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THIRD-PARTY REMOVAL UNDER SECTION 1441(c)

INTRODUCTION

Section 1441(c)\(^1\) of Title 28 of the United States Code permits a defendant to remove an entire case from state to federal court\(^2\) when "a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action."\(^3\) By allowing a defendant\(^4\) to remove a claim cognizable in federal court if it is "separate and independent" from non-removable claims in the same suit, section 1441(c) prevents a plaintiff from destroying a defendant's right of removal by the joinder of unrelated non-removable claims.\(^5\) Neither


2. Removal is the procedure whereby a defendant sued in state court may elect to have the case heard in federal court. C. Wright, The Law of Federal Courts § 38 (4th ed. 1983). Unavailable at English common law and not mentioned in the Constitution, id. at 209; 1A J. Moore & B. Ringle, Moore’s Federal Practice ¶ 0.156[1], at 15, 0.157[1.-1], at 33, (2d ed. 1983), removal is a statutory right. 1A J. Moore & B. Ringle, supra, ¶ 0.157[1.-1], at 34; C. Wright, supra, § 38, at 209. Nonetheless, it is well settled that the power of Congress to provide for removal is constitutional. City of Greenwood v. Peacock, 384 U.S. 808, 833 (1966); Tennessee v. Davis, 100 U.S. 257, 265 (1880).

In general, actions are removable if they originally could have been brought in federal court. C. Wright, supra, § 38, at 210; see 28 U.S.C. § 1441(a) (1976). An important limitation upon this general rule is that cases in which jurisdiction would be based solely on diversity are not usually removable if any of the defendants is a resident of the state in which the action is brought. 1A J. Moore & B. Ringle, supra, ¶ 0.157[5], at 123; C. Wright, supra, § 38, at 214; e.g., Martin v. Snyder, 148 U.S. 663, 663-64 (1893); Dunkin Donuts of Am. v. Family Enters., 381 F. Supp. 371, 372 (D. Md. 1974); Hudler v. Wilson, 376 F. Supp. 592, 592 (D. Colo. 1974); see 28 U.S.C. § 1441(b) (1976). By contrast, if removal jurisdiction is premised upon a federal question, the defendant may remove regardless of his citizenship. 1A J. Moore & B. Ringle, supra, ¶ 0.160[1], at 217-19; C. Wright, supra, § 38, at 214; see 28 U.S.C. § 1441(b) (1976).

3. 28 U.S.C. § 1441(c) (1976) provides:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

4. Under the general removal statutes currently in effect, it is well settled that a plaintiff who has elected to bring his action in a state forum may not later remove the case to federal court. C. Wright, supra note 2, § 40, at 227; see Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941); 28 U.S.C. § 1441(a) ("any civil action brought in a State court . . . may be removed by the defendant or defendants . . . .")

the statutory language nor the legislative history, however, indicates whether Congress intended this right of removal to attach only to claims asserted by a plaintiff against a defendant, or whether it also intended this right to extend to claims brought by a defendant against a third-party defendant, who is made a party to the suit by the original defendant through impleader. In the absence of any explicit congressional or Supreme Court guidance on this issue, lower federal courts have disagreed over the application of section 1441(c) to third-party claims. A majority of courts and commentators has concluded that third-party claims may not be removed under the statute. Under one line of analysis, third-
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party claims have been considered insufficiently "separate and independent" from the main claim, as required by section 1441(c).10 Alternatively, based upon the Supreme Court's determination that removal statutes should be strictly construed, third-party removal has been denied on the grounds that either section 1441(c) pertains only to claims joined by the original plaintiff,11 or that only the original defendant, not the third-party defendant, may remove.13


Led principally by the Fifth Circuit, a minority of courts has permitted third-party removal, usually on the basis of the principle of uniform application of removal statutes. Their position is that if third-party removal is prohibited, the right of removal will be dependent on the different state impleader statutes. For example, a third party impleaded under a liberal state impleader statute would be unable to remove. If the same third party could not be impleaded due to a strict state statute, however, the defendant presumably would sue the third party in a new action and the third party generally would have a right of removal. These courts therefore reason that third-party removal under section 1441(c) must be allowed in order to prevent such removal from being dependent upon arbitrary, and largely fortuitous, differences between state impleader procedures. In addition, the American Law Institute has recommended that third-party claim removable after severed from main claim by state court.


party claims in diversity cases should generally be removable in order to avoid potential local prejudice.\textsuperscript{18} Even when the minority view is accepted and removal of third-party claims is permitted, the federal courts do not adjudicate the entire suit.\textsuperscript{19} Rather, the courts that permit third-party removal remand the principal claim to state court in virtually every case of this nature,\textsuperscript{20} thereby preserving the plaintiff's choice of forum and maintaining a logical consistency with the concept of the third-party claim as "separate and independent" from the principal claim.\textsuperscript{21} Remand of the main claim is appropriate under section 1441(c), which provides

\textsuperscript{18} American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts § 1304(b), at 16-17, 144, 146 (1969) (proposed statute and commentary). As adopted by the American Law Institute (ALI), however, the provision would not allow third-party removal if the defendant and the third party are both insured by the same liability insurer, or if they have a relationship of insurer-insured or of employer-employee. \textit{id.} § 1304(b), at 16-17, 146 (proposed statute and commentary). Furthermore, the ALI would not permit third-party removal on the basis of a federal question. \textit{id.} at 197 (commentary to § 1312(a)); see id. § 1312(a), at 25-26 (proposed statute).


