

CHAPTER IX

SUBJECT MATTER JURISDICTION IN ANTITRUST AND BUSINESS TORT LITIGATION

This chapter opens the discussion of procedural issues commonly encountered in antitrust and business tort litigation. When evaluating choices among federal and state statutory and common law claims potentially available to address marketplace conduct, subject matter jurisdiction often becomes a threshold issue. Personal jurisdiction, process, and venue are treated in the next chapter. – Eds.

A. Introduction

This chapter examines issues that typically arise in assessing subject matter jurisdiction of the state and federal courts in antitrust and business tort litigation. While relatively straightforward, the authorities governing subject matter jurisdiction and the strategy involved in determining when to pursue the subject matter jurisdiction of a particular court often determine the outcome of a variety of procedural issues related to the initial stages of business litigation, such as removal and remand, transfer of venue, and preemption, which are treated in subsequent chapters.

B. Types of Federal Subject Matter Jurisdiction

Subject matter jurisdiction is literally the power of a court to entertain and adjudicate certain types of disputes.¹ A judgment rendered in a court without subject matter jurisdiction is invalid.² While most state courts generally possess subject matter jurisdiction over actions brought under federal or state law unless a statute excludes it, a federal

1. 1 ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 1.1, at 3 (1998).

2. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 77 (1996) (district court must possess federal court subject matter jurisdiction when judgment is rendered for it to be valid); *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 437 (6th Cir. 2002) (judgment is void if rendered by court lacking subject matter jurisdiction); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (same).

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court may exercise subject matter jurisdiction only when it is specifically authorized to do so. Federal courts are thus commonly referred to as courts of “limited,” rather than “general,” jurisdiction.³ A party intending to litigate in federal court, either by initiating the lawsuit or seeking removal, bears the burden of establishing the court’s jurisdictional authority over the case.⁴

Federal subject matter jurisdiction over a particular controversy must derive from an act of Congress.⁵ Even a contractual agreement between parties is incapable of conferring subject matter jurisdiction on a federal court.⁶ The principal federal statutes relating to business tort litigation and conferring subject matter jurisdiction on federal courts are

set out in Chapter 85 of the Judicial Code (codified at Title 28 of the United States Code), and deal with the three main types of federal subject matter jurisdiction: federal question,⁷ diversity,⁸ and supplemental jurisdiction.⁹

3. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 388 F.3d 337, 346 (D.C. Cir. 2004); *Tsegay v. Ashcroft*, 386 F.3d 1347, 1353 (10th Cir. 2004); *De Asencio v. Tyson Foods, Inc.*, 343 F.3d 301, 310 n.14 (3d Cir. 2003); *Marine Equip. Mgmt. Co. v. United States*, 4 F.3d 643, 646 (8th Cir. 1993); *United States v. Chambers*, 944 F.2d 1253, 1258 (6th Cir. 1991); *see generally* 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3522 (2d ed. 1997).

4. *See, e.g., McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (party seeking to litigate in federal court bears burden of establishing jurisdictional basis for doing so); *Herrick Co. v. SCS Commc'ns, Inc.*, 251 F.3d 315, 323 (2d Cir. 2001) (burden lies with party attempting to bring action to federal court).

5. *See McNutt*, 298 U.S. at 189.

6. *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *see also Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 161 (3d Cir. 2004) (parties cannot create subject matter jurisdiction by their own agreement).

7. *See* 28 U.S.C. § 1331.

8. *See id.* § 1332.

9. *See id.* § 1367.

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1. Federal Question Jurisdiction

Federal question jurisdiction derives from the nature of the asserted claim. The general federal question statute provides that federal district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, without regard to the amount in controversy between the parties.¹⁰

A cause of action is generally deemed to “arise under” federal law either when the cause of action is created by federal law or is grounded in state law but requires the resolution of a substantial question of federal law involving a significant federal interest.¹¹ “Federal law” includes federal statutes, federal administrative agency regulations,¹² as well as

10. *Id.* § 1331. The elimination of the amount-in-controversy requirement has rendered statutes, such as those that confer federal subject matter jurisdiction over claims arising under federal antitrust laws, largely redundant. *See* 13B WRIGHT ET AL., *supra* note 3, § 3574.

11. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9-10 (1983) (case “arises under” federal law when substantial disputed issue of federal law is necessary element of state law claim); *Ayres v. GM*, 234 F.3d 514, 518 (11th Cir. 2000) (litigation of claim depends on resolution of substantial, disputed question of federal law); *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1373 (11th Cir. 1998) (case “arises under federal law if federal law creates cause of action or if substantial disputed issue of federal law is necessary element of state

law claim); *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996) (even though claim is created by state law, it may involve resolution of federal question sufficient to give rise to jurisdiction under § 1331); *see also* *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 371 (5th Cir. 1995) (federal question jurisdiction may exist over state law claim when prior judgment on federal question completely precluded state claim). *But see* *Rivet v. Regions Bank of La.*, 522 U.S. 470, 478 (1998) (rejecting Fifth Circuit approach and holding that “claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b)”).

12. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993); *Dixie Fuel Co. v. Comm’r of Soc. Sec.*, 171 F.3d 1052, 1057 (6th Cir. 1999) (finding jurisdiction of federal district courts over reviews of federal agency actions under § 1331), *overruled on other grounds*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003).

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federal common law.¹³ Courts have also recognized that international law may be considered as part of the laws of the United States for purposes of federal question jurisdiction.¹⁴

As noted above, certain federal statutes confer subject matter jurisdiction upon the district courts relating to particular subject matters. To invoke federal subject matter jurisdiction on the basis of a federal statute, a party must show that the cause of action pled arises under the statutory jurisdictional grant. These statutes include those related to admiralty and maritime law,¹⁵ bankruptcy,¹⁶ statutory interpleader,¹⁷ commerce and antitrust,¹⁸ patents and other intellectual property rights,¹⁹ civil rights,²⁰ the Federal Deposit Insurance Corporation,²¹ and the Racketeer Influenced and Corrupt Organizations (“RICO”) Act.²²

There is federal question jurisdiction only over *claims* arising under federal law. Conversely, the existence of a federal *defense* to a state law

13. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (claims grounded in federal common law may give rise to federal court jurisdiction), *vacated on other grounds*, 451 U.S. 304 (1981); *Frank v. Bear Stearns & Co.*, 128 F.3d 919, 922 (5th Cir. 1997) (federal question jurisdiction may exist in actions arising under federal common law); *Bollman Hat Co. v. Root*, 112 F.3d 113, 115 (3d Cir. 1997) (federal question jurisdiction will support claims arising under federal statute as well as federal common law).

