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Note

When A Permissive Intervenor Impairs The Plaintiff's Control

The Federal Rules of Civil Procedure give the plaintiff considerable power over the lawsuit and facilitate joinder and intervention. These policies can give rise to a conflict. An original party to an action may find himself foreclosed from joining additional parties simply because an intervenor who has already been added to the action presents a jurisdictional barrier. This Note explores one such situation: when a federal court grants a motion for permissive intervention in a diversity action, and the plaintiff later seeks to permissively join a party who is adverse to, and shares citizenship with, the already admitted permissive intervenor. Most federal plaintiffs do not encounter this problem, but those who do face a serious jurisdictional dilemma.

The following hypothetical will be used to illustrate the conflict. Plaintiff, a citizen of Nevada, sues defendant, a citizen of California, in the federal district court of California. Subject matter jurisdiction is based on diversity of citizenship, and complete diversity is required. Intervenor, a citizen of Oregon, is allowed to permissively intervene as a plaintiff in the action under rule 24(b)(2) of the Federal Rules of Civil Procedure.¹ The Nevada plaintiff then seeks to amend the complaint under rule 15(a) to permissively join a second defendant, a citizen of Oregon, under the provisions of rule 20(a). Neither the intervenor nor the defendant to be joined is an indispensable party.²

This Note addresses the original plaintiff's power to manage this suit and the procedural and jurisdictional limitations on such power with respect to joinder of additional parties and permissive intervention. The principles regarding the plaintiff's power to control the action when joining a party, the intervenor's rights as a party, and diversity jurisdiction are then applied to the hypothetical posed above. The Note concludes that while the original Nevada plaintiff should not be able to join the additional Oregon defendant, the procedural tools of

1. All references to rules are to the Federal Rules of Civil Procedure, enacted pursuant to 28 U.S.C. § 2072 (1982). The rules are reprinted at 28 U.S.C. app. 515-677 (1982).

2. The presence of indispensable parties in an action requires the court to apply rule 19, and presents entirely different considerations than does the permissive addition of parties, the sole issue considered in this Note. See *infra* notes 11, 20, 25.

severance and consolidation can be used to satisfy the needs of the various parties.

The Plaintiff's Power to Shape the Suit

Traditionally, the party who initiates an action controls the litigation.³ The courts generally adhere to the notion that those who seek a forum should be protected from the actions of other claimants.⁴ One line of cases suggests that the plaintiff's right to proceed should not be defeated by subsequent joinder or intervention without the plaintiff's consent.⁵ It has been argued that a party who is first in time, like the plaintiff in the hypothetical, should enjoy preference over a plaintiff who files later,⁶ such as the intervenor.

The Federal Rules of Civil Procedure defer to the plaintiff in several ways. For example, rule 24(b)(2) requires the court to consider undue delay or prejudice to the original parties when deciding a motion for permissive intervention,⁷ as well as the plaintiff's opposition to such a motion.⁸ The court also has the power to transfer an action at the plaintiff's request instead of dismissing it for failure to satisfy procedural requirements.⁹ Rule 15(a) allows plaintiffs to amend their plead-

3. See McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 713-14 (1976); see also Friedenthal, *Increased Participation by Non Parties: The Need for Limitations and Conditions*, 13 U.C.D. L. REV. 259, 262 (1980) (an individual plaintiff "should be given every fair chance to control his own suit").

4. "A plaintiff ordinarily is free to decide who shall be parties to his lawsuit." Simpson v. Providence Washington Ins. Group, 608 F.2d 1171, 1174 (9th Cir. 1979). See also McDonald v. General Mills, Inc., 387 F. Supp. 24, 38 (E.D. Cal. 1974) (plaintiff has traditional prerogative of choosing the parties to litigation absent countervailing concerns such as rule 19). See generally Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968) (litigation rights of an intervenor need not be as full as the rights of original parties).

5. See *American Bowling Supply Co. v. Al Martin, Inc.*, 96 F. Supp. 35, 37 (D. Kan. 1951). Cf. *Johnson v. Riverland Levee Dist.*, 117 F.2d 711 (8th Cir. 1941). In *Johnson and American Bowling Supply* a nondiverse party attempted to permissively intervene. In *Johnson*, the plaintiff consented and the court no longer had jurisdiction of the entire case. *Johnson*, 117 F.2d at 715. In *American Bowling Supply*, the plaintiff did not consent, the court refused the motion, and jurisdiction was maintained. *American Bowling Supply*, 96 F. Supp. at 36-37.

6. See Theis, *Younger v. Harris: Federalism in Context*, 33 HASTINGS L.J. 103, 111 (1981).

7. FED. R. CIV. P. 24(b)(2). See, e.g., *FMC Corp. v. Keizer Equip. Co.*, 433 F.2d 654 (6th Cir. 1970) (petition denied where the moving party had continuously known of the action for eight years and the petition was filed near the end of an eighteen day trial).

8. See *National Am. Corp. v. Federal Republic of Nigeria*, 425 F. Supp. 1365, 1372-73 (S.D.N.Y. 1977); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 207 F. Supp. 252, 257 (N.D. Ill. 1962).

