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Pendent Jurisdiction (Astor-Honor, Inc. v. Grosset & Dunlap, Inc.)

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In deciding *Toal*, the court, for the first time,[98] held the "discovery rule" to be applicable to medical malpractice actions arising under the Federal Tort Claims Act,[99] and thus the statute of limitations does not begin to run until "the claimant has discovered, or in the exercise of reasonable diligence should have discovered, the acts constituted the alleged malpractice."[100] It would appear, however, that the court's continuous mention of the particular circumstances of the case would indeed limit this holding to actions wherein a foreign object has negligently been left in the plaintiff's body,[101] and should not be understood as applying to all medical malpractice actions arising under federal statute.

PENDENT JURISDICTION

The judicial inclination toward the expansion of the concept of pendent jurisdiction[102] was enhanced by *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*[103] In this action for copyright infringement, unfair competition and unfair trade practices, Judge Friendly stated[104] that when an unfair competition claim[105] is asserted against three defendants in one out of four counts of a complaint whose other three counts allege copyright infringement,[106] asserted against only two of the defendants,

in Flanagan v. Mount Eden General Hospital, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969), a case concerning a foreign object negligently left in the plaintiff's body. Prior to the *Flanagan* decision, the law in New York as to all medical malpractice actions was that the statute of limitations commenced to run upon the patient's termination of a continuous relationship with the wrongdoing doctor or hospital. *See* Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962); Conklin v. Draper, 254 N.Y. 620, 173 N.E. 892 (1930).

98 Certain other circuits have been holding this way for some time. *See, e.g.*, Brown v. United States, 353 F.2d 578 (9th Cir. 1965); Quinton v. United States, 304 F.2d 234 (5th Cir. 1962).

99 *See* note 93 *supra*.

100 438 F.2d at 224-25.

101 This decision is indeed harmonious with present New York decisional law. In Flanagan v. Mount Eden General Hospital, 24 N.Y.2d 427, 431, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 27, the New York Court of Appeals held that in cases "where a foreign object has negligently been left in the patient's body, the Statute of Limitations will not begin to run until the patient could have reasonably discovered the malpractice." *See also* Murphy v. St. Charles Hosp., 35 App. Div. 2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970).

102 *See* 3A J. MOORE, FEDERAL PRACTICE ¶ 18.07, at 1951 (2d ed. 1971). Pendent jurisdiction is a type of ancillary jurisdiction. It is derived from an expansive reading of Article III, Section 2 of the Constitution of the United States. The Supreme Court began the doctrine of pendent jurisdiction in the case of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). There the Court held that a federal court may decide issues of state law when necessary to decide a federal question because the power to decide a case must include the power to resolve all issues necessary to the decision.

103 441 F.2d 627 (2d Cir. 1971).

104 Although this is not the holding of the case, it nevertheless is strong dictum and in all likelihood will be followed in subsequent cases decided in the Second Circuit.

105 Such a claim is one which arises under state law.

106 Copyright infringement is a claim which arises under federal law. 28 U.S.C. § 1338(a) (1970).

a federal court has jurisdiction to entertain the unfair competition claim against the third defendant if it derives from the same "common nucleus of operative fact[s]," as the related copyright infringement claim. This test was stated in *United Mine Workers v. Gibbs*.[107] Thus the pendent jurisdiction doctrine empowers a federal judge to render judgment against a defendant in a state claim who is not a party to any claim of which the court had independent jurisdiction, if the state claim meets the requirements of the *Gibbs* rule.[108]

Judge Friendly applied the rule established by *Gibbs* which, simply stated, holds that pendent jurisdiction exists whenever the state and federal claims are derived from "a common nucleus of operative fact"[109] — if the claims are such that a plaintiff would "ordinarily be expected to try them all in one proceeding."[110] Justice Brennan, speaking for the *Gibbs* Court, reasoned that pendent jurisdiction's "justification lies in considerations of judicial economy, convenience and fairness to litigants."[111] This objective of the *Gibbs* case is consistent with the Federal Rules,[112] and although the facts in *Gibbs* are not identical to those in *Astor*, the Court's "language and common sense considerations underlying it seem broad enough to cover" the problem presented in *Astor*.[113]

> A plaintiff with claims against three alleged conspirators for the same set of acts "would ordinarily be expected to try them all in one judicial proceeding," assuming that all defendants were subject to the process of the court.[114] It would be an unjustifiable waste

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107 383 U.S. 716, 725 (1966).

108 441 F.2d at 630. The Supreme Court in *Gibbs* discarded the test established in Hurn v. Oursler, 289 U.S. 238, 246 (1933), under which pendent jurisdiction was present whenever "two distinct grounds in support of a single cause of action [were] alleged," but not where the claims constituted two causes of action. Prior to *Gibbs* joinder of a pendent party was not a likely possibility since the pendent party's claim was almost certainly a second cause of action. See United Shoe Workers v. Brooks Shoe Mfg. Co., 191 F. Supp. 288 (E.D. Pa. 1960).

109 383 U.S. at 725.

110 *Id.*

111 *Id.* at 726. Economy results from similarity in the proof offered for the federal and nonfederal claims. Convenience results from the consolidation of pretrial procedures. Furthermore, the retention of jurisdiction over both claims may provide a greater opportunity for settlement of the entire dispute between the parties.

112 *Cf.* FED. R. CIV. P. 1: "These rules . . . . shall be construed to secure the just, speedy, and inexpensive determination of every action."

113 441 F.2d at 629. *See* Note, UMW v. Gibbs and *Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968) for an in depth analysis of the *Gibbs* case and related problems. *See also* 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23 (C. Wright ed. 1960).