14. *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542 n.7 (5th Cir. 1997) (recognizing creation of federal common law in area of foreign relations in determining subject matter jurisdiction); *see also* *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (allowing federal common law in area of foreign relations as means of conferring federal question jurisdiction); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352 (2d Cir. 1986) (even though action was based on state law theory, “an examination shows that the plaintiff’s claims necessarily require determinations that will directly and significantly affect American foreign relations”).

15. 28 U.S.C. § 1333.

16. *Id.* § 1334.

17. *Id.* § 1335.

18. *Id.* § 1337.

19. *Id.* § 1338.
20. *Id.* § 1343.
21. 12 U.S.C. §§ 1441a, 1819.
22. 18 U.S.C. §§ 1961 *et seq.*

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claim will not support federal question jurisdiction, even when the defense is specifically asserted in the defendant's answer or anticipated in the plaintiff's pleadings.²³ This principle applies even when parties agree that the only disputed issue in the case is the availability of a federal defense.²⁴

The federal issue also must be "substantial" to sustain federal question jurisdiction. Historically, federal courts have been prohibited from exercising jurisdiction over issues when the federal claims are "so attenuated and unsubstantial as to be absolutely devoid of merit."²⁵ Substantiality, however, does not refer to the value of the claim at issue. In *Hagans v. Lavine*,²⁶ the Supreme Court stated that "substantial" means that a claim is not "essentially fictitious," "implausible," or "patently without merit."²⁷ A party need not prove in advance that it will ultimately or even likely succeed on the merits of a federal cause of action; federal question jurisdiction remains even if a court eventually determines that the federal cause of action lacks merit.²⁸

2. Diversity Jurisdiction

Article III of the U.S. Constitution authorizes federal courts to entertain suits between citizens of different states, as well as for cases or controversies between "a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."²⁹ Section 1332 of Title 28, which provides

23. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9-12 (1983).

24. *Williams*, 482 U.S. at 393.

25. *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904); *see also* *EEOC v. Chicago Club*, 86 F.3d 1423, 1428 (7th Cir. 1996); *Wiley v. NCAA*, 612 F.2d 473, 477 (10th Cir. 1979).

26. 415 U.S. 528 (1974).

27. *Id.* at 537, 542-43; *see also* *Zheng v. Reno*, 166 F. Supp. 2d 875, 880 (S.D.N.Y. 2001); *Bartolini v. Ashcroft*, 226 F. Supp. 2d 350, 354 (D. Conn. 2002).

28. *Bell v. Hood*, 327 U.S. 678, 682 (1946) (allegation of substantial federal claim is sufficient to invoke subject matter jurisdiction even if ultimately dismissed on merits for failure to state cause of action); *see also* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction").

29. U.S. CONST. art. III, § 2.

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the statutory authority for diversity jurisdiction, provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive

of interest and costs, and is between

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state . . . as plaintiff and citizens of a State or of different States.³⁰

The grounds for diversity jurisdiction must be set forth either in the initial complaint or in the defendant's removal papers.³¹ Courts generally determine diversity jurisdiction soon after a case is filed in federal court.³² Once a federal court has determined that diversity jurisdiction is present, subsequent events typically will not oust such jurisdiction.³³ Defects in jurisdictional allegations, including diversity jurisdiction, may be amended and cured, by leave of court, in both the trial and appellate courts.³⁴

Determining proper citizenship is the primary inquiry in assessing diversity jurisdiction. The citizenship of an individual party is based upon his or her domicile, which is defined as the "place where [a party]

30. 28 U.S.C. § 1332(a).

31. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (burden of establishing grounds for diversity jurisdiction lies with party invoking such jurisdiction); *Herrick Co. v. SCS Commc'ns, Inc.*, 251 F.3d 315, 322-23 (2d Cir. 2001) (same); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 492-93 (6th Cir. 1998) (same); *Advani Enters., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 160 (2d Cir. 1998) (same).

32. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989).

33. *See, e.g., Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1336 (5th Cir. 1995) (amendment to plaintiff's complaint limiting damages to amounts below jurisdictional threshold will not divest jurisdiction); *Freeport-McMoRan, Inc. v. KN Energy, Inc.*, 498 U.S. 426, 428 (1991) (addition of nondiverse, nonessential party cannot destroy jurisdiction).

34. 28 U.S.C. § 1653; *see also Whitmire v. Victus Ltd.*, 212 F.3d 885, 890 (5th Cir. 2000) (trial court abused its discretion in refusing to permit party to amend jurisdictional allegations to assert diversity jurisdiction and allowing party to amend on appeal).

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has his true, fixed and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom."³⁵ Courts have historically held that, because an individual has only one domicile, an individual may be the citizen of only one state for diversity jurisdiction purposes.³⁶

A corporation, however, may maintain "dual citizenship," because it is deemed to be a citizen of both the state of incorporation and the state of its principal place of business.³⁷ For businesses that conduct critical corporate functions in multiple locations, determining "principal place of business" citizenship can be complicated. Some courts have adopted a "nerve center" approach whereby the focus is on where corporate policies are primarily formulated.³⁸ Other approaches focus on the locations of the corporate assets, facilities, and employees.³⁹ The more

modern approach – referred to at times as the “total activity” test⁴⁰ – is to evaluate where most of the corporate activity occurs by examining both the location of a corporation’s “nerve center” and its primary place of corporate activity.⁴¹

35. CHARLES ALAN WRIGHT, LAWS OF FEDERAL COURT § 26, at 161 (5th ed. 1994).

36. *Williamson v. Osenton*, 232 U.S. 619, 625 (1914) (individual party can only be citizen of one state at a time); *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1272 (10th Cir. 2001) (party has one domicile at a time); *Bank One v. Montle*, 964 F.2d 48, 49 (1st Cir. 1992) (for diversity purposes, person is citizen of state of domicile); *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991) (same); *Avins v. Hannum*, 497 F. Supp. 930, 942 (E.D. Pa. 1980) (party may only be citizen of one state at a time).

37. 28 U.S.C. § 1332(c)(1); *see also Dimmitt & Owens Fin., Inc. v. United States*, 787 F.2d 1186, 1190 (7th Cir. 1986).

38. *Topp v. CompAir, Inc.*, 814 F.2d 830, 834-35 (1st Cir. 1987).

39. *See, e.g., Grand Union Supermarkets of the V.I., Inc. v. H.E. Lockhart Mgmt., Inc.*, 316 F.3d 408, 411 (3d Cir. 2003); *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960); *Anniston Soil Pipe Co. v. Cent. Foundry Co.*, 216 F. Supp. 473, 475-76 (N.D. Ala. 1963), *aff’d*, 329 F.2d 313, 313 (5th Cir. 1964).