9. See *Lamar v. American Basketball Ass'n*, 468 F. Supp. 1198, 1200 (S.D.N.Y. 1979) (transferring an action under 28 U.S.C. § 1406(a) when court improperly joined a defendant over whom the court lacked in personam jurisdiction and venue).

ings, once as a matter of right and thereafter at the discretion of the court.¹⁰ With respect to permissive joinder,¹¹ this rule permits the original plaintiff to assert a claim under rule 20(a) against any additional parties that can be joined, if the claim arises out of the same transaction or occurrence as the original claim and the claims of all parties so joined share common questions of law or fact.¹²

Of course, there are limits on the plaintiff's right to shape the lawsuit. Except for the first, motions for leave to amend a pleading under rule 15(a) are committed to the court's discretion.¹³ When the amendment would join a party through rule 20(a), the court must consider¹⁴ judicial economy and trial convenience,¹⁵ the motives of the moving party,¹⁶ delay or prejudice,¹⁷ the effect of the joinder on jurisdiction

10. Rule 15(a) states in pertinent part:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

FED. R. CIV. P. 15(a).

11. Permissive joinder is to be distinguished procedurally, but not jurisdictionally, from compulsory joinder of persons needed for a just adjudication, which is governed by rule 19. *See, e.g.*, 3A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 19.01[1] (2d ed. 1984) [hereinafter cited as MOORE'S].

12. Rule 20(a) states in pertinent part:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action.

FED. R. CIV. P. 20(a).

13. "[T]he leave [to amend] sought should . . . be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

14. *See* *Martinez v. Safeway Stores, Inc.*, 66 F.R.D. 446 (N.D. Cal. 1975); *see also* *Foman v. Davis*, 371 U.S. 178, 182 (1962) (Court enumerated factors to consider when exercising discretion under rule 15 that are similar to those discussed for rule 20). *See infra* notes 15-19 & accompanying text.

15. *See* *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977); *Miller v. Davis*, 464 F. Supp. 458, 460-61 (D.D.C. 1978); *Anderson v. Francis I. duPont & Co.*, 291 F. Supp. 705, 711 (D. Minn. 1968).

16. *See* *Desert Empire Bank v. Insurance Co. of North Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980); *see also* *Shaw v. Munford*, 526 F. Supp. 1209, 1213-14 (S.D.N.Y. 1981) (court found no evidence that plaintiff's motive in joining parties that destroyed diversity was to deprive the federal court of jurisdiction); *Soam Corp. v. Trane Co.*, 506 F. Supp. 302, 308 (S.D.N.Y. 1980) (no evidence additional defendants joined to defeat diversity jurisdiction); *Gonzalez v. Leonard*, 497 F. Supp. 1058, 1076-77 (D. Conn. 1980) (joinder disfavored that would only result in numerous motions to dismiss).

17. *See* *Desert Empire Bank v. Insurance Co. of North Am.*, 623 F.2d 1371, 1375 (9th

over the action,¹⁸ and the ability of the court to provide complete relief.¹⁹ Moreover, the federal rules were drafted and are construed to allow many parties into the litigation,²⁰ thereby reducing the plaintiff's control. The rules governing intervention, joinder, indispensable parties, and class actions all circumscribe either the plaintiff's ability to join parties or to keep parties out of the litigation.

A second source of limitations is subject matter jurisdiction, the power of a court to hear a case.²¹ The plaintiff, having chosen the forum, cannot complain if the limited jurisdiction of that court prohibits certain subsequent amendments of the original complaint to add parties.²² For example, a plaintiff's consent to intervention by parties who do not independently meet the requirements of subject matter jurisdiction may result in the loss of jurisdiction over the plaintiff's original

Cir. 1980); *see also* *Shaw v. Munford*, 526 F. Supp. 1209, 1213-14 (S.D.N.Y. 1981); *Gonzalez v. Leonard*, 497 F. Supp. 1058, 1076-77 (D. Conn. 1980); *Miller v. Davis*, 464 F. Supp. 458, 461 (D.D.C. 1978).

18. *See* *Desert Empire Bank v. Insurance Co. of North Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980); *see also* *Reynolds v. Wabash R.R.*, 236 F.2d 387 (8th Cir. 1956); *Thorp v. Petrola*, 81 F.R.D. 513 (N.D. W. Va. 1979).

19. *See* *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977); *Rumbaugh v. Winifrede R.R.*, 331 F.2d 530 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964).

20. "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers v. Gibb*, 383 U.S. 715, 724 (1966). *See* Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 416-24, 469-76 (1976); Jones, *Problems and Prospects of Participation in Affirmative Action Litigation: A Role for Intervenor*, 13 U.C.D. L. REV. 221, 223-24 (1980).

The addition of an indispensable third party may limit the plaintiff's control over the action. *See supra* note 11. However, a party who does not qualify as an indispensable party under rule 19(b) may be dropped from an action to preserve diversity under rule 21. *Ralli-Coney, Inc. v. Gates*, 528 F.2d 572, 575 (5th Cir. 1976); *Nash v. Hall*, 436 F. Supp. 633, 634-35 (W.D. Okla. 1977). This principle does not address this Note's hypothetical case as neither the intervenor nor the defendant to be joined are indispensable.