\textsuperscript{21} \textit{Carl Heck Eng'rs v. Lafourche Parish Police Jury}, 622 F.2d 133, 136 (5th Cir. 1980); \textit{Peturis v. Fendley}, 496 F. Supp. 203, 205 (S.D. Ala. 1980); \textit{Wayrynen}}
that after a claim is removed "the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction." 22

This Note examines whether removal of third-party claims is justified under section 1441(c) and argues that third-party defendants should be allowed to remove under this provision only if the third-party claim is indeed "separate and independent" from the principal claim. 23 This Note further contends that impleaded claims by their nature are not truly "separate and independent," and thus may not be removed under section 1441(c). 24 The various interests of each of the parties and the policy ramifications of those interests with respect to third-party removal are also addressed. 25 The Note concludes that additional claims asserted against an impleaded third-party defendant may be sufficiently "separate and independent" from the principal claim to provide a proper basis for removal under section 1441(c). 27

I. THIRD-PARTY REMOVAL—CONFLICTING JUDICIAL INTERPRETATIONS OF SECTION 1441(c)

A. The Shamrock Analyses

The Supreme Court set forth the pivotal removal analyses in Shamrock Oil & Gas Corp. v. Sheets. 28 Curiously, the Shamrock analyses have been applied both to permit and to deny third-party removal.

1. Strict Construction of Removal Statutes—The Majority View

The Supreme Court in Shamrock articulated the principle of strict construction of removal statutes. In Shamrock, which involved a predecessor of Section 1441, 29 the plaintiff contended that he should be considered a "defendant" in a permissive counterclaim for purposes


23. See infra pt. I.

24. See infra pt. II.

25. See infra pt. III.

26. Under various state joinder provisions patterned after Fed. R. Civ. P. 18(a), a defendant may assert any additional claims he has against an impleaded third-party defendant. See, e.g., Ala. R. Civ. P. 18(a); Colo. R. Civ. P. 18(a); Mont. R. Civ. P. 18(a); Vt. R. Civ. P. 18(a).

27. See infra pt. IV.

28. 313 U.S. 100 (1941).

of removal. The Court disagreed, holding that the right of removal under the statute was confined to the original defendant. In reaching its decision, the Court stated:

[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such [removal] legislation. . . . "Due regard for the rightful independence of state governments . . . requires that [the federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

Based upon the Shamrock principle of strict construction of removal statutes, a majority of courts has denied third-party removal under section 1441(c) on two grounds. Under one line of analysis, courts have construed the phrase "joined with" in section 1441(c) to mean that removal under the section can be achieved only on the basis of claims joined by the plaintiff, not those joined by the defendant, thereby precluding removal of third-party claims. Other courts have analyzed section 1441(c) in conjunction with section 1441(a), which sets forth the general rule that only defendants can remove. Follow-

Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are [sic] now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State.

Id. at 1094 (emphasis added).

30. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941).
31. Id. at 108.
32. Id. at 108-09 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)).
35. 28 U.S.C. § 1441(a) (1976). Section 1441(a) provides as follows: Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id.
ing the Court in Shamrock, these courts have interpreted the term "defendant" from section 1441(a) to refer only to the original defendant, and thus have concluded that section 1441(c) does not provide for removal by third-party defendants.\textsuperscript{36}

Both analyses, however, are subject to criticism. Section 1441(c) does not explicitly refer to claims joined exclusively by the plaintiff, and it therefore may be argued that removal by third-party defendants should not be denied merely because the plaintiff did not join the claim.\textsuperscript{37} Denying third-party removal on the basis of a restrictive interpretation of "joined with" thus may be inconsistent with the express language of the statute.\textsuperscript{38} Moreover, in other procedural contexts the term "join" simply refers to the linking of claims or parties in one suit, and does not limit the opportunity for joinder to the plaintiff.\textsuperscript{39} For example, Rule 18(a), which is concerned with the joinder of claims, specifically provides that any party may join claims against an opposing party.\textsuperscript{40} The phrase "joined with" in section 1441(c) can, therefore, be interpreted to refer to the joinder of claims by any party, not just the plaintiff.

In addition, the term "defendant" is absent from section 1441(c). Courts therefore have argued that removal by third-party defendants should not be denied on the ground that section 1441(c) applies only to the original defendant.\textsuperscript{41} Moreover, even if section 1441(c) is read in


\textsuperscript{40} Fed. R. Civ. P. 18(a). The Rule reads as follows:

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

\textit{Id.}

conjunction with section 1441(a), a third-party defendant is as much a “defendant” as the original defendant, because the third party may be indirectly liable for the plaintiff’s entire judgment.42

Regardless of the specific analysis under the majority view, reliance upon Shamrock may be misplaced. Courts denying removal by third parties have reasoned that the issue is essentially the same as that presented in Shamrock43—whether a plaintiff may remove on the theory that he is a “defendant” on a permissive counterclaim.44 Shamrock, however, can be distinguished from cases of third-party removal. The Court in Shamrock stated that the plaintiff should abide by his choice of a state forum.45 A third-party defendant, on the other hand, does not choose to litigate in state court, but rather is brought involuntarily into the forum by the defendant.46 Like an original defendant, a third-party defendant therefore may need the protection of the removal statutes, while the plaintiff does not.47 A third-party defendant thus should have a right of removal under section 1441(c) if the statutory requirement of a “separate and independent” claim is met.