40. *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 404 (5th Cir. 1987) (applying the “total activity” test).

41. *Toms v. Country Quality Meats, Inc.*, 610 F.2d 313, 315 (5th Cir. 1980); *Lugo-Vina v. Pueblo Int’l, Inc.*, 574 F.2d 41, 44 (1st Cir. 1978); *Daris ex*

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A domestic corporation having its principal place of business abroad seemingly provides an exception to the “dual citizenship” rule. In *Torres v. Southern Peru Copper Corp.*,⁴² the Fifth Circuit held that a domestic corporation with its principal place of business in a foreign state is considered to be a citizen only of its state of incorporation.⁴³ In contrast, a foreign corporation incorporated abroad may be found to be a citizen of the state where it has its principal place of business.⁴⁴ A federal corporation established under a congressional act, however, cannot be sued in a federal diversity case because, as a general matter, such a corporation is not considered to be a citizen of any particular state.⁴⁵

An unincorporated association, such as a general or limited partnership, is deemed to be a citizen of *every* state in which its partners are citizens.⁴⁶ In a shareholder derivative action, only the named shareholders of a corporation are considered for purposes of determining diversity jurisdiction.⁴⁷ Section 1332 also provides special rules for determining the citizenship of resident aliens⁴⁸ and legal

rel. Estate of Hart v. Trumbo, Inc., No. 102-CV-183, 2002 WL 31992187, at *2 (N.D. Miss. Dec. 2, 2002).

42. 113 F.3d 540 (5th Cir. 1997).

43. *Id.* at 543. The Fifth Circuit further stated that it was aware of no other authority for determining the citizenship of a domestic corporation with its principal place of business in a foreign state. *Id.*

44. *Danjaq, S.A. v. Pathe Commc’ns Corp.*, 979 F.2d 772, 776 (9th Cir. 1992)

(foreign corporation maintained citizenship in state of principal place of business); *Panalpina Weltransport GmbH v. Geosource, Inc.*, 764 F.2d 352, 354 (5th Cir. 1985).

45. *Bankers' Trust Co. v. Tex. & Pac. Ry. Co.*, 241 U.S. 295, 310 (1916); *see also Weathermon v. Disabled Am. Veterans*, 15 F. Supp. 2d 940, 941 (D. Neb. 1998) (no diversity jurisdiction because DAV is national citizen).

But see Patterson v. Am. Nat'l Red Cross, 101 F. Supp. 655, 657 (S.D. Fla. 1951) (finding diversity jurisdiction because corporation created by congressional act granting its corporate existence was citizen of District of Columbia).

46. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990).

47. *Weinstock v. Kallet*, 11 F.R.D. 270, 272 (S.D.N.Y. 1951); *see generally* 7C WRIGHT ET AL., *supra* note 3, § 1822.

48. 28 U.S.C. § 1332(a); *see JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 99-100 (2002) (corporation organized

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representatives.⁴⁹ In class actions, the citizenship of the named class representatives controls the diversity analysis.⁵⁰ Diversity, therefore, is required only between the named plaintiffs and named defendants to a class action; the citizenship of the absent class members is not considered.⁵¹

Section 1332 requires complete diversity of citizenship, meaning that diversity is destroyed when a single plaintiff shares citizenship with a single defendant.⁵² Because the statute requires both complete diversity of citizenship and at least \$75,000 in controversy, a plaintiff seeking to avoid removal based on diversity jurisdiction may either join a non-diverse defendant or specifically plead for an amount damages less than \$75,000.⁵³ Additionally, and as discussed more fully in Chapter 12, even when the parties are diverse the plaintiff may avoid removal by filing suit in a state court of the defendant's home state.⁵⁴

under laws of British Virgin Islands is deemed citizen of foreign state for purposes of alienage jurisdiction under § 1332(a)(2)).

49. 28 U.S.C. § 1332(c)(2).

50. *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 365-66 (1921), *overruled on other grounds*, *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 138 (1941); *Kerney v. Fort Griffin Fandangle Ass'n*, 624 F.2d 717, 719 (5th Cir. 1980); *see also Rosmer v. Pfizer*, 263 F.3d 110, 112 (4th Cir. 2001).

51. *Cauble*, 255 U.S. at 365-66.

52. *See Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 361-62 (1959), *superceded by rule on other grounds*, *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 390 (3d Cir. 2002); *see also, e.g., Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1005 (9th Cir. 2001) ("The parties in this case remain citizens of different states, over whom the federal court may exercise jurisdiction [Plaintiff's] lack of standing [as to one defendant] only renders his claims against [the non-diverse defendant] nonjusticiable in federal court, but does not alter the presence of complete diversity."); *Krueger v. Cartwright*, 996 F.2d 928, 931 (7th Cir. 1993); *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 814 (5th Cir. 1993); *Sweeney v. Westvaco Co.*, 926 F.2d 29, 41 (1st Cir. 1991).

53. *See Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir. 1993); 14A WRIGHT ET AL., *supra* note 3, § 3725.

54. 28 U.S.C. § 1441(b); *see also* *Hurt v. Dow Chem. Co.*, 963 F.2d 1142, 1145 (8th Cir. 1992); *Hartford Accident & Indem. Co. v. Costa Lines Cargo Servs., Inc.*, 903 F.2d 352, 358 (5th Cir. 1990).

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The presence of a “stateless citizen” (a United States citizen domiciled abroad⁵⁵) precludes federal diversity jurisdiction.⁵⁶ Finally, for diversity purposes, federal courts do not recognize dual citizenship with respect to persons who are citizens of both the United States and a foreign country; instead, federal courts recognize only the American nationality of the dual citizen in determining diversity jurisdiction.⁵⁷ With respect to determining the amount in controversy, federal law determines the value of a claim, even a claim asserted under state law.⁵⁸ Where a statute provides for treble damages, such damages can be considered in determining the amount in controversy.⁵⁹ Likewise, claims for punitive damages may be included in calculating the amount in controversy⁶⁰ unless such damages are “patently frivolous and without foundation” or otherwise unavailable as a matter of state substantive law.⁶¹ As a general matter, attorneys’ fees are excluded in determining

55. 1 HAIG, *supra* note 1, § 1.7, at 29.

56. *Sadat v. Mertes*, 615 F.2d 1176, 1180 (7th Cir. 1980); *Smith v. Carter*, 545 F.2d 909, 911 (5th Cir. 1977).

57. *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 711 (9th Cir. 1992); *Action S.A. v. Marc Rich & Co.*, 951 F.2d 504, 507 (2d Cir. 1991) (only American nationality of dual citizen should be recognized under § 1332(a)(2)); *Sadat*, 615 F.2d at 1187 (same).