21. *See* *Ford v. Valmal Indus., Inc.*, 494 F.2d 330, 331 (10th Cir. 1974). *See generally* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522 (1975 & Supp. 1984) [hereinafter cited as WRIGHT & MILLER].

22. "A plaintiff cannot complain if [federal jurisdiction] does not encompass all of his possible claims . . . since it is he who has chosen the federal rather than the state forum and must thus accept its limitations." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978). In a state such as California, the plaintiff in the hypothetical case would have personal jurisdiction to the extent allowable by the United States Constitution, and presumably could sue both defendants in state court without the restrictions of diversity jurisdiction. By choosing the federal forum the plaintiff has consented to certain limits on his power over the action. In *Owen Equipment* the Court specifically addressed the plaintiff's power to amend her other pleadings. "Thus it is clear that the [plaintiff] could not originally have brought suit in Federal Court naming [nondiverse, adverse parties]. . . . Yet the identical lawsuit resulted when she amended her complaint. Complete diversity was destroyed just as surely as if she had sued [the nondiverse party] initially." *Id.* at 374. The same reasoning should apply to the facts of the hypothetical.

action as well as the denial of the intervention.²³ In addition, if a plaintiff amends a complaint based on diversity jurisdiction to raise claims against nondiverse parties, the court will no longer have jurisdiction.²⁴

Permissive Intervention

Permissive intervention is governed by rule 24(b), which allows a potential party to enter an existing action if the party's claim satisfies certain requirements. Permissive intervention is subject to the discretion of the court, which must determine under rule 24(b)(2) that the intervenor's claim or defense shares a common question of law or fact with the original action and that granting the petition will not prejudice those parties already in the action.²⁵

If the common question of law or fact and prejudice requirements are satisfied in favor of intervention, the court has discretion to consider a number of additional factors. Among these are the effect of intervention on jurisdiction,²⁶ the opposition of the original parties to the intervention,²⁷ the effect of the intervention on other potential parties,²⁸ and the motives of the intervenor.²⁹ The court may also consider the intervenor's proposed development of the underlying issues in the case,³⁰ particularly those issues that are before the court but have not

23. The basis for the few holdings on this point is that the plaintiff consented to the joinder of parties whose presence destroyed diversity, thereby depriving the court of jurisdiction over the whole action. *See Johnson v. Riverland Levee Dist.*, 117 F.2d 711, 715 (8th Cir. 1941); *Gaddis v. Junker*, 27 F.2d 156, 158-59 (E.D. Tex. 1928); *Forest Oil Co. v. Crawford*, 101 F. 849, 852 (3rd Cir. 1900).

24. *See Oppenheim v. Sterling*, 368 F.2d 516 (10th Cir. 1966), *cert. denied*, 386 U.S. 1011 (1967).

25. FED. R. CIV. P. 24(b)(2). Permissive intervention is to be distinguished from intervention of right, which is governed by rule 24(a). The latter does not require an independent basis of subject matter jurisdiction. *See, e.g., Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977). The intervenor of right has a strong interest in the litigation, and must show that the litigation affects his or her interest regarding the "property or transaction which is the subject of the action," that "disposition of the action may . . . impair . . . his ability to protect that interest," and that this interest "is [in]adequately represented by existing parties." FED. R. CIV. P. 24(a)(2).

26. *See Reedsburg Bank v. Apollo*, 508 F.2d 995, 1000 (7th Cir. 1975); *Humble Oil & Ref. Co. v. Sun Oil Co.*, 190 F.2d 191, 197 (5th Cir. 1951).

27. *See cases cited supra* note 8.

28. *See Utah v. United States*, 394 U.S. 89, 95-96 (1969) (admission of one intervenor would, in fairness, require admission of 120 other defendants).

29. *See Edmondson v. Nebraska*, 383 F.2d 123 (8th Cir. 1967) (improper motive found where petition had the earmarks of a sham); *Gentry v. Hibernia Bank*, 154 F. Supp. 62 (N.D. Cal. 1956) (flagrant attempt to avoid diversity requirements grounds for refusal of petition).

30. *See Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). *Spangler* discusses permissive intervention in some depth and includes a list of seven factors to be considered. *Id.*

been adequately addressed.³¹ In weighing these considerations, the court must also bear in mind the underlying federal policy to promote judicial economy.³²

Because a motion for permissive intervention is addressed to the discretion of the court,³³ the court may limit the scope of the intervention³⁴ to serve the underlying purpose of the federal rules, which is to secure a "just, speedy, and inexpensive determination."³⁵ The court may limit the intervention to issues already in the pleadings,³⁶ or may condition the intervention on the acceptance of discovery conducted before the intervention.³⁷ The petition may be granted on the condition that the intervenor not request a jury trial.³⁸ Furthermore, the court may refuse to allow the intervenor to become a full adversary party by restricting the intervenor's participation to the filing of an *amicus curiae* brief.³⁹

The court must impose any limitations on the scope of an intervenor's participation in a suit before the petition is granted.⁴⁰ Once the

31. See *Environmental Defense Fund, Inc. v. Costle*, 79 F.R.D. 235, 244 (D.D.C. 1978) (intervenor proposed more complete consideration of an issue material to the settlement of the dispute that the original parties had not fully addressed).

