Question 11



Can all claims be adjudicated in the same federal action?

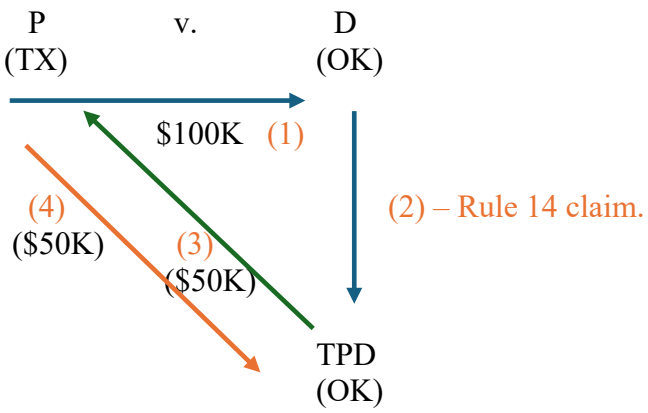
Question 12:



Can all claims be adjudicated in the same federal action?

NB: the A+ answer is the one that asks: what rule authorizes the TPD to bring a claim against P. Doing so would reveal that the answer is Rule 14(a)(2)(D), which provides that the TPD "may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff." So, for the A+ answer, how does Rule 14(a)(2)(D) bear relevance to the 1367(a) analysis?

Question 13:



Can all claims be adjudicated in the same federal action? Does your answer change if Claim 4 is a compulsory counterclaim [Rule 13(a)] v. a permissive one [Rule 13(b)]?