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Res Judicata Implications of Pendent Jurisdiction

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THE RES JUDICATA IMPLICATIONS OF PENDENT JURISDICTION

By exercising pendent jurisdiction,[1] a federal court may hear a state or federal claim[2] that is closely related to the federal claim before it when no independent basis for federal jurisdiction exists.[3] Many of the rationales for pendent jurisdiction also support the doctrine of res judicata.[4] Both doctrines promote judicial economy, fairness, finality, and the convenience of the parties.[5]

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[1] The exercise of pendent jurisdiction comports with the "cases and controversies" clause of the Constitution. U.S. CONST. art. III, § 2; Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819-20 (1824). Although a judicially created doctrine, pendent jurisdiction is consistent with the statute authorizing general federal question jurisdiction. *See* 28 U.S.C. § 1331 (1976) ("The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States. . . ."). "Civil action" reasonably includes the pendent state claim as well as the underlying federal claim. The statute arguably falls short of the article III jurisdictional grant. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 921 n.1 (2d ed. 1973).

[2] Although pendent jurisdiction usually concerns a related state claim, the pendent claim can be a federal claim. When a plaintiff asserts a federal claim that fails to meet the jurisdictional amount requirement of 28 U.S.C. § 1331 (1976), for example, the claim presents no independent basis for federal jurisdiction. *See* Hagans v. Lavine, 415 U.S. 528, 550 (1974); Rosado v. Wyman, 397 U.S. 397, 425 (1970).

[3] *See generally* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567 (1975 & Cum. Supp. 1980).

[4] Res judicata requires that a plaintiff litigate his entire claim in one judicial proceeding and precludes him from reasserting it in a later action against the same defendant or a party in privity. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 111 (Tent. Draft No. 4, 1977) [§ 62] [Throughout this Note the corresponding section numbers that will appear in the final *Restatement Second* are given in brackets after citation to the tentative drafts]; Vestal, *Extent of Claim Preclusion*, 54 IOWA L. REV. 1 (1968); Vestal, *Res Judicata/Claim Preclusion: Judgment For the Claimant*, 62 NW. U.L. REV. 357 (1967).

In this Note, "res judicata" refers to claim preclusion as distinguished from issue preclusion. Claim preclusion bars a plaintiff from reasserting the same claim; issue preclusion prevents the relitigation of issues actually litigated and determined in a prior action. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 68-68.1 (Tent. Draft No. 4, 1977) [§§ 27-28]. For a discussion of both claim preclusion and issue preclusion, see Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948); Vestal, *Protecting a Federal Court Judgment*, 42 TENN. L. REV. 635 (1975).

Merger and bar are the two branches of claim preclusion. When a plaintiff wins a suit, his claim is "merged" with the judgment; when he loses a suit, he is "barred" from reasserting the same claim in a subsequent action. RESTATEMENT (SECOND) OF JUDGMENTS §§ 47-48 (Tent. Draft No. 1, 1973) [§§ 18-19]; *see generally* Martin, *The* Restatement (Second) of Judgments: *An Overview*, 66 CORNELL L. REV. 404, 406-10 (1981).

[5] *See* notes 8-12 and accompanying text *infra*.

The *Restatement (Second) of Judgments* would bar a plaintiff from asserting a related state claim after omitting it in an earlier federal action if the federal court would have exercised pendent jurisdiction over the state claim.[6] The proper application of the *Restatement Second* rule is unclear, however, because the exercise of pendent jurisdiction is discretionary.[7] This Note examines the relationship between res judicata and pendent jurisdiction in various procedural contexts. It concludes that the preclusive effect of the initial judgment should depend upon the grounds on which the federal court disposed of the federal claim and the amount of judicial resources expended in the federal action, as measured by the timing of the dismissal.

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POLICY, THE *RESTATEMENT SECOND*, AND THE *GIBBS* DOCTRINE

Res judicata seeks to conserve judicial resources,[8] prevent vexatious litigation, and promote the finality of judgments.[9] Pen-

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[6] RESTATEMENT (SECOND) OF JUDGMENTS § 61.1, Comment e (Tent. Draft No. 5, 1978) [§ 25] provides:

> A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.