32. See FED. R. CIV. P. 1.

33. "Rule 24(b) necessarily vests broad discretion in the district court to determine the fairest and most efficient method of handling a case with multiple parties and claims." *Securities & Exch. Comm'n v. Everest Management Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972).

34. See *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 191-92 (2d Cir. 1970) (noting that the conditions necessary to the efficient conduct of proceedings should be applicable to permissive intervention); *United States ex rel. Browne & Bryan Lumber Co. v. Massachusetts Bonding & Ins. Co.*, 303 F.2d 823, 829 (2d Cir. 1962) (conditioning intervention on waiver of jury trial sustained), *cited with approval in* *Ross v. Bernhard*, 396 U.S. 531, 541 n.15 (1970) (distinguishing *Browne* from situation in which intervention is allowed without conditions); *Moore v. Tangipahoa Parish School Bd.*, 298 F. Supp. 288, 293-94 (E.D. La. 1969) (permissive intervention allowed subject to the condition that intervenors only address certain issues and not reopen and question matters already decided by the court).

35. FED. R. CIV. P. 1.

36. See *Brennan v. United Steelworkers of Am.*, 501 F. Supp. 912, 920 (W.D. Pa. 1980); *Carroll v. American Fed'n of Musicians*, 33 F.R.D. 353, 354 (S.D.N.Y. 1963). *Cf.* *Spangler v. United States*, 415 F.2d 1242, 1245 (9th Cir. 1969) (citing *Stewart-Warner Corp. v. Westinghouse Elec. Corp.*, 325 F.2d 822 (2d Cir. 1963), *cert. denied*, 376 U.S. 944 (1964)) (finding that limits on the intervenor cannot be so narrow as to exclude claims and defenses of the intervenor that have a "sufficiently close relationship" to the underlying action).

37. See *Carroll v. American Fed'n of Musicians*, 33 F.R.D. 353, 354 (S.D.N.Y. 1963).

38. See *United States ex rel. Browne & Bryan Lumber Co. v. Massachusetts Bonding & Ins. Co.*, 303 F.2d 823, 829 (2d Cir. 1962), *cited with approval in* *Ross v. Bernhard*, 396 U.S. 531, 541 n.15 (1970).

39. See *Peterson v. United States*, 41 F.R.D. 131, 135 (D. Minn. 1966); *see also* *Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975) (suggesting use of *amicus curiae* brief).

40. See, e.g., *In re First Colonial Corp.*, 544 F.2d 1291, 1297-98 (5th Cir.), *cert. denied sub nom.* *Baddock v. American Benefit Life Ins. Co.*, 431 U.S. 904 (1977) (an intervenor "may appeal from an appealable order unless the intervention has been specially limited to

petition is granted, the intervenor's rights as a party in the action vest and cannot thereafter be restricted.⁴¹ Thus, upon the grant of the petition, an intervenor has the rights of a full party,⁴² and is to be treated as an original party in the subsequent course of the action.⁴³

It is this last point that creates the jurisdictional problem for the plaintiff in the hypothetical. He has no recourse once the intervenor becomes a full party. If the plaintiff is not able to anticipate or discover the identity of the additional defendant he wants to join until after the intervention is granted, obviously the court cannot take this conflict into consideration when considering the merits of the intervenor's petition.

The Requirement of Independent Subject Matter Jurisdiction for Joinder and Intervention and the Plaintiff's Dilemma

The federal courts are courts of limited jurisdiction,⁴⁴ and limita-

forbid it"); *In re Oceana Int'l, Inc.*, 49 F.R.D. 329, 333 (S.D.N.Y. 1969). See generally 3B MOORE'S, *supra* note 11, ¶ 24.17[1].

41. See *Ross v. Bernhard*, 396 U.S. 531, 541 n.15 (1970) (once intervention granted generally, the right to a jury trial cannot be restricted); *Wheeler v. American Home Prods. Corp.*, 563 F.2d 1233, 1237 (5th Cir. 1977); *Spangler v. United States*, 415 F.2d 1242, 1245 (9th Cir. 1969) (citing *Stewart-Warner Corp. v. Westinghouse Elec. Corp.*, 325 F.2d 822 (2d Cir. 1963), *cert. denied*, 376 U.S. 944 (1964)); *Raylite Elec. Corp. v. Noma Elec. Corp.*, 170 F.2d 914, 915 (2d Cir. 1948); *In re Oceana Int'l Inc.*, 49 F.R.D. 329, 333-34 (S.D.N.Y. 1970). See generally MOORE'S, *supra* note 11, ¶ 24.17[1].

42. See MOORE'S, *supra* note 11, ¶ 24.16; see also *Ross v. Bernhard*, 396 U.S. 531, 541 n.15 (1970) (one who has been granted general intervention could not be denied a right to jury trial); *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1049 (5th Cir. 1975) (intervenor has full rights under title VII of the Civil Rights Act); *In re Rabbe, Glissman & Co.*, 71 F. Supp. 678, 680 (S.D.N.Y. 1947) (an intervenor is for all intents and purposes an original party).