58. *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352-53 (1961); *see also* *Hart v. Schering-Plough Corp.*, 253 F.3d 272, 274 (7th Cir. 2001) (damages and costs used in calculating jurisdictional amount in controversy is governed by federal law).

59. *In re High Fructose Corn Syrup Antitrust Litig.*, 936 F. Supp. 530, 533 (C.D. Ill. 1996); *Kenebrew v. Conn. Gen. Life Ins. Co.*, 882 F. Supp. 749, 751 (N.D. Ill. 1995).

60. *Golden v. Golden*, 382 F.3d 348, 355 (3d Cir. 2004) (valid requests for punitive damages will generally satisfy amount in controversy requirement); *Dow Agrosciences LLC v. Bates*, 332 F.3d 323, 326 (5th Cir. 2003) (same); *Hartford Ins. Group v. Lou-Con Inc.*, 293 F.3d 908, 910 (5th Cir. 2002) (including punitive damages in amount in controversy calculation); *Crawford v. F. Hoffman-LaRoche Ltd.*, 267 F.3d 760, 766 (8th Cir. 2001) (punitive damages may be used to establish diversity jurisdiction); *Allison v. Sec. Benefit Life Ins. Co.*, 980 F.2d 1213, 1215 (8th Cir. 1992) (same).

61. *Golden*, 382 F.3d at 355; *Byrd v. Corestates Bank, N.A. (In re Corestates Trust Fee Litig.)*, 39 F.3d 61, 64 (3d Cir. 1994) (same); *see also* *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 572 (6th Cir. 2001) (punitive

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the amount in controversy.⁶² Nonetheless, where a statute mandates or allows for the recovery of attorneys’ fees or where such fees are provided for by contract, attorneys’ fees may be included with the amount in controversy.⁶³

When a claim is one for declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation. This may include the value of the right to be protected or the value of the extent of the injury to be prevented.⁶⁴

damages must be considered in jurisdictional amount in controversy unless apparent to “legal certainty” that such amounts cannot be recovered); *Holley Equip. Co. v. Credit Alliance Corp.*, 821 F.2d 1531, 1535 (11th Cir. 1987) (same).

62. *Mo. State Life Ins. Co. v. Jones*, 290 U.S. 199, 200 (1933); *Spielman v. Genzyme Corp.*, 251 F.3d 1, 7 (1st Cir. 2001).

63. *Jones*, 290 U.S. at 200; *Spielman*, 251 F.3d at 7 (noting exceptions to general rule); *Velez v. Crown Life Ins. Co.*, 599 F.2d 471, 474 (1st Cir. 1979) (recognizing two logical exceptions to general rule that attorneys’ fees are excluded in determining amount in controversy); *Cordero, Miranda & Pinto v. Winn*, 721 F. Supp. 1496, 1497 (D.P.R. 1989) (attorneys’ fees not included in calculating jurisdictional amount unless authorized by statute, contract, or other legal authority); *see also Johnson v. Am. Online, Inc.*, 280 F. Supp. 2d 1018, 1025-26 (N.D. Cal. 2003) (attorneys’ fees may be included in calculating jurisdictional amount in controversy where underlying statute allows recovery of such fees).

64. *See, e.g., Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977) (in actions seeking declaratory or injunctive relief, it is well established that amount in controversy is measured by value of object of litigation); *Young v. Leventhal*, 389 F.3d 1, 3 (1st Cir. 2004) (same, citing *Hunt*); *America’s Moneyline Inc. v. Coleman*, 360 F.3d 782, 786 (7th Cir. 2004) (value of object of litigation is pecuniary result that would flow to plaintiff or defendant from court’s granting injunction or declaratory judgment); *Bates*, 332 F.3d at 326 (when claim is one for declaratory relief, amount in controversy is determined by value of right to be protected or extent of injury to be prevented); *Cincinnati Ins. Co. v. Zen Design Group, Ltd.*, 329 F.3d 546, 548 (6th Cir. 2003) (same); *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 807 (11th Cir. 2003) (same); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (same); *Dixon v. Edwards*, 290 F.3d 699, 711 (4th Cir. 2002) (determining amount in controversy satisfied on grounds that, if contract were declared null and injunction entered, one defendant would lose compensation of

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With respect to class actions, the Supreme Court previously in *Zahn v. International Paper Co.*,⁶⁵ required each plaintiff in the class to satisfy the jurisdictional amount in controversy requirement.⁶⁶ Thereafter, however, there remained a split among the federal circuits as to whether the passage of the Judicial Improvements Act in 1990,⁶⁷ which clarified the supplemental jurisdiction of the federal courts, overruled *Zahn*.⁶⁸ In 2000, the Supreme Court addressed this issue but split 4-4 in its decision.⁶⁹

This year, however, the Court with a clear majority held that the supplemental jurisdiction statute gives a district court that has diversity jurisdiction over one plaintiff’s claim, including the amount in controversy, jurisdiction over other plaintiffs’ (including unnamed class members’) similar claims, without regard to the amount in controversy for each of their individual claims.⁷⁰ For that reason, the supplemental

over \$75,000 and another defendant would be deprived of services valued at more than \$75,000).

65. 414 U.S. 291 (1973).

66. *Id.* at 301.

67. *See* 28 U.S.C. § 1367.

68. *See* Trimble v. Asarco, Inc., 232 F.3d 946, 961 (8th Cir. 2000) (*Zahn* remains controlling law); Leonhardt v. W. Sugar Co., 160 F.3d 631, 641 (10th Cir. 1998) (same); Meritcare Inc. v. St. Paul Mercury Ins. Co, 166 F.3d 214, 218 (3d Cir. 1999) (same). *But see* Free v. Abbott Labs., Inc. (*In re* Abbott Labs.), 51 F.3d 524, 529 (5th Cir. 1995) (holding that Judicial Improvements Act of 1998 overruled *Zahn*), *aff'd*, 529 U.S. 333 (2000) (per curiam; judgment affirmed by equally divided Court); Olden v. LaFarge Corp., 383 F.3d 495, 502 (6th Cir 2004) (same); Rosmer v. Pfizer Inc., 263 F.3d 110, 114 (4th Cir. 2001) (same); Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 930 (7th Cir. 1996) (same); *see also* del Rosario Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 143 (1st Cir. 2004) (expressing no view on issue whether § 1367 overturns Supreme Court's holding in *Zahn* that each member in diversity-only class action must meet jurisdictional amount in controversy), *cert. granted*, 125 S. Ct. 314 (2004).

69. In 2000, the Court affirmed by an equally divided court a Fifth Circuit decision which had overruled *Zahn*. *Free (In re Abbott Labs.)*, 529 U.S. at 333; *see also* Del Vecchio v. Conseco, Inc., 230 F.3d 974, 977 (7th Cir. 2000) (discussing *Free*).

70. Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2625 (2005) (appeal combined with *del Rosario Ortega*).

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jurisdiction statute overturns the Court's decision to the contrary in *Zahn*.⁷¹

The punitive damages claims of individual class action members may not ordinarily be aggregated for jurisdictional purposes.⁷² Although some federal circuits as recently as the mid-1990s permitted aggregation of punitive damages across a class of plaintiffs, those courts have retreated from these decisions and now generally prohibit aggregation.⁷³ An exception to the "complete diversity" and "amount-incontroversy" requirements in diversity cases warrants special mention.

The federal district courts have original jurisdiction over interpleader actions when the amount in controversy is \$500 or more⁷⁴ and there is "minimal diversity" between the parties.⁷⁵ Minimum diversity requires that at least one plaintiff and one defendant be citizens of different states.⁷⁶ Once diversity jurisdiction has been established, diversity is not destroyed even if a stakeholder is discharged, leaving only non-diverse parties.⁷⁷

71. *See id.*

72. *Crawford*, 267 F.3d at 765; *see also* Gibson v. Chrysler Corp., 262 F.3d 927, 945-47 (9th Cir. 2001); Martin v. Franklin Capital Corp., 251 F.3d 1284, 1292-93 (10th Cir. 2001); Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1264-65 (11th Cir. 2000); Ard v. Transcon. Pipe Line Corp., 138 F.3d 596, 601-02 (5th Cir. 1998); Anthony v. Sec. Pac. Fin. Servs., Inc., 75 F.3d 311, 315 (7th Cir. 1996). *But see* Snyder v. Harris, 394 U.S. 332, 335

(1969) (distinct claims of two or more plaintiffs cannot be aggregated except when plaintiffs “write to enforce a single title or right in which they have a common and undivided interest”).

73. *See* *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073-77 (11th Cir. 2000), *overruling* *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996); *Ard*, 138 F.3d at 601-02 (refusing to follow cases aggregating punitive damages across class plaintiffs, outside of context of Mississippi law).

74. 28 U.S.C. § 1335(a); *CNA Ins. Cos. v. Waters*, 926 F.3d 247, 250 n.5 (3d Cir. 1991).

75. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967); *Waters*, 926 F.2d at 250 n.5; *Metro. Life Ins. Co. v. Capozzoli*, 9 F. Supp. 2d 645, 646 (W.D. Va. 1998).

76. *Tashire*, 386 U.S. at 530.

77. *Leimbach v. Allen*, 976 F.2d 912, 917 (4th Cir. 1992).

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3. Federal Jurisdiction for Certain Class Actions Under The Class Action Fairness Act of 2005

On February 18, 2005, President Bush signed the Class Action Fairness Act of 2005 (the “Act”).⁷⁸ Among other things, the Act creates federal jurisdiction for certain class actions. It also provides for removal of certain class actions to federal court.⁷⁹ The Act is applicable to class actions commenced after enactment.⁸⁰

Under the Act, a federal court “shall have original jurisdiction” over any non-securities⁸¹ civil action: (1) in which the matter in controversy exceeds \$5 million⁸² (the claims of the class members “shall be” aggregated to make this determination⁸³); (2) brought as a class action with more than 100 plaintiffs⁸⁴; and (3) where one of the following is present: (i) a class member is a citizen of a state different from any defendant; (ii) a class member is a foreign state (or a citizen of a foreign state) and any defendant is a citizen of a state; or (iii) a class member is a citizen of a state and any defendant is a foreign state (or a citizen of a

78. S. 5, 109th Cong. (2005). The full title of the Act is “A BILL To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.” *Id.*

79. *See infra* Chapter 12.

80. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2628 (2005) (Act “is not retroactive”). The Act is a short, nine-section bill. Sections 3-5 are the Act’s substantive provisions – respectively the consumer class action bill of rights, the provision for federal district court jurisdiction, and the provision for removal. Sections 1 and 2 are prefatory in nature, listing the short title, table of contents, and statement of Congressional findings and purposes. Section 6 requires preparation of a report on class action settlements. Section 7 requires enactment of already-enacted changes to the federal rule of civil procedure governing class actions. Section 8 subordinates the Act to statutory rulemaking authority given to the Supreme Court and federal Judicial Conference. Section 9 lists the Act’s effective date. All subsequent references are to the Act as codified.

81. 28 U.S.C. § 1332(d)(9).

82. *Id.* § 1332(d)(2).

83. *Id.* § 1332(d)(6).

84. *Id.* § 1332(d)(5)(B).

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foreign state).⁸⁵ Hence, the requirement of “complete diversity” no longer applies to certain class actions.

A court can decline to exercise jurisdiction over a class in which greater than one-third but less than two-thirds of the class members and the primary defendants are citizens of the state in which the action was originally filed.⁸⁶ The law provides a list of 6 factors for the court to consider: (1) whether the claims asserted involve matters of national or interstate interest; (2) whether the claims are governed by the law of the state in which the action was filed; (3) whether the action was pleaded in a way to avoid federal jurisdiction; (4) whether the action was brought in a forum with a nexus to the class members, the alleged harm, or the defendants; (5) whether the number of class members resident in the state in which the action was filed is substantially larger than the number from any other state and the citizenship of the other members is dispersed among a substantial number of states; and (6) whether, during the prior three years, one or more class actions asserting similar claims has been filed.⁸⁷

A court must decline to exercise jurisdiction over a class action if the following factors exist: (1) more than two-thirds of the class members are citizens of the state in which the action was originally filed; (2) at least one defendant against whom significant relief is sought and whose alleged conduct forms a significant basis for the claims is a citizen of the state in which the action was originally filed; (3) the principal injuries occurred in the state in which the action was originally filed; *and* (4) during the prior 3 years, no other class actions have been filed asserting similar factual allegations against any of the defendants.⁸⁸ In addition, a court must decline to exercise jurisdiction over a class if more than two-thirds of the class members and the primary defendants are citizens of the state in which the action was originally filed.⁸⁹

For jurisdiction purposes, the term “class action” includes *any* litigation in which “monetary relief claims of 100 or more persons are

85. *Id.* § 1332(d)(2)(A)-(C).

86. *Id.* § 1332(d)(3).

87. *Id.* § 1332(d)(3)(A)-(F).

88. *Id.* § 1332(d)(4).

89. *Id.* § 1332(d)(4)(B).

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proposed to be tried jointly.”⁹⁰ This new federal diversity jurisdiction does not apply if the primary defendants are states, state officials, or governmental entities against whom the district court may be foreclosed from ordering relief.⁹¹ There are further exclusions based upon certain limited types of cases and claims.