2. Uniform Application of Removal Statutes—The Minority View

Shamrock has also been read as support for the view permitting removal of third-party claims.48 The Shamrock Court stated:

The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law . . . . Hence the [removal statute] must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.49

44. See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 103-04 (1941).
45. See id. at 106-07 & n.2.
46. See supra note 7 and accompanying text.
49. 313 U.S. 100, 104 (1941).
Thus, section 1441(c) must be construed so that its application cannot be affected by state law concerning impleader of third-party claims.\(^5\)

If third-party removal is not permitted under section 1441(c), removal will turn on the applicable state impleader statute.\(^5\) For example, if a strict state impleader statute prohibited impleader of a particular claim by the defendant/third-party plaintiff against a potential third-party defendant, the defendant/third-party plaintiff would presumably sue the potential third-party defendant in a new action.\(^5\) Assuming the general criteria for removal were satisfied, the potential third-party defendant would unquestionably have a right as defendant to remove the case.\(^5\) If a liberal state impleader statute allowed the defendant to implead this same claim against the potential third-party defendant, however, the ability of the third-party defendant to remove would rest on the interpretation of section 1441(c).\(^4\) To deny third-party removal under section 1441(c) on the basis of a particular state’s impleader procedure would be contrary to the policy of uniform application of removal statutes.\(^5\)

The foundation upon which this argument rests is the unfairness of allowing removal to turn on local state practice regarding third-party procedures.\(^5\) Such variance in state practice, however, existed in the situation presented in *Shamrock*.\(^5\) Indeed, the result in *Shamrock*


\(^{51}\) See *supra* note 50.


\(^{53}\) See *supra* note 52.

\(^{54}\) See *supra* note 52.


\(^{56}\) 1A J. Moore & B. Ringle, *supra* note 2, ¶ 0.167[10], at 511-13. See *supra* note 48.

made the right of removal depend on local state practice concerning counterclaims. The principle of uniform application of removal statutes therefore may fail to provide an adequate basis for third-party removal. Rather, the ability of a third-party defendant to remove must depend upon whether the statutory requirement that the claim be "separate and independent" is met.

B. The Meaning of "Separate and Independent"

1. Judicial Interpretation of the "Separate and Independent" Requirement

Section 1441(c) requires that a claim be "separate and independent" before a defendant can remove the claim to federal court. In American Civil Procedure, 426 F.2d 935, 938 (5th Cir. 1970)); Knight v. Hellenic Lines, 543 F. Supp. 915, 918 (E.D.N.Y. 1982); 1A J. Moore & B. Ringle, supra note 2, ¶ 0.167[10] n.24, at 512; see Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941). In Shamrock, the Court held that a plaintiff could not remove on the theory that he was a "defendant" on a permissive counterclaim. 313 U.S. at 106-08. If the local state procedure did not permit the defendant to assert the counterclaim, however, the defendant would have had to assert the claim in a new action, where the defending party, the plaintiff in the prior suit, generally would have a right of removal. 1A J. Moore & B. Ringle, supra note 2, ¶ 0.167[10] n.24, at 512; see Central of Ga. Ry. v. Riegel Textile Corp., 426 F.2d 935, 938 (5th Cir. 1970).

In addition, many state impleader statutes are patterned after Rule 14 of the Federal Rules of Civil Procedure and are virtually identical in language, providing that the defendant may implead a party who may be liable to him if he is liable to the plaintiff. E.g., Ala. R. Civ. P. 14(a); Ariz. R. Civ. P. 14(a); Ark. R. Civ. P. 14(a); Colo. R. Civ. P. 14(a); Conn. Gen. Stat. § 82-102(a) (West Supp. 1983); Del. Super. Ct. Civ. R. 14(a); Fla. R. Civ. P. 1.180(a); Ga. Code Ann. § 9-11-14(a) (1982); Idaho R. Civ. P. 14(a); Ind. R. Trial P. 14(a); Kan. R. Civ. P. 60-214(a); Ky. R. Civ. P. 14.01; Mass. R. Civ. P. 14(a); Minn. R. Civ. P. 14.01; Mont. R. Civ. P. 14(a); Nev. R. Civ. P. 14(a); N.M.R. Civ. P. 14(a) (district courts); N.Y. Civ. Prac. Law § 1007 (McKinney 1976); N.D.R. Civ. P. 14(a); Ohio R. Civ. P. 14(a); S.D. Codified Laws Ann. § 15-6-14(a) (Supp. 1983); Tenn. R. Civ. P. 14.01; Utah R. Civ. P. 14(a); Vt. R. Civ. P. 14(a); W. Va. R. Civ. P. 14(a). As a result, the uniform application rationale for removal is questionable, because the same claims generally could be impleaded regardless which state impleader statute is employed.

59. 28 U.S.C. § 1441(c) (1976). When a "separate and independent" claim is properly removed under section 1441(c), the entire case is initially brought into federal court. Id. The provision thus provides a means for a federal court to hear state claims that are unrelated to the "separate and independent" federal claim. This raises the constitutional question whether Congress may provide removal jurisdiction for state claims that are not within the federal courts' original statutory jurisdiction. 1A J. Moore & B. Ringle, supra note 2, ¶ 0.163[3], at 315-22; C. Wright, supra note 2, § 39, at 223; 14 C. Wright, A. Miller & E. Cooper, supra note 7, at 649-54; Cohen, supra note 5, at 20-25, 34-41; Levin, supra note 5, at 484-87; Moore & VanDerCreek, supra note 9, at 434-37. The majority of commentators, however, have concluded that section 1441(c) is constitutional. See 1A J. Moore & B. Ringle, supra note 2, ¶ 0.163[3], at 317-21; C. Wright, supra note 2, § 39, at 223; Cohen, supra note 5, at 25, 41; Moore & VanDerCreek, supra note 9, at 496-98. But see
can Fire & Casualty Co. v. Finn, the Supreme Court interpreted the phrase "separate and independent" in section 1441(c). The Court stated that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)."