43. See *In re Rabbe, Glissman & Co.*, 71 F. Supp. 678, 680 (S.D.N.Y. 1947). Two other factors suggest that an intervenor, once allowed into an action, is a full party. First, the intervenor is required to file pleadings with the petition for intervention, FED. R. CIV. P. 24(c), a requirement that only applies to parties under the Federal Rules of Civil Procedure. See FED. R. CIV. P. 7-11 (requiring only parties to file pleadings); see also *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153 (S.D. Cal. 1954). Thus, once the petition is granted, the party's pleadings become fully a part of the action.

Second, the history of procedural rules indicates that an intervenor should be granted the rights of a full party. Before the enactment of the current federal rules, intervention was governed by Equity Rule 37. Equity Rule 37 was intended to apply only to actions in equity in the federal courts. Actions at law were governed by state procedure. However, the federal courts "were apt to term the intervention [to an action at law] an ancillary bill in equity" and apply Equity Rule 37. 3B MOORE'S, *supra* note 11, ¶ 24.04. Equity Rule 37 stated that an action in intervention was subordinated to the main action. The federal rules dropped any reference to subordination, thus implying an intent not to make an action in intervention subordinate to the original action. See *Spangler v. United States*, 415 F.2d 1242, 1245 (9th Cir. 1969); *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153 (S.D. Cal. 1954); 3B MOORE'S, *supra* note 11, ¶ 24.04.

44. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978).

tions on the federal courts' power to hear cases must be strictly construed.⁴⁵ Consequently, an independent basis of federal subject matter jurisdiction must exist for the claim of a party seeking to intervene permissively,⁴⁶ as well as for a party joined under rule 20.⁴⁷

45. See, e.g., *id.* at 377 ("The policy of the [diversity] statute calls for its strict construction.") (quoting *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941); *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

46. *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977). See generally C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 75, at 506-07 (1983). The requirement of an independent basis of subject matter jurisdiction for permissive intervention is not free from confusion. First, there are exceptions to this requirement. See *Spring Construction Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980) (citing 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE ¶ 1917 (1972 & Supp. 1981)) (suggesting that there are exceptions to the general rule in instances such as class actions); *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977) (citing 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 24.18[1] (2d ed. 1982)) (exceptions for class actions and for intervenors with an in rem interest in an in rem action).

There is authority contrary to the general rule in the cases that rest on *Wichita R.R. & Light Co. v. Public Utils. Comm'n*, 260 U.S. 48 (1922). The Supreme Court in *Wichita* stated that "jurisdiction [is not] defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties." *Id.* at 54. *Miller v. Miller*, 406 F.2d 590 (10th Cir. 1969), and *United States v. Local 638, Enter. Ass'n of Pipefitters*, 347 F. Supp. 164 (S.D.N.Y. 1972), both cite *Wichita* as support for their holdings that allow permissive intervention without an independent basis of subject matter jurisdiction. *Miller*, 406 F.2d at 593 & n.10; *Pipefitters*, 347 F. Supp. at 167 & n.7 (if the suit proposed to be initiated by the intervenor is "ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved") (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934)). However, while a permissive intervenor is clearly a party "whose presence is not essential," *Wichita* was decided prior to the enactment of the Federal Rules of Civil Procedure, and recent Supreme Court decisions that restrict extension of subject matter jurisdiction cast doubt on the validity of its holding. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370-73 (1978) (absent ancillary jurisdiction all claims must be within the original jurisdiction of the federal court). *Owen Equipment* involved a non-diverse third-party defendant, but its reasoning logically can be extended to a permissive intervenor who will also be unable to assert ancillary jurisdiction. Cf. *Aldinger v. Howard*, 427 U.S. 1 (1976) (refusing to extend pendent jurisdiction over a party as to which no independent basis of subject matter jurisdiction existed); 7A WRIGHT & MILLER, *supra* note 21, § 1917 (finding *Wichita Railroad* no longer appropriate in light of modern procedure and strictly limiting the case to its facts).

In *Utah v. United States*, 394 U.S. 89 (1969), the Supreme Court sustained a denial of intervention partly because of the difficulties involved in the retention of jurisdiction over the original action if complete diversity no longer existed. *Id.* at 96. Some commentators have called for the extension of ancillary jurisdiction to all intervenors, thus removing the requirement for an independent basis of jurisdiction. See *Goldberg*, *supra* note 20, at 473-74; *Shapiro*, *supra* note 4, at 760, 763-64.

47. See *Reynolds v. Wabash R.R.*, 236 F.2d 387, 390 (8th Cir. 1956); *Jacobs v. United States*, 367 F. Supp. 1275, 1278 (D. Ariz. 1973) ("the discretion under [rule 20] to deny joinder or to order severance of trial is itself an indication that the Court should not strain to obtain jurisdiction where it does not otherwise exist."); 3A MOORE'S, *supra* note 11, ¶ 20.07[1]; 7 WRIGHT & MILLER, *supra* note 21, § 1659. Unlike the confusion of authority

In the absence of a congressional or judicial exception, any action based on diversity jurisdiction must satisfy the "complete diversity" requirement.⁴⁸ No such exception has been made for intervenors or parties joined under rule 20, so the citizenship of such potential parties must be diverse from that of all the adverse parties.⁴⁹