4. Pendent and Supplemental Jurisdiction

a. Pendent Jurisdiction

Especially in complex commercial disputes, it is common for the same conduct to give rise to claims under both federal and state law. Courts have long recognized under the doctrine of “pendent” (now “supplemental”) jurisdiction that where a federal court has obtained jurisdiction over a federal claim, related claims arising under state law may be asserted in the same action.⁹² A federal district court’s authority to adjudicate pendent state law claims is not limitless, however, particularly when a court dismisses the federal claims during the course of the litigation.

The modern rules concerning pendent jurisdiction were established in the Supreme Court’s 1966 decision in *United Mine Workers v. Gibbs*.⁹³ There, the Supreme Court held that pendent jurisdiction over state law claims is appropriate when (1) the federal claim has sufficient substance to confer subject matter jurisdiction on the federal court; (2) the state and federal claims derive from a “common nucleus of operative fact”; and (3) those claims are such that one would ordinarily expect to try them all in one judicial proceeding.⁹⁴

The Supreme Court noted, however, that pendent jurisdiction is not a plaintiff’s right, but rather a judicial power to be exercised by the court,

90. *Id.* § 1332(d)(11)(B). This provision gives jurisdiction to mass asbestos and other environmental bodily injury actions. Exempted is any lawsuit (a) in which all of the claims concern injuries and events occurring in the forum (or in adjoining states), (b) where the claims were aggregated by defense motion, or (c) brought pursuant to state statute authorizing claims on behalf of the general public. *Id.*

91. *Id.* § 1332(d)(5)(A).

92. *See Hagans*, 415 U.S. at 554; 28 U.S.C. § 1367.

93. 383 U.S. 715 (1966).

94. *Id.* at 725.

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in its discretion, and further stated that a district court should reexamine pendent jurisdiction at each stage of the litigation, by weighing policy considerations such as judicial economy, convenience and fairness to the litigants, and comity.⁹⁵ If these factors do not weigh in favor of maintaining pendent jurisdiction, as when a federal claim is dismissed and only state law claims remain, the district court may dismiss the state law claims without prejudice.⁹⁶ Even where the federal claims are not dismissed, if the state issues substantially predominate in terms of proof, the scope of the issues raised, or the comprehensiveness of the remedies sought, the state claims may be dismissed without prejudice, for resolution in state court.⁹⁷

Soon after *Gibbs* was decided, the Supreme Court in *Rosado v. Wyman*⁹⁸ held that a trial court’s discretion over the administration of pendent claims is broad enough to allow the court to retain such claims, even after the federal claim has been rendered moot.⁹⁹ The Court concluded that, because mootness usually is beyond the control of the parties and often occurs at the last stages of trial, dismissal of a pendent claim in such circumstances would frustrate judicial economy.¹⁰⁰

In the wake of *Rosado*, it has been widely recognized that federal courts possess considerable discretion when determining whether to dismiss or retain pendent state law claims after the federal claims have been dismissed or rendered moot. For example, in *Union City Barge Line, Inc. v. Union Carbide Corp.*,¹⁰¹ the Fifth Circuit held that a district court had discretion to exercise pendent jurisdiction over state law business tort claims, even though it had entered summary judgment on the federal antitrust claims.¹⁰²

Federal courts' discretionary authority over pendent state law claims was further analyzed by the Supreme Court in 1988 in *Carnegie-Mellon*
95. *Id.* at 726-27.

96. *Id.*

97. *Id.* at 727.

98. 397 U.S. 397 (1970).

99. *Id.* at 404.

100. *Id.* at 404-05.

101. 823 F.2d 129 (5th Cir. 1987).

102. *Id.* at 142; *see also, e.g.,* Gem Corrugated Box Corp. v. Nat'l Kraft Container Corp., 427 F.2d 499, 501 n.1 (2d Cir. 1970).

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University v. Cohill.¹⁰³ The *Cohill* court held that when a case is removed from state court to federal court, the federal court may, after dismissal of the federal claims, exercise its discretion to remand the state law claims to state court rather than either retaining or dismissing them.¹⁰⁴

b. Supplemental Jurisdiction

In 1990, Congress codified the doctrines of pendent and ancillary jurisdiction under the rubric of "supplemental jurisdiction." Section 310 of the Judicial Improvement Act of 1990¹⁰⁵ expressly authorizes district courts to assume supplemental jurisdiction over claims that are "so related" to claims within the original jurisdiction of the court "that they form part of the same case or controversy under Article III" of the Constitution.¹⁰⁶ The statute effectively overruled the Supreme Court's 1989 decision in *Finley v. United States*,¹⁰⁷ which had placed severe limitations on the joinder of additional defendants on grounds of "pendent party jurisdiction."¹⁰⁸

For a federal court to exercise supplemental jurisdiction, the three criteria set forth by the Supreme Court in *Gibbs* must be satisfied.¹⁰⁹ The primary requirement is federal jurisdiction over the original controversy. If original federal jurisdiction is lacking, supplemental jurisdiction becomes a moot issue.¹¹⁰ The supplemental jurisdiction statute codifies

103. 484 U.S. 343 (1988).

104. *Id.* at 357.

105. 28 U.S.C. § 1367 (applying to civil actions filed on or after December 1, 1990).

106. *Id.* § 1367(a).

107. 490 U.S. 545 (1989).

108. *Id.* at 556.

109. *E.g.,* MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1102 (3d

Cir. 1995) (citing *Gibbs*, 383 U.S. at 725).

110. *See id.* at 1093-96, 1102 (federal court should undertake threshold analysis of determining whether original federal jurisdiction is present before determining whether to apply supplemental jurisdiction over related state claims); *Gill v. Upson Reg'l Med. Ctr.*, 1 F. Supp. 2d 1480, 1481 (M.D. Ga. 1998) (unless there exists initial basis for federal jurisdiction in first instance, there can be no supplemental jurisdiction over state claims); *see also Sarmiento v. Tex. Bd. of Veterinarian Med. Exam'rs*, 939 F.2d 1242, 1245 (5th Cir. 1991) (federal court may retain supplemental jurisdiction

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the federal common law precedent requiring that the state law issue be so effectively intertwined with the federal claim on which jurisdiction is based that the two form the same case or controversy.¹¹¹ A good example of such an intertwined set of claims is a cross-claim for contribution or indemnity, which necessarily arises from the same operative facts as the primary claim on which it is based.¹¹²

The statute also sets forth the circumstances under which a federal district court may decline to exercise supplemental jurisdiction over state law claims, which include:

“(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.”¹¹³

Once a federal court decides it has supplemental jurisdiction over a state law claim, it is not obligated to reconsider the issue unless requested by one of the parties.¹¹⁴ If the court decides not to entertain the non-federal

even when federal claim alleged is deemed “frivolous or a mere matter of form”).