Applying the Finn test, courts either have found that the principal and third-party claims involve a single wrong to the plaintiff, or...
have determined that the third-party claim derives from "an interlocked series of transactions." When either of these criteria is met, Finn requires the federal court to decline jurisdiction over the claim.

Courts permitting removal of third-party claims, however, hold that a third-party claim does not necessarily involve a "single wrong to plaintiff, for which relief is sought." The third party in some cases may have only wronged the defendant, and the plaintiff thus is technically not seeking relief from the third party. In addition, the principal and third-party claims do not necessarily derive from "an interlocked series of transactions" as set forth in the Finn test. The factual inquiries in each claim may be quite distinct, such as when the principal claim sounds in tort and the third-party claim sounds in contract, therefore making the claims sufficiently "separate and independent."

In order to determine whether third-party claims can meet this statutory requirement, it is necessary to establish a precise meaning for the phrase "separate and independent." An inquiry must be made into the legislative history of section 1441(c) to arrive at a proper interpretation of this phrase.


64. See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14 (1951).


66. See supra note 65.


2. Legislative History and Statutory Construction

Under the statutory predecessor to section 1441(c),69 two categories of claims could be removed: (1) separable controversies, which were thought to be integrally related to other claims in the suit yet capable of being detached and adjudicated alone;70 and (2) separate controversies, which were unrelated to other claims in the suit.71 The distinctions between separable and separate controversies, although theoreti-


69. Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087, 1094-95. The statute provided, in pertinent part:

And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district.

Id. at 1094. Unlike section 1441(c), this portion of the statute did not provide for removal on the basis of a federal question. See id.

70. IA J. Moore & B. Ringle, supra note 2, ¶ 0.162[3], at 304-08; Lewin, supra note 5, at 428; see C. Wright, supra note 2, § 39, at 220; Duvall, Removal—The "Separate and Independent Claim," 7 Okla. L. Rev. 385, 387 (1954); Comment, Chaos of Jurisdiction in the Federal District Courts, 35 Ill. L. Rev. 566, 576 (1941) [hereinafter cited as Chaos of Jurisdiction]. The phrase "separable controversy" derives from The Separable Controversy Act of 1866, 14 Stat. 306, which introduced the concept that if a "separable controversy between citizens of different states" was present within a larger lawsuit, the separable portion of the action could be removed. 14 C. Wright, A. Miller & E. Cooper, supra note 7, § 3724, at 621. The statute was amended in 1875, Act of March 3, 1875, 15 Stat. 306, which introduced the concept that if a "separable controversy between citizens of different states" was present within a larger lawsuit, the separable portion of the action could be removed. 14 C. Wright, A. Miller & E. Cooper, supra note 7, § 3724, at 621. The statute was amended in 1875, Act of March 3, 1875, 18 Stat. 470 (repealed 1911), and the Supreme Court construed the new language to mean that the entire suit could be removed if a separable controversy was present. Id.; Barney v. Latham, 103 U.S. 205, 212 (1880). The amended statute remained largely unchanged until the provision was superseded by section 1441(c). For examples of separable controversies, see Pullman Co. v. Jenkins, 305 U.S. 534 (1939); Barney v. Latham, 103 U.S. 205 (1880); Texas Employers' Ins. Ass'n v. Felt, 150 F.2d 227 (5th Cir. 1945). See generally Holmes, The Separable Controversy—A Federal Removal Concept, 12 Miss. L. J. 163 (1939); Keefe & Lacey, The Separable Controversy—A Federal Concept, 33 Cornell L.Q. 261 (1947).

71. IA J. Moore & B. Ringle, supra note 2, ¶ 0.163[1], at 308-11; Cohen, supra note 5, at 4; Duvall, supra note 67, at 387; Lewin, supra note 5, at 428 & n. 15; see C. Wright, supra note 2, § 39, at 220. Courts developed the principle that if state law permitted the joinder of distinct suits, one between parties of diverse citizenship and one between citizens of the same state, only the controversy between the diverse parties could be removed. Note, The Content of "Separable Controversy" for Purposes of Removal to the Federal Courts., 36 Colum. L. Rev. 794, 799 n.35 (1936); see Note, Removal under Section 1441(c) of the Judicial Code, 52 Colum. L. Rev. 101, 101-02 (1952) [hereinafter cited as Removal Under Section 1441(c)]; Note, Separation of Causes in Removal Proceedings, 41 Harv. L. Rev. 1104, 1104-50 (1928) [hereinafter cited as Separation of Causes]. The removable portion of such a case was deemed a "separate," rather than "separable," controversy. IA J. Moore & B. Ringle, supra note 2, ¶ 0.163[1], at 308-09; see C. Wright, supra note 2, § 39, at 220; see,
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By eliminating the separable controversy as a ground for removal, Congress intended to simplify removal as well as to limit it to those situations in which distinct claims or causes of action had been joined. In changing the basis for removal to claims which are "separate and independent," the revisers apparently had the concept of the separate controversy in mind, because they specifically indicated that a separate cause of action may be removed under the section. Separable controversies, which are integrally related to other claims in the suit, were expressly eliminated from the provision. The legislative history, therefore, suggests that Congress, by using the phrase "separate and independent," intended to predicate removal under section 1441(c) upon a high degree of disassociation between the claim to be removed and the other claims in the suit.