The Supreme Court requires strict application of the doctrine of diversity jurisdiction.⁵⁰ Applying all the preceding principles to the hypothetical case, it appears that the original Nevada plaintiff should not be permitted to join the Oregon defendant, who is not diverse from the intervenor, also a citizen of Oregon. The intervenor would be treated as an original party and thus the joinder of the Oregon defendant would offend the requirements of complete diversity. The plaintiff, who chose this forum of limited jurisdiction, must abide by these limits.⁵¹

Such a strict application of jurisdictional rules may place the hypothetical plaintiff in an untenable position. Requiring the original plaintiff to join all potential parties prior to a possible intervention, merely in order to ensure the continuing jurisdiction of the court in the event of such intervention, is impractical in a dispute in which the identity of potential parties may not be ascertainable at the time suit is brought. Conditioning the ability of a federal court to fully decide an otherwise proper controversy on the citizenship of parties initially unknown, and perhaps unknowable until the proceedings are under way, seems both unfair to the plaintiff and an inefficient use of judicial re-

with respect to permissive intervention, *see supra* note 46, there is agreement that a party to be permissively joined must have an independent basis of subject matter jurisdiction.

48. The federal district courts have original jurisdiction over controversies between citizens of different states. 28 U.S.C. § 1332(a) (1982). One statutory requirement of diversity jurisdiction is that all plaintiffs be diverse from all defendants. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978) (citing *Snyder v. Harris*, 394 U.S. 332, 338-39 (1969)). Because such "complete diversity" is not a constitutional requirement, Congress may legislate a "minimum diversity" standard for certain actions, requiring only that one plaintiff be diverse from one defendant. *See State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (discussing the minimal diversity requirement in federal statutory interpleader, 28 U.S.C. § 1335(a)(1), in which only one claimant need be diverse from one other claimant). This power is extended in cases of "ancillary" and "pendent" jurisdiction. The Supreme Court also has allowed the federal courts to exercise jurisdiction without complete diversity in the absence of a contrary expression by Congress. *Aldinger v. Howard*, 427 U.S. 1, 18 (1976) (noting that ancillary and pendent jurisdiction may be asserted only when there is no express or implied negation of its existence by Congress).

49. Adversity requires aligning the parties as plaintiffs and defendants. The denomination by the parties of their status is not determinative and the court will realign them to match their adverse interests even if diversity jurisdiction is destroyed in the process. *See City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 72-76 & nn. 3-4 (1941); *Jet Traders Inv. Corp. v. Tekair, Ltd.*, 89 F.R.D. 560, 566-67 (D. Del. 1981).

50. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978).

51. *See supra* note 22-24, 46 & accompanying text.

sources. Such a practice could lead to aborted or incomplete adjudications and a multiplicity of suits, possibly resulting in inconsistent judgments or a denial of recovery altogether. Such results are contrary to the fundamental federal policy of promoting the "just, speedy, and inexpensive" resolution of disputes.

A Procedural Solution

The plaintiff in the hypothetical case could retain control over joinder of parties in the litigation under three circumstances. First, the requirement of complete diversity could be changed through congressional action or by judicial interpretation.⁵² Such changes have been widely discussed, but there is no indication that they will be adopted by Congress or the courts.⁵³ Second, the plaintiff could refile the action in state court, thereby avoiding the diversity requirement. However, assuming the plaintiff filed in federal court for strategic reasons, this alternative is not desirable. Third, the plaintiff could use procedures available under the existing federal rules to effect a just result. It is this third alternative that offers the most practical approach for the plaintiff.

There are two procedures the federal district court may use⁵⁴ that

52. Changes in diversity requirements could increase the predictability of joinder in multi-party disputes. Congress or the courts could modify the jurisdictional rules so that the minimal diversity situation posed by the hypothetical would be sufficient. Alternatively, minimal diversity could be used instead of complete diversity as the standard for general civil litigation between parties of different states. See Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 27-29 (1964). Such a standard would be constitutionally permissible, see U.S. CONST. art III, § 2; see also *supra* notes 48 & accompanying text, and it would be easily applicable since it requires only that one plaintiff be of different citizenship than one defendant. However, such a change might have the undesirable effect of significantly increasing the caseload of the federal courts. Congress has not expressed an interest in any such proposal.

A third possibility is the complete abolition of diversity jurisdiction, see Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979), which would eliminate many procedural problems. The plaintiff in the hypothetical would only be able to file suit in state court. This approach would pare down the caseload of the federal courts, leaving only cases involving federal questions. *Id.* at 969-70. This would be constitutionally permissible, since Congress has the power to grant or deny jurisdictional authority to the lower courts. *Palmore v. United States*, 411 U.S. 389, 400-01 (1973); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). The second and third changes in diversity jurisdiction would avoid the convoluted procedural and jurisdictional inquiry that must take place under the present rules governing procedures and standards for diversity jurisdiction while allowing a direct, predictable procedural path to addressing the controversy on its merits. However, it is not anticipated that either Congress or the courts will implement any of these changes.

53. See *supra* note 52.

54. This Note assumes that the court does not have the option of ignoring the issue of subject matter jurisdiction over the party to be joined. Cf. *Fetzer v. Cities Serv. Oil Co.*, 572 F.2d 1250 (8th Cir. 1978). The *Fetzer* court upheld the subject matter jurisdiction of the district court over an action involving two claims and nondiverse parties because one nondi-

would avoid the jurisdictional problems resulting from permissive joinder of a nondiverse defendant and yet achieve a satisfactory result for both the plaintiff and the intervenor.