111. *Krell v. Prudential Ins. Co. of Am.* (*In re Prudential Ins. Co. of Am. Sales Practices Litig.*), 148 F.3d 283, 301 (3d Cir. 1998) (any exercise of supplemental jurisdiction must meet Article III case or controversy requirement).

112. *Allen v. City of Los Angeles*, 92 F.3d 842, 846 (9th Cir. 1996) (affirming supplemental jurisdiction over state law cross-claims for attorneys' fees in civil rights action because defendant's entitlement to reimbursement formed part of same case or controversy as plaintiff's claims); *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (*Allen* does not impose obligation on federal courts to conduct § 1367(c) analysis sua sponte whenever any of its factors is implicated).

113. 28 U.S.C. § 1367(c); *see also Allen*, 92 F.3d at 846; *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995); *McLaurin v. Prater*, 30 F.3d 982, 985 (8th Cir. 1994); *Exec. Software N. Am., Inc. v. U.S. Dist. Court*, 24 F.3d 1545, 1555-56 (9th Cir. 1994); *Tinius v. Carroll Co. Sheriff Dep't*, 255 F. Supp. 2d 971, 977-78 (N.D. Iowa 2003).

114. *Acri*, 114 F.3d at 1001; *see also Myers v. County of Lake*, 30 F.3d 847, 848-50 (7th Cir. 1994) (finding jurisdiction over state law claims and noting that no party had requested the district court to exercise

claim, it can dismiss the claim without prejudice or, if removed to federal court, remand the claim back to state court.¹¹⁵

The four circumstances under which a federal court may decline supplemental jurisdiction are a codification of the factors set forth in *Gibbs* and its progeny, as well as a recognition that federal courts may abstain from determining complex or novel issues of state law.¹¹⁶ Since the supplemental jurisdiction statute's enactment in 1990, courts have warned that supplemental jurisdiction should not be used as a device to expand federal jurisdiction over disputes that state courts are better suited to decide.¹¹⁷ While federal courts often decline to retain jurisdiction over state law claims after dismissing the federal claims on which federal jurisdiction was originally based,¹¹⁸ a federal court has discretion to retain supplemental jurisdiction if justified under considerations of

discretionary authority to decline supplemental jurisdiction under § 1367(c); *Doe by Fein v. District of Columbia*, 93 F.3d 861, 871 (D.C. Cir. 1996) (challenge to court's exercise of supplemental jurisdiction, when one of discretionary factors weighs against federal jurisdiction, is waivable).

115. *Cohill*, 484 U.S. at 351; *Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 619 (4th Cir. 2001).

116. *Gibbs*, 383 U.S. at 725.

117. *See, e.g.*, *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 306 (2d Cir. 2003) (exercise of supplemental jurisdiction is abuse of discretion when federal claim is dismissed at early stage and state claims turn on unresolved questions of state law that "dictate that these questions be left for decision by the state courts"); *Rounsevill v. Zahl*, 13 F.3d 625, 631 (2d Cir. 1994) (novel state law claim is best left for state court after dismissal of federal claim); *Williams v. Van Buren Township*, 925 F. Supp. 1231, 1237-38 (E.D. Mich. 1996) (refusing to invoke supplemental jurisdiction over claims for violation of Michigan law, even though claims arose out of same set of facts as federal claim, because state law claims raised novel and complex issues of state law best left to the Michigan state courts); *see also Int'l Ass'n of Firefighters of St. Louis v. City of Ferguson*, 283 F.3d 969, 975-76 (9th Cir. 2002).

118. *Batiste v. Island Records, Inc.*, 179 F.3d 217, 227-28 (5th Cir. 1999) (reversing district court's decision to decline jurisdiction over state law claims, after dismissal of federal claims, because state law issues were not difficult to adjudicate, case had been pending for several years, and court was "intimately familiar" with remaining state law claims).

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judicial economy, convenience, fairness, and comity.¹¹⁹ Finally, the "exceptional circumstances" provision of the statute grants discretion to decline supplemental jurisdiction over state law claims, even in the absence of the statutory factors set forth in the supplemental jurisdiction statute, when "compelling reasons" exist for declining jurisdiction.¹²⁰

C. Tolling

The Judicial Improvement Act also provides that the limitations period for any state law claim asserted under the supplemental jurisdiction statute is tolled while the case is pending in federal court, and for a period of thirty days thereafter (unless state law provides for a longer tolling period).¹²¹ Therefore, if a federal district court dismisses supplemental state law claims without prejudice, a plaintiff will have to make sure that state law provides for a longer tolling period or otherwise re-file the claims in state court within thirty days of dismissal.¹²²

D. Exclusive versus Concurrent Jurisdiction

Another issue in forum selection is whether subject matter jurisdiction over a particular claim lies exclusively in the federal or state courts, or whether those courts have concurrent jurisdiction over the claim. Congress has specifically provided for exclusive federal court jurisdiction over a wide variety of civil claims, including those arising under the federal antitrust laws,¹²³ the Securities Exchange Act,¹²⁴ and

119. *Cohill*, 484 U.S. at 357; *see also* *Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 37 (1st Cir. 2003); *Correspondent Servs. Corp. v. First Equities Corp.*, 338 F.3d 119, 126-27 (2d Cir. 2003); *Pickern v. Best W. Timber Cove Lodge*, 194 F. Supp. 2d 1128, 1133 (E.D. Cal. 2002).

120. 28 U.S.C. § 1367(c)(4).

121. 28 U.S.C. § 1367(d); *see* *Jinks v. Richland County*, 538 U.S. 456, 464-67 (2003) (Section 1367(d) is not unconstitutional and applies to claims brought against a state's political subdivisions). *But see* *Raygor v. Regents of The Univ. of Minn.*, 534 U.S. 533, 542-48 (2002) (no tolling of statute of limitations for claims against nonconsenting states filed in federal court but subsequently dismissed on sovereign immunity grounds).

122. *See, e.g.*, GA. CODE ANN. § 9-2-61 (2004) (six-month tolling period); N.Y. C.P.L.R. § 205(a) (McKinney 2004) (same).

123. 15 U.S.C. § 15; *see* *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 451 n.6 (1943); *Blumenstock Bros. Adver. Agency v. Curtis Pub. Co.*, 252 U.S.