74. See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 9-11 (1951); H.R. Rep. No. 308, 80th Cong., 1st Sess. A133-34 (1947), reprinted in Reviser's Note, 28 U.S.C. § 1441(c) (1976); 1A J. Moore & B. Ringle, supra note 2, ¶ 0.162[1], at 299; C. Wright, supra note 2, § 39, at 221; C. Wright, A. Miller & E. Cooper, supra note 7, § 3724, at 622-23.

75. H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947), reprinted in Reviser's Note, 28 U.S.C. § 1441(c) (1976); see 1A J. Moore & B. Ringle, supra note 2, ¶ 0.162[1], at 299; Cohen, supra note 5, at 6; Moore & VanDercreek, supra note 9, at 492.

76. See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 11-12 (1951); H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947), reprinted in Reviser's Note, 28 U.S.C. § 1441(c) (1976); Lewin, supra note 5, at 429. In this context, it is interesting to note that the decisions under the former statute were also in conflict as to third-party removal. Some courts held that third-party claims were separable and thus removable, Summers & Oppenheim, Inc. v. Tillinghast Stiles Co., 19 F. Supp. 230, 230-31 (S.D.N.Y. 1937); Gillette Safety Razor Co. v. Chaffee-Shipper's Serv., 10 F. Supp. 898, 898-99 (S.D.N.Y. 1935), while other courts determined that third-party claims were non-separable and non-separate and therefore were not removable, Henry v. Rice, 74 F. Supp. 225, 223 (E.D. Mo. 1947); Von Herwarth v. Gristede Bros., 29 F. Supp. 911, 912 (S.D.N.Y. 1937).


Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of United States District
The Supreme Court’s decision in *Finn* is in accord with this legislative history. After tracing the evolution of section 1441(c), the Court emphasized that the phrase “separate and independent” means that the claims must be substantially disconnected from the other claims in the suit. The Court noted: “The addition of the word ‘independent’ gives emphasis to congressional intention to require *more complete disassociation* between the federally cognizable proceedings and those cognizable only in state courts before allowing removal.” By interpreting the statute in this manner, the Court was following a long line of Supreme Court precedent in which the terms “separate” and “independent” have been employed in a jurisdictional context to mean that the claims are logically and factually unrelated.

This construction of section 1441(c) is consistent with decisions denying removal by original defendants under the statute in the lower federal courts. In addition, federal courts that have permitted defendants to remove under section 1441(c) have done so on the ground that the claims were sufficiently disassociated. Furthermore, this

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Courts. In this respect it will somewhat decrease the volume of Federal litigation.

*Id.* See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 12 (1951); Cohen, *supra* note 5, at 6-8; *Lewin, supra* note 5, at 432; *Removal under Section 1441(c), supra* note 71, at 101-02. But see *Keefe, Thaler, Bernstein, Wright & Gilmer, Venue and Removal Jokers in the New Federal Judicial Code, 38 Va. L. Rev. 559, 603 (1952)* (contending that Congress intended no change in the basis for removal).

80. See *American Fire & Casualty Co. v. Finn, 341 U.S. 6, 9-12 (1951).*

81. E.g., *Reeves v. Beardall, 316 U.S. 283, 286 (1942)* (when joined claims arise out of “wholly separate and distinct transactions or engagements,” they are “unrelated”); *Hurn v. Oursler, 289 U.S. 238, 245-48 (1933)* (a “separate and distinct” and “wholly independent” non-federal claim is outside federal pendent jurisdiction); *Pacific R.R. Removal Cases, 115 U.S. 1, 22-23 (1885)* (joined claim of a “separate and distinct” character is essentially a complete and different suit).


construction of the statute conforms with the rationale of section 1441(c) that a party should not be able to defeat another party's right of removal through the addition of unrelated non-removable claims.\(^\text{84}\) Having established that the phrase "separate and independent" means that only claims which are entirely unrelated may be removed under section 1441(c), the next inquiry is whether a third-party claim can ever be sufficiently disassociated to satisfy this statutory requirement.

II. IMPLERADER AND THE "SEPARATE AND INDEPENDENT" REQUIREMENT

Requests for third-party removal to date generally have been based upon a situation in which the original defendant asserts a claim against a third-party defendant through impleader.\(^\text{85}\) When a defendant impleads a third party, he does so on the theory that if he is liable to the plaintiff, the third-party defendant will be liable to him.\(^\text{86}\) A properly impleaded claim, therefore, must be contingent to some extent upon the outcome of the principal action.\(^\text{87}\) Because the liability of the impleaded third party depends upon the way in which the principal claim is resolved,\(^\text{88}\) the third-party defendant may protect his interests by setting forth any defenses that the defendant could have interposed.\(^\text{89}\) In addition, the third-party action will generally be

\(^{84}\) See supra note 5. Section 1441(c) and its predecessors represent a response to the practice of certain plaintiffs who joined in-state defendants with out-of-state defendants in order to prevent removal to federal court. See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 10 (1951); Southland Corp. v. Estridge, 456 F. Supp. 1296, 1299 (C.D. Cal. 1978).


\(^{89}\) Fed. R. Civ. P. 14(a); see C. Wright, supra note 2, § 76, at 513. Many state impleader statutes also provide for this interposing of defenses by the third party. E.g., Ariz. R. Civ. P. 14(a); Colo. R. Civ. P. 14(a); Idaho R. Civ. P. 14(a); Mont. R. Civ. P. 14(a); Vt. R. Civ. P. 14(a); W. Va. R. Civ. P. 14(a); see, e.g., Modernage
dismissed if the defendant is not held liable to the plaintiff. For these reasons, a third-party claim is largely dependent upon the principal claim.