The district court could sever the intervenor's claim from the original action pursuant to the court's discretionary power under rule 21.⁵⁵ The court then could allow the plaintiff to join the defendant who was not diverse from the intervenor and consolidate the plaintiff's action against the two defendants with the intervenor's action. Such consolidation is permissible under rule 42(a).⁵⁶

Consolidation does not merge the actions⁵⁷; they retain their separate character but are brought together for purposes of judicial economy.⁵⁸ While separate verdicts are required,⁵⁹ joint hearings or trials may be ordered⁶⁰ if judicial economy can be served without problems such as jury confusion⁶¹ or delay due to incomplete discovery.⁶²

verse party was dismissed to preserve complete diversity and because the trial court in effect severed the two claims, thereby preserving diversity in each claim. *Id.* at 1253.

Any attempt to disregard subject matter jurisdiction could lead to reversal on appeal, as subject matter jurisdiction may be questioned at any time by any party or by the court. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

55. Rule 21 provides in pertinent part that upon motion by a party or by the court's own motion "[a]ny claim against a party may be severed and proceeded with separately." FED. R. CIV. P. 21. The Ninth Circuit has discussed how severance can be used to avoid otherwise fatal jurisdictional problems. *See Anrig v. Ringsby United*, 603 F.2d 1319, 1325 (9th Cir. 1978).

56. Rule 42(a) provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

FED. R. CIV. P. 42(a).

57. "[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-97 (1933) (discussing consolidation practice before the enactment of the Federal Rules of Civil Procedure), *cited with approval in Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 735 n.22 (1976) (Marshall, J., dissenting). *See also* 9 WRIGHT & MILLER, *supra* note 21, § 2382.

58. *See Garber v. Randell*, 477 F.2d 711, 714 (2d Cir. 1973); *Stein, Hall & Co. v. Scindia Steam Navigation Co.*, 264 F. Supp. 499, 501 (S.D.N.Y. 1967).

59. "[T]he causes of action [remain] distinct, and [require] separate verdicts and judgments." *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 293 (1892) (discussion of consolidation practice under statutes prior to the enactment of the Federal Rules of Civil Procedure). *See also In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439, 441-42 (1st Cir. 1972).

60. The court "may order a joint hearing or trial of any or all matters in issue in the actions." FED. R. CIV. P. 42(a).

61. *See Molever v. Levenson*, 539 F.2d 996, 1003 (4th Cir.), *cert. denied*, 429 U.S. 1024 (1976) ("Even as ultimately restricted, the proceedings lasted 15 days and absorbed over 4,500 transcribed pages of testimony. In light of such a plenitude of evidence, the jurors would have had to be of uncommonly retentive minds to allocate proof among the four separate claims.").

The use of severance and then consolidation in the hypothetical case would be particularly appropriate. Consolidation would satisfy jurisdictional and procedural requirements, provide for joint hearings for issues sharing common questions of law or fact⁶³ and deriving from the same transaction or occurrence,⁶⁴ and yet avoid a single proceeding for claims that are only loosely connected.⁶⁵ Consolidation would preserve the plaintiff's control over his suit without hindering other parties from entering the dispute.

Severance and consolidation are also appropriate in this context because the plaintiff's joinder motion will require satisfaction of both the common question of law or fact requirement and the same transaction or occurrence requirement,⁶⁶ whereas the intervenor's claims only need be linked to the action by the single and less stringent requirement of common question of law or fact.⁶⁷ Because the plaintiff's claims might therefore be more closely connected than those of the intervenor,⁶⁸ and because the plaintiff should be given broad power to control his litigation,⁶⁹ the court should make liberal use of severance and consolidation. However, this approach may not be appropriate if it would work prejudice against the intervenor, who has become a full party.⁷⁰

Although such severance and consolidation may be no more than procedural maneuvering to satisfy diversity jurisdiction, it is the approach most likely to produce trial efficiency and judicial economy, two central concerns of the federal rules.⁷¹ This efficiency is particularly apparent when one considers discovery and appeals.

A number of rules governing discovery restrict parties to gathering

62. See *La Chemise LaCoste v. Alligator Co.*, 60 F.R.D. 164, 176 (D. Del. 1973) (consolidation denied where one case was close to trial and the other would require substantial discovery to prepare it for trial).

63. This is a requirement of rule 42(a) and is paralleled in rule 20(a) and 24(b)(2).

64. This is a requirement of rule 20(a) but is not a requirement of rule 42(a). However, any set of actions satisfying the same transaction or occurrence standard usually will have common questions of law or fact. All of the claims in the hypothetical thus fall within the ambit of the powers granted in rule 42(a), being linked by at least a common question of law or fact.