114 The court indicated in a footnote that a different problem would have occurred if the defendant not named in the three counts under original federal jurisdiction could have been subjected to jurisdiction in the Southern District of New York only by nationwide service of process or if venue against it would be improper. However, the instant defendant was subject to process in the Southern District of New York, and both the state and the federal claims "arose" in that district. *Cf.* 28 U.S.C. § 1391 (1964).

> of judicial and professional time—indeed, a travesty on sound judicial administration—to allow [plaintiff] to try its unfair competition claim against [two defendants] in federal court but to require it to prosecute a claim involving precisely the same facts against [the third defendant] in a State court a block away."[115]

While the decision of the *Astor* court seems to be the logical conclusion of the proper application of the *Gibbs* rule, the Court of Appeals for the Ninth Circuit reached the opposite determination only two years earlier on facts very similar to those present in *Astor*.[116] Indeed, a highly reputable authority on this subject, Moore's *Federal Practice*, has also drawn this opposite conclusion:

> The doctrine of pendent jurisdiction has been applied only in cases in which the claim is against the same party against whom the main claim is pending. It does not permit the bringing in of a different party as to whom no federal claim can be said to be pendent.[117]

Moore's *Federal Practice* cites the case of *Tucker v. Shaw*[118] as authority for this statement.[119] *Astor* weakened the force of this lower court case and thus undermines the validity of the above quoted statement.

The objective of Justice Brennan in *Gibbs* was to depart from a rigid jurisdictional theory toward an economic, fair, convenient and sound judicial administration.[120] Many of the federal courts have aimed at this objective.[121] The clear and unambiguous wording of the statute

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115 441 F.2d at 629-30 [footnote added], *citing* Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 (1945).

116 Williams v. United States, 405 F.2d 951 (9th Cir. 1969). This case involved the joinder of defendants as to whom there was no diversity with a claim for the same injury against the United States under the Federal Tort Claims Act. The court of appeals approved the district court's dismissal of these defendants.

The various district court decisions are divided. Ellicott Machine Corp. v. Wiley Mfg. Co., 297 F. Supp. 1044 (D. Md. 1969) and Bevan v. Columbia Broadcasting System, Inc., 293 F. Supp. 1366 (S.D.N.Y. 1968), held against jurisdiction of a party not named as a defendant in the copyright, patent or trademark claim. American Foresight of Philadelphia Inc. v. Fine Arts Sterling Silver, Inc., 268 F. Supp. 656 (E.D. Pa. 1967) held for federal jurisdiction.

117 3A J. MOORE, FEDERAL PRACTICE ¶ 18.07, at 1952 (2d ed. 1971). *See also* Note, UMW v. Gibbs *and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 664 (1968).

118 308 F. Supp. 1 (E.D.N.Y. 1970).

119 3A J. MOORE, FEDERAL PRACTICE ¶ 18.07, at 1952 n.5a (2d ed. 1971).

120 383 U.S. at 726.

121 Vanderbloom v. Sexton, 422 F.2d 1233 (8th Cir. 1970); Ortman v. Stanray Corp., 371 F.2d 154 (7th Cir. 1967); Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969); *In re* Union Nat'l Bank & Trust Co. of Souderton, Pa., 298 F. Supp. 422 (E.D. Pa. 1969); Chapiewsky v. G. Heileman Brewing Co., 297 F. Supp. 33 (W.D. Wis. 1968); American Foresight of Philadelphia, Inc. v. Fire Arts Sterling Silver, Inc., 268 F. Supp. 656 (E.D. Pa. 1967); Commonwealth of Pennsylvania v. Brown, 260 F. Supp. 323 (E.D. Pa. 1966); United States v. P.J. Carlin Constr. Co., 254 F. Supp. 637 (E.D.N.Y. 1966).

on this subject upholds jurisdiction.[122] And the result of interpreting the statute in this manner is manifestly desirable.[123]

PERSONAL PROPERTY RIGHTS

Three recent Second Circuit cases have illuminated the shadowy contours of federal jurisdiction under Title 28, section 1343(3) of the United States Code which states:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.[124]

All three cases have relied on Justice Stone's formulation that the Civil Rights' statutes confer jurisdiction only when "the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights."[125] All three cases concern rights secured by the Constitution and not rights secured by federal laws. This dis-

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This objective was approved in Rosado v. Wyman, 397 U.S. 397 (1970):

> We are not willing to defeat the common sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to the resolution of the pendent claim.

397 U.S. at 405.

[122] 28 U.S.C. § 1338(b) (1964) states:

> The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws.

Except for section 1338(b) pendent jurisdiction has been a judicial doctrine. The American Law Institute included statutory treatment of pendent jurisdiction in its suggested revision of title 28. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1313(a) (Tent. Draft No. 5, May 2, 1967):

> [T]he court shall have jurisdiction to determine all claims arising under State law that arise out of the same transaction or occurrence or series of transactions or occurrences as the federal claim, defense, or counterclaim, if such a determination is necessarily in order to give effective relief on the federal claim or counterclaim or if a substantial question of fact is common to the claims arising under State law and to the federal claim, defense, or counterclaim.

[123] With the state courts complaining about their small budgets and large case loads, it would not be unreasonable for the federal courts to assume their obligation to absorb their share of the cases. Moreover, the objective of a "just, speedy, and inexpensive determination of every action" will be better served if an entire dispute can be resolved by one court.

[124] 28 U.S.C. § 1343(3) (1970). This section has no jurisdictional amount requirement, unlike the general federal question statute, 28 U.S.C. § 1331 (1970), which requires that the amount in controversy exceed the sum or value of $10,000.

[125] Hague v. C.I.O., 307 U.S. 496, 531 (1939) (Stone, J., concurring). Justice Stone's formulation is criticized in Note, *The Proper Scope of the Civil Rights Act*, 66 HARV. L. REV. 1285, 1288-91 (1953).