Impleader, however, is not a compulsory procedure; a defendant may choose not to bring a third-party defendant into a suit, even though such a procedural option is available. For example, the defendant may decide to assert his claim in an independent action. It can be argued, therefore, that a third-party claim is "separate and independent" from the principal claim, because the third-party claim can be properly adjudicated in an entirely separate action. At the same time, however, the purpose of impleader is to enable related claims to be disposed of in one suit. That is, it requires that the third-party claims be dependent on the principal claims.


Confirming this dependency between an impleaded claim and the principal claim, the Supreme Court has stated that “[a] third-party complaint depends at least in part upon the resolution of the primary lawsuit. Its relation to the original complaint is thus not mere factual similarity but logical dependence.” It thus may be improper for a third-party defendant to attempt to remove an impleaded claim under section 1441(c), because a “separate and independent” claim is not a claim that can properly be impleaded by the defendant. An impleaded claim, therefore, by definition should not be characterized as “separate and independent” for purposes of removal under section 1441(c).

Moreover, it can be argued that under this analysis impleaded claims fail to meet the Supreme Court’s criteria, established in Finn, for “separate and independent” claims under section 1441(c). Because the liability of a third party on an impleaded claim derives from the liability of the defendant to the plaintiff, the principal claim and the third-party claim are both concerned with the “wrong to plaintiff, for which relief is sought.” The transactions giving rise to the third-party claim thus are also “interlocked” with the plaintiff’s claim. An impleaded third-party claim, therefore, should not be interpreted as “separate and independent” according to the construction given those terms by the Court in Finn.


98. See supra note 86 and accompanying text.


100. 341 U.S. at 14 (1951); see supra note 63.

101. Under federal law, impleaded third-party claims are within the ancillary jurisdiction of a federal court, even though such claims lack an independent basis of federal subject matter jurisdiction. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375 & n.18 (1978); C. Wright, supra note 2, § 76, at 515; e.g., H. L. Peterson Co. v. Applewhite, 383 F.2d 430, 433 (5th Cir. 1967); Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1958). Similarly, pendent jurisdiction permits a federal court to hear a
III. Policy Concerns in Analyzing Third-Party Removal

An analysis of the interests of the plaintiff, the defendant, and the third-party defendant further weighs against third-party removal of impleaded claims and therefore is consistent with the statutory purpose of section 1441(c). Removal is a statutory right that gives a defendant the authority to choose a federal forum when Article III jurisdiction otherwise exists. A third-party defendant, at times, has an interest in removing the impleaded claim to federal court. For claim even though it has no independent basis of federal jurisdiction over the claim. C. Wright, supra note 2, § 19, at 103-05; e.g., United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); Hurn v. Oursler, 289 U.S. 238, 245-46 (1933); see Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370-71 (1978); Aldinger v. Howard, 427 U.S. 1, 9 (1976). Thus, pendent jurisdiction is thought to be closely related to ancillary jurisdiction. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978); Aldinger v. Howard, 427 U.S. 1, 9-13 (1976). An analogy to pendent jurisdiction is, therefore, appropriate to an analysis of impleaded claims. The Supreme Court in Hurn v. Oursler, 289 U.S. 238 (1933), held that a non-federal claim that can be characterized as “wholly independent,” id. at 248, and “separate and distinct,” id. at 246, from a federal claim is not within federal pendent jurisdiction. Id. at 246, 248. If the related doctrine of pendent jurisdiction may not extend to such separate and independent non-federal claims, then, by analogy, ancillary jurisdiction, which includes impleader, should not include such claims. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375 & n.18 (1978). In Owen Equipment, the plaintiff amended his complaint to assert a claim against the third-party defendant, who was impleaded by the defendant. Id. at 367. The defendant’s motion for summary judgment was granted, leaving only the plaintiff and the third party in the case in federal court. Id. at 368. It was later revealed at trial that the third party and the plaintiff were citizens of the same state. Id. at 369. Because the parties failed to meet the complete diversity requirement, the Court stated that the trial court lacked jurisdiction to hear the claim. Id. at 377. Characterizing the claim as “entirely separate” and “independent” from the principal claim, id. at 376, the Court held that it was outside federal ancillary jurisdiction. Id. at 376-77. This analogy is consistent with the requirement that a defendant must have an independent basis of federal jurisdiction for any additional claims asserted against the third party not arising from impleader. Nishimatsu Constr. Co. v. Houston Nat’l Bank, 515 F.2d 1200, 1205 (5th Cir. 1975); United States ex rel. Payne v. United Pac. Ins. Co., 472 F.2d 792, 795-96 (9th Cir.), cert. denied, 411 U.S. 982 (1973); C. Wright, supra note 2, § 76, at 511. In light of this analysis, it would be an improper expansion of federal jurisdiction to find that an impleaded third-party claim is “separate and independent” under section 1441(c).