There are few reported decisions concerning the problem of the relationship between res judicata and pendent jurisdiction. The fact pattern at issue is relatively rare; it presupposes that (1) no diversity of citizenship exists, (2) the plaintiff omits a related state claim in federal court, (3) the plaintiff then asserts the related state claim in a subsequent judicial proceeding, and (4) the defendant raises the defense of res judicata in the subsequent action. *See* note 15 *infra*.

[7] *See* notes 27-37 and accompanying text *infra*.

[8] Claim preclusion promotes judicial economy to the extent that courts define "claim" broadly. RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 5, 1978) [§ 24] adopts a broad definition:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined

dent jurisdiction also promotes judicial economy and the interests of litigants. It permits parties to resolve state and federal claims arising from the same factual situation [10] in a single forum, thus reducing litigation costs and the possibility of inconsistent judgments.[11] Pendent jurisdiction also broadens access to the federal courts.[12]

To give the proper preclusive effect to a federal action in which the plaintiff omitted a related state claim,[13] courts must

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pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Under this expansive definition, different theories of recovery flowing from one factual unit constitute one claim. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 61.1 (Tent. Draft No. 5, 1978) [§ 25].

[9] *See* note 4 *supra.*

[10] *See* note 23 *infra.*

[11] For a general discussion of the development and policies served by pendent jurisdiction, see Shakman, *The New Pendent Jurisdiction of the Federal Courts,* 20 STAN. L. REV. 262 (1968).

[12] One commentator has forcefully argued that the primary purpose of pendent jurisdiction is to provide plaintiffs with both federal and state claims a true choice of forum. Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction,* 75 Nw. U.L. REV. 245 (1980). Without pendent jurisdiction, plaintiffs with both federal and state claims would hesitate to bring suit in federal court because they could not litigate the entire controversy there. *Id.* at 255-56.

[13] To determine the preclusive effect of the initial action, the court in the subsequent action must decide which res judicata law to apply. Of course, if most state courts adopt the *Restatement Second,* the choice of law problem will largely disappear. For an excellent discussion of the effect in a later action of a federal court judgment, see Degnan, *Federalized Res Jndicata,* 85 YALE L.J. 741 (1976).

The full faith and credit clause, U.S. CONST. art. IV, § 1, applies only when both courts are state courts. When a state court renders the initial judgment, 28 U.S.C. § 1738 (1976) directs all courts, federal and state, to give the judgment full faith and credit. Furthermore, the statute mandates that state court judgments "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such [s]tate . . . from which they are taken." *See* Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151, 153 (5th Cir. 1974) (upholding full faith and credit given to prior state court action).

Congress has never indicated what effect a federal or state court must give to another federal court's judgment. When a federal court renders the initial judgment, the problem is one of res judicata and not of full faith and credit. Stoll v. Gottlieb, 305 U.S. 165, 171 (1938). One federal court, commenting on 28 U.S.C. § 1738 (1976), stated, "This legislative annexation appears entirely appropriate as necessary and proper for the operation of courts . . . and the courts have adopted no less expansive a policy, easily reading into § 1738 a requirement that state courts extend full respect to the judgments of federal judicial tribunals. . . ." Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d at 153 n.1. Professor Degnan expounds the emerging principle as follows: "A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment . . . are determined by the law of the system which rendered the judgment." Degnan,

analyze the relationship between res judicata and pendent jurisdiction.[14] The *Restatement Second* provides a general rule for determining the preclusive effect of an omitted state claim: if the federal court *could* have exercised pendent jurisdiction over the omitted state claim, the plaintiff may not assert it in any subsequent action,[15] unless the federal court clearly *would* have declined to exercise pendent jurisdiction.[16] The *Restatement Second* rule is based on the Supreme Court's clarification and expansion of pendent jurisdiction in *United Mine Workers v. Gibbs*.[17] In *Gibbs*, the Court distinguished and described the two components of pendent jurisdiction: power and discretion. A court has the power to hear a pendent state claim if it has subject matter jurisdiction over

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supra, at 773 (emphasis omitted). The drafters of the *Restatement Second* incorporated this view in RESTATEMENT (SECOND) OF JUDGMENTS § 135 (Tent. Draft No. 7, 1980) [§ 87]: "Federal law determines the effects under the rules of res judicata of a judgment of a federal court."