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the federal patent and copyright laws.¹²⁵ In other instances, the federal and state courts share concurrent jurisdiction over federal claims, including civil claims under the RICO statute,¹²⁶ section 12(2) of the Securities Act of 1933,¹²⁷ and the federal trademark laws, including section 43(a) of the Lanham Act.¹²⁸

Where federal courts maintain exclusive jurisdiction, the state courts are without subject matter jurisdiction to decide the exclusively-federal claim, whether asserted in the plaintiff's complaint or the defendant's counterclaim.¹²⁹ The state courts may, however, entertain the validity of federal defenses, even when the state court would otherwise lack jurisdiction to adjudicate an affirmative claim under the same statute.¹³⁰

The Third Circuit has held that a state court which does not have jurisdiction to hear an exclusively-federal claim may nonetheless approve a state class action settlement releasing such a claim, stating further that the state court's approval order was entitled to full faith and

436, 441 (1920); *State v. Am. League of Prof'l Baseball Clubs*, 460 F.2d

654, 658 (9th Cir. 1972).

124. 15 U.S.C. § 78aa; *see* *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 352 (2d Cir. 1990), *superseded by statute on other grounds as stated in* *Lavian v. Haghazari*, 884 F. Supp. 670, 677 n.4 (E.D.N.Y. 1995).

125. 28 U.S.C. § 1338(a); *see* *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (patent laws); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964) (copyright laws).

126. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (resolving prior conflict among federal appellate courts and certain state supreme courts).

127. 15 U.S.C. § 77(v); *see* *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1197 (9th Cir. 1988) (while Congress has provided for concurrent jurisdiction in cases arising under the 1933 Act, if such a case is filed in state court, it may not be removed pursuant to § 77(v)(a)).

128. 28 U.S.C. § 1338(a); *see* *Stanford Telecomms. Inc. v. U.S. Dist. Ct. for N. Dist. of Cal.*, No. 88-7425, 1989 WL 418538, at *1 (9th Cir. Feb. 24, 1989); *Bear Creek Prods., Inc. v. Saleh*, 643 F. Supp. 489, 491 (S.D.N.Y. 1986).

129. *See, e.g., Jack's Cookie Co. v. Du-Bro Foods, Inc.*, 546 N.Y.S.2d 809, 812 (1989) (state court lacked jurisdiction over federal antitrust counterclaim).

130. *See, e.g., Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 12 n.12 (1983); *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1, 2-4 (1st Cir. 1984).

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credit and that the preclusive effect of the state court judgment barred subsequent litigation of the federal claims in federal court.¹³¹

Even if a federal claim is available, a litigant is not obligated to assert it. The fact that the same conduct may give rise to both federal and state law claims does not prevent a plaintiff from foregoing the federal claim and pursuing its remedies in state court, or vice versa. This principle has been applied in circumstances where a plaintiff has declined to assert a claim under federal antitrust law and has proceeded solely under state antitrust law, thereby risking a later *res judicata* bar to the federal claim.¹³²

When the requirements for diversity jurisdiction are present, the federal and state courts generally have concurrent jurisdiction over the state law claims. As discussed in Chapter 13, however, the federal courts may choose to abstain from deciding novel issues of state law or other matters traditionally left to the determination of state courts.

E. Challenges to Subject Matter Jurisdiction

As a general matter, federal courts are obligated – before resolving a case on the merits – to determine whether federal subject matter jurisdiction exists. The procedural rules are designed to foster such an early determination,¹³³ which is necessary to prevent the district court and the parties from expending significant time and expense in litigating a claim the court does not have the power to decide.¹³⁴ Any party may

131. *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1556, 1561-64 (3d Cir. 1994).

132. *See, e.g., Williams*, 482 U.S. at 392; *Ashley v. Sw. Bell Tel. Co.*, 410 F. Supp. 1389, 1393 (W.D. Tex. 1976); *City of Galveston v. Int'l Org. of*

Masters, 338 F. Supp. 907, 909 (S.D. Tex 1972); *see generally* ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES (3d ed. 2004).

133. FED. R. CIV. P. 12(b).

134. *Elliott v. Tilton*, 62 F.3d 725, 729 (5th Cir. 1995) (parties and district court should address subject matter jurisdiction at outset of case rather than on appeal and “prior to a substantial investment in case preparation”), *vacated on other grounds*, 69 F.3d 35, 36 (5th Cir.), *vacated on other grounds*, 89 F.3d 260, 262 (5th Cir. 1996).

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challenge federal jurisdiction, even the party that originally invoked it.¹³⁵ A party can even admit the existence of federal court jurisdiction and later challenge its existence during the same proceeding.¹³⁶

Even when the parties fail to raise the issue, the federal district courts are required to examine the basis of their jurisdiction.¹³⁷ Subject matter jurisdiction may be challenged at any time, including when a case is on appeal.¹³⁸ Both trial and appellate courts must dismiss a case *sua sponte* if federal jurisdiction is found to be lacking.¹³⁹ Parties cannot, by stipulation, consent, waiver or otherwise, confer federal jurisdiction on a district court.¹⁴⁰ Otherwise, subject matter jurisdiction could be broadened through the conduct or consent of the parties, in violation of the fundamental rule that federal courts are courts of limited jurisdiction, and possess only that jurisdiction specifically authorized by the Constitution or Congress.¹⁴¹

A federal judgment rendered without subject matter jurisdiction may not, however, be collaterally attacked in another proceeding.¹⁴²

135. *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 16-17 (1951) (party which originally brought case to federal court may challenge it during same proceeding), *superseded by statute on other grounds as stated in* *D’Ambrosio v. Chicago Truck Drivers*, No. 89 C 6666, 1991 WL 96445, at *2 (N.D. Ill. May 31, 1991).

136. *Eisler v. Stritzler*, 535 F.2d 148, 151 (1st Cir. 1976).

137. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908); *Bracken v. Matgouranis*, 296 F.3d 160, 162 (3d Cir. 2002) (recognizing court’s duty to examine basis of jurisdiction).

138. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376-77 (1940); *see also* FED. R. CIV. P. 12(h)(3).

139. *Louisville & Nashville R.R. Co.*, 211 U.S. at 152; *Crosby v. Crosby v. Holsinger*, 816 F.2d 162, 163 (4th Cir. 1987).

140. *Sosna*, 419 U.S. at 398 (agreement of parties insufficient to cure jurisdictional defects); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir. 1985) (parties’ conduct, even amounting to waiver or estoppel, cannot create federal jurisdiction).

141. *Giannakos*, 762 F.2d at 1297.

142. *See Chicot County Drainage Dist.*, 308 U.S. at 376-77. Although the holding in *Chicot County Drainage* appears to conflict with the principle that subject matter jurisdiction may not be waived, “the principle of finality of judgments in this context overrides competing factors of federal jurisdiction.” 1 HAIG, *supra* note 1, § 1.5, at 8.