65. See *infra* notes 72-75 & accompanying text.

66. FED. R. CIV. P. 20(a). See *supra* note 11-12 & accompanying text.

67. FED. R. CIV. P. 24(b). See *supra* note 25 & accompanying text.

68. The stronger the linkage between claims, the greater the preference for trying them together. At one extreme, claims loosely linked, such as claims involved in permissive intervention, are allowed at the court's discretion, and the rights of the original parties must be considered. See *supra* notes 7, 26 & accompanying text. At the other extreme are indispensable parties, who must be allowed into the action regardless of the rights of the original parties because their presence is required for a "just adjudication." See *supra* note 11.

69. See *supra* notes 3-9 & accompanying text.

70. See *supra* note 41-43 & accompanying text.

71. FED. R. CIV. P. 1.

information from other *parties*;⁷² in a consolidated proceeding, the parties to one action are not necessarily parties to the other action or actions, and thus may take advantage of these kinds of discovery only against parties in their own action. For example, after a severance and consolidation in the hypothetical case, the intervenor would only be able to engage in discovery with the party that he asserted a claim against: the original defendant. The original plaintiff would be able to conduct discovery in a single action against both of the parties he asserted claims against, and the two defendants would be able to conduct discovery against each other.⁷³ This would serve judicial economy by minimizing discovery burdens,⁷⁴ and would preserve the litigants' privacy interest by preventing an intervenor from conducting discovery against a party that he either could not sue or has shown no interest in suing.

A further benefit of using severance and consolidation is that appeals may be taken only from the separate actions.⁷⁵ As a result, the plaintiff and the subsequently joined defendant need not be involved in an appeal by the intervenor involving issues that are not of interest or are against their interests. If separate appeals might cause judicial inefficiency, the appellate court can hear and decide the appeals jointly.⁷⁶

A second procedural course is for the court to informally request that the plaintiff file a separate action against the nondiverse party. Upon motion of the plaintiff or *sua sponte*, the court would then consolidate the original action involving the plaintiff, the intervenor, and the original defendant, with the new action between the plaintiff and the defendant who is not diverse from the intervenor.

This choice is not as advantageous as the first in that it requires the plaintiff to maintain two actions. The defendants are prohibited from

72. FED. R. CIV. P. 26(b)(4) (Trial Preparation: Experts); FED. R. CIV. P. 26(f) (Discovery Conference); FED. R. CIV. P. 29 (Stipulations Regarding Discovery Procedure); FED. R. CIV. P. 33 (Interrogatories to Parties); FED. R. CIV. P. 34 (Production of Documents and Things and Entry Upon Land Inspection and Other Purposes); FED. R. CIV. P. 35 (Physical and Mental Examination of Person) (limited to parties or persons in the custody of parties); FED. R. CIV. P. 36 (Requests for Admission).

73. This result would be particularly advantageous when the defendants are jointly and severally liable to the plaintiff, thus needing to conduct full discovery on each other.

74. Expense to the parties is a concern of judicial economy. FED. R. CIV. P. 1. *See, e.g.,* Gonzalez v. Leonard, 497 F. Supp. 1058, 1077 (D. Conn. 1980) (permissive joinder); Stein, Hall & Co. v. Scindia Steam Navigation Co., 264 F. Supp. 499, 501 (S.D.N.Y. 1967) (consolidation).

75. *See, e.g.,* Hebel v. Ebersole, 543 F.2d 14, 16-17 (7th Cir. 1976); *In re* Massachusetts Helicopter Airlines, Inc., 469 F.2d 439, 441-42 (1st Cir. 1972). *See generally* 6 MOORE'S, *supra* note 11 ¶ 54.27[2]; C. WRIGHT, *supra* note 46, § 101, at 699-701.

76. The language of Federal Rule of Appellate Procedure 3(b) implies that separate appeals from a consolidated proceeding may themselves be heard and decided jointly. *See* Davies v. Commissioner, 715 F.2d 435, 436 (9th Cir. 1983) (considering five separate appeals from a consolidated tax court action).

engaging in certain types of discovery between themselves because they are not parties to the same action and the intervenor is given access to certain types of discovery against the plaintiff even though the intervenor has not chosen to sue the plaintiff. In addition, an appeal by the intervenor is more likely to involve the original plaintiff because this plaintiff would be a party in the intervenor's action.

If the court has failed to follow either of these courses, and has granted permissive joinder without due concern for diversity, jurisdictional deficiencies may still be corrected by severing the claim lacking independent subject matter jurisdiction⁷⁷ and consolidating the actions.⁷⁸ Such severance and consolidation may be effected *sua sponte* or at the court's discretion.⁷⁹

Conclusion

Federal subject matter jurisdiction based on complete diversity requires that no plaintiff in an action share citizenship with any defendant. In the context of permissive intervention and permissive joinder this requirement may limit the plaintiff's control of the action, and erect a barrier to the admission of parties who are not diverse, possibly leading to judicial inefficiency and unfairness to the plaintiff. Although the parties and the court are bound by jurisdictional requirements, the court has the discretion to order such severance and consolidation as would best serve judicial economy. Thus, when jurisdictional requirements limit the plaintiff's ability to join additional parties after a permissive intervention, the use of severance and consolidation should allow a plaintiff to retain the control he or she desires without prejudicing the intervenor.

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77. See *supra* note 55 & accompanying text.

78. See *supra* notes 55-58 & accompanying text.

79. See *supra* notes 55-56 & accompanying text.

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