102. C. Wright, supra note 2, § 38, at 209.

103. There are a number of potential reasons why a party would want to have a case heard in federal rather than state court, including: freedom from local prejudice, see Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting); Bank of the United States v. Deveaux, 9 U.S. 37, 50, 5 Cranch 61, 87 (1809); the broad federal discovery procedures, 1A J. Moore & B. Ringle, supra note 2, ¶ 0.157[13], at 198; the possibility of transferring the case to a more convenient venue in a sister state, id. at 197; the federal unanimous jury verdict requirement, id. at 196; the greater discretion afforded to federal judges, id. at 198 n.18; the larger area from which jurors are drawn, id.; and the overall quality of the administration of justice, 13 C. Wright, A. Miller & E. Cooper, supra note 7, § 3601, at 592-93 & n.66.
example, the third-party defendant may believe that the quality of justice is superior in federal court,104 where the judges have tenure for life.105 The third party may also wish to remove in order to avail himself of the federal pre-trial procedures, which are considered better than those found in certain state court systems.106 Moreover, the third-party defendant’s removal interest is particularly acute when the plaintiff and defendant are citizens of the forum state, while the third party is a citizen of another state.107 In such cases, the third-party defendant may fear state court prejudice against him, which is a long-standing rationale for removal.108

Recognizing that a third party may be subject to local state bias,109 the American Law Institute (ALI) has adopted a proposal whereby a third-party defendant would have a general right of removal in diver-
sity cases. The ALI, however, was concerned that the original defendant would misuse this right of removal by impleading a third party as a means of getting his case to federal court. Accordingly, the ALI limited the right of third-party removal by expressly prohibiting such removal if the defendant and the third party are both insured by the same liability insurer, or if they have a relationship of insurer-insured or of employer-employee: those situations in which the third-party defendant could be under the control of the original defendant. Although the potential for collusion to gain access to a federal court is one reason to limit third-party removal, there are other interests of the defendant and the plaintiff which must be considered in formulating a policy with respect to removal of third-party claims.

The defendant generally will have an interest in keeping the impleaded third-party claim in state court. When third-party removal is permitted, the federal court will hear the impleaded claim but will routinely remand the principal claim to state court. When such remand occurs, if the defendant does not wish to dismiss the claim, he must defend the principal claim in state court while also bringing the third-party claim in federal court. Because the defendant has an interest in resolving all of his related disputes in a single proceeding, such a splitting of the suit may be procedurally uneconomical for him. The defendant’s interests, therefore, weigh against permitting third-party removal of impleaded claims.

110. Id. § 1304(b), at 16-17, 146. The American Law Institute, however, would not permit third-party removal on the basis of a federal question. Id. at 197; see id. § 1312(a).
111. Id. at 146-47. For example, if the plaintiff and the defendant were citizens of the same state, the defendant could implead a diverse third party for the principal purpose of having the entire case removed to federal court by the third-party defendant.
112. Id.; see id. § 1304(b), at 16-17.
113. See infra notes 115-16 and accompanying text.
114. See supra notes 19-20 and accompanying text.
116. The primary purpose of impleader is to eliminate the “circuity of actions” in making the defendant participate in two suits which could be economically resolved in one proceeding. See United States v. Yellow Cab Co., 340 U.S. 543, 556 (1951); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 477 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978); United States Fidelity & Guar. Co. v. Perkins, 388 F.2d 771, 773 (10th Cir. 1968); United Bank of Denver Nat’l Ass’n v. Shavlik, 189 Colo. 280, 282, 541 P.2d 317, 318 (1975); C. Wright, supra note 2, § 76, at 509; 6 C. Wright & E. Miller, supra note 7, § 1442, at 202-03.
The plaintiff has an interest in recovering a complete judgment without inordinate delay.\textsuperscript{117} This interest may be prejudiced by third-party removal. When a third-party claim is removed under section 1441(c), the entire action is brought into federal court.\textsuperscript{118} In virtually every case of third-party removal, however, the principal claim is subsequently remanded.\textsuperscript{119} As a result, the plaintiff is subjected to a procedural delay while his claim is removed to federal court and later remanded. The third party may also use this delay as a strategic weapon to encourage a settlement between the plaintiff and the defendant, particularly when the plaintiff is under financial pressure to recover on the claim.\textsuperscript{120}

Removal by the third party under section 1441(c) may also impair the plaintiff’s recovery of the entire judgment. For example, if the main claim is remanded to state court after the third-party action is removed and the original defendant lacks sufficient financial resources to compensate the plaintiff for his complete judgment, the plaintiff would be uncertain as to his recovery despite having won the case on the merits. The plaintiff’s recovery of his judgment would depend upon the later resolution of the dispute between the defendant and the third-party defendant, which would have to be resolved at some future date in federal court. Although the plaintiff might ultimately obtain his entire judgment, he would be subjected to a lengthy period of uncertainty.

Accordingly, removal of impleaded claims by third-party defendants may substantially prejudice the plaintiff’s interests. Although the third party has an interest in having his claim adjudicated in federal court,\textsuperscript{121} this interest is outweighed by the effect such removal might

\textsuperscript{117} Another purpose of impleader is to avoid the “potentially damaging time delay” between judgments in the main and third-party actions. 6 C. Wright & A. Miller, supra note 7, § 1442, at 203; see Dery v. Wyer, 265 F.2d 804, 806-07 (2d Cir. 1959); Joe Grasso & Son, Inc. v. United States, 42 F.R.D. 329, 331 (S.D. Tex. 1966), aff’d, 380 F.2d 749 (5th Cir. 1967).

\textsuperscript{118} See 28 U.S.C. § 1441(c) (1976).

\textsuperscript{119} See supra notes 19-20 and accompanying text.

\textsuperscript{120} See Amendments to Federal Rules of Civil Procedure, 446 U.S. 997, 997-1001 (1980) (Powell, J., dissenting) (procedural delay forces settlements upon those unable to bear the burden of delay); Note, Tactical Use and Abuse of Depositions under the Federal Rules, 59 Yale L.J. 117, 131 (1949) (procedural delay encourages settlement when a party is anxious to go to trial). The defendant and the third-party defendant, therefore, would have an incentive to collude in order to bring the case into federal court. See Marsh Inv. Corp. v. Langford, 494 F. Supp. 344, 350 n.6 (E.D. La. 1980) (potential for collusion between defendant and third-party defendant), aff’d, 652 F.2d 583 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); American Law Institute, supra note 18, at 146-47.

\textsuperscript{121} See supra notes 102-09.
have on the interests of the plaintiff and the original defendant.\textsuperscript{122} Public policy considerations, therefore, militate against removal of impleaded third-party claims.

IV. \textbf{Additional Claims Against Third-Party Defendants—A Viable Justification for Removal}

Under various state procedures patterned after the Federal Rules, it is possible for a defendant, after he has properly impleaded a third-party defendant, to assert any additional claims he has against such third-party defendant.\textsuperscript{123} Such additional claims could provide a proper basis for removal under section 1441(c). A number of courts have impliedly approved the removal of additional claims asserted against a third-party defendant.\textsuperscript{124} These courts, although denying removal of the particular third-party claim before them, have indicated that they would permit third-party removal under section 1441(c) if a truly "separate and independent" claim was presented.\textsuperscript{125}

When a defendant asserts an additional claim against a third-party defendant, unlike the situation in impleader, he does not allege that the third-party defendant would be liable to him if he is found liable to the plaintiff.\textsuperscript{126} Rather, the defendant simply takes advantage of the procedural economy of resolving another claim against the third-party

\textsuperscript{122} See supra notes 113-20.


\textsuperscript{125} See supra note 124.

\textsuperscript{126} The defendant alleges that the third-party defendant is liable to him regardless of the outcome of the defendant's dispute with the plaintiff. See, e.g., Falcon Tankers, Inc. v. Litton Sys., 300 A.2d 231, 240 (Del. Super. Ct. 1972); Navajo Freight Lines v. Baldonado, 90 N.M. 264, 266-67, 562 P.2d 497, 499-500 (1977); Ala. R. Civ. P. 18(a); Colo. R. Civ. P. 18(a); Utah R. Civ. P. 18(a).

This analysis can also be applied to additional claims which could theoretically be brought by a plaintiff against a third-party defendant. For example, pursuant to a statute equivalent to Fed. R. Civ. P. 14(a) a plaintiff could assert a claim against a third-party defendant arising from the transaction that is the subject of the principal action. See, e.g., Colo. R. Civ. P. 14(a); Mass. R. Civ. P. 14(a); Ohio R. Civ. P. 14(a). Having asserted such a claim against the third-party defendant, the plaintiff could assert additional claims against the third party pursuant to a state counterpart
defendant in the same action as the impleaded claim, in order to resolve all his disputes with the third-party defendant in one action.\(^{127}\) The additional claim, therefore, can properly be adjudicated alone because the liability of the third-party defendant does not derive from the resolution of the principal claim against the defendant.\(^{128}\) Such an additional claim is "separate and independent" from the principal claim because it is not dependent upon the resolution of that action.\(^{129}\) In addition, the Finn interpretation of "separate and independent" is satisfied because the additional claim is not connected with the "single wrong to plaintiff," and does not arise from the "interlocked series of transactions" giving rise to the plaintiff's claim.\(^{130}\) Removal of such a claim under section 1441(c), therefore, would be proper under Finn.

Removal of an additional claim asserted against a third-party defendant is also consistent with principles of ancillary jurisdiction. Impleaded claims are cognizable in federal court under ancillary jurisdiction and thus are not "separate and independent" as required by section 1441(c).\(^{131}\) On the other hand, an additional claim against a third-party defendant requires an independent basis of federal jurisdiction because ancillary jurisdiction does not extend to such a claim.\(^{132}\) Such an additional claim therefore can properly be characterized as "separate and independent" from the principal claim and should be removable by the third-party defendant.

In addition, considerations of public policy militate in favor of such third-party removal of additional claims. Assuming that a federal court hears only the additional claim and remands the remainder of the suit to state court, the plaintiff's interests will not be substantially prejudiced, because the third-party defendant will remain a party to the state court action.\(^{133}\) Moreover, the actions are unrelated and thus properly adjudicable as separate actions.\(^{134}\) The interests of the third-party defendant in having his claim removed will be fulfilled. It is proper for the third-party defendant to be allowed to remove such an additional claim, because section 1441(c) is designed to prevent the...

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\(^{128}\) See C. Wright, supra note 2, § 76, at 511.  
\(^{130}\) See supra notes 62-63 and accompanying text.  
\(^{131}\) See supra note 101.  
\(^{132}\) See supra note 101.  
\(^{133}\) See supra notes 117-20 and accompanying text.  
\(^{134}\) See supra notes 126-30.
destruction of a right of removal by the joinder of a claim with other unrelated non-removable claims.\textsuperscript{135} Thus, the third party will be able to gain the protection of the removal statutes, without prejudicing the plaintiff's interests.\textsuperscript{136} Although the defendant must pursue actions in two different fora, his interests are outweighed by the removal interests of the third-party defendant.

\textbf{Conclusion}

Claims asserted by a defendant against a third party through impleader are not "separate and independent" from the principal claim and, therefore, should not provide a basis for removal of such claims to federal court under section 1441(c). Furthermore, public policy considerations militate against removal of such claims. Additional claims brought by a defendant against a third-party defendant, however, appear to satisfy the statutory requirement of being "separate and independent" and removal of such claims is consistent with policy interests regarding the parties. A third-party defendant, therefore, should have a right of removal under section 1441(c) with respect to such additional claims.

\textit{Haden P. Gerrish}

\textsuperscript{135} See \textit{supra} note 5.

\textsuperscript{136} The third-party defendant will remain a party to the state court action, thereby protecting the plaintiff's interests. See \textit{supra} notes 117-20.