Professor Casad suggests that in certain situations, the court in the subsequent action can give a greater preclusive effect to a judgment than would the rendering court. *See* Casad, *Intersystem Issue Preclusion and the* Restatement (Second) of Judgments, 66 CORNELL L. REV. 510, 519-28 (1981).

[14] The Supreme Court recognized this relationship in United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966): "[T]he weighty policies of judicial economy and fairness to parties reflected in *res judicata* doctrine were in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as the federal claims." The *Gibbs* Court, however, did not discuss the res judicata implications of a plaintiff's omission of a related state claim in federal court. *See* Comment, *The Expanding Scope of Federal Pendent Jurisdiction*, 34 TENN. L. REV. 413, 420 (1967).

The relationship between res judicata and pendent jurisdiction is similar to that between res judicata and compulsory counterclaims. FED. R. CIV. P. 13(a) compels a defendant to assert any counterclaim arising out of the same "transaction or occurrence" as the plaintiff's claim. The decisions vary when a defendant omits his compulsory counterclaim in federal court and then asserts it as plaintiff in a state court that has no compulsory counterclaim rule. *See, e.g.*, Phoenix Ins. Co. v. Haney, 235 Miss. 60, 70, 108 So. 2d 227, 231 (1959) (plaintiff permitted to assert claim in latter action); Horne v. Woolever, 170 Ohio St. 178, 182, 163 N.E.2d 378, 382 (1959) (plaintiff barred from asserting claim in latter action), *cert. denied*, 362 U.S. 951 (1960); London v. Philadelphia, 412 Pa. 496, 500, 194 A.2d 901, 902 (1963) (plaintiff barred from asserting claim in latter action). Nevertheless, the res judicata-pendent jurisdiction problem is more complex because the exercise of pendent jurisdiction is discretionary. *See* notes 27-37 and accompanying text *infra*.

[15] Assuming no diversity of citizenship, *see* note 6 *supra*, the plaintiff must bring his second action in state court because the federal courts lack jurisdiction over his state claim. If the court exercised diversity jurisdiction in the initial action, ordinary principles of res judicata would bar the plaintiff from asserting the state claim in a subsequent action. *See* note 6 *supra*. If diversity jurisdiction arose during the period between suits, the plaintiff could commence the second action in federal court. Because the res judicata law of the rendering forum applies, *see* note 13 *supra*, the forum of the second action is irrelevant. This Note assumes that the second action is in state court.

[16] *See* note 6 *supra*.

[17] 383 U.S. 715 (1966). For a discussion of the effect of *Gibbs* on the pendent jurisdiction doctrine, see Note, *UMW v. Gibbs And Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968).

the underlying federal claim,[18] and the state claim is sufficiently related to the federal claim.[19] A federal court has subject matter jurisdiction over federal question claims that are not frivolous or asserted solely for the purpose of obtaining federal jurisdiction.[20] Federal courts typically exercise broad discretion in deciding whether an underlying federal claim survives a motion to dismiss for lack of subject matter jurisdiction.[21]

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[18] United Mine Workers v. Gibbs, 383 U.S. at 725.

[19] Of course, the court must also have jurisdiction over the person to adjudicate either the federal or the state claim. RESTATEMENT (SECOND) OF JUDGMENTS § 4 (Tent. Draft No. 5, 1978) [§ 1] states in relevant part, "A court has authority to render judgment in an action when . . . [t]he party against whom judgment is to be rendered has submitted to the jurisdiction of the court. . . ." This requirement applies to both federal and state courts and is certainly not unique to pendent jurisdiction.

[20] *See* 28 U.S.C. § 1331 (1976). In Bell v. Hood, 327 U.S. 678 (1946), the Court clarified the conditions under which a federal court has jurisdiction to decide a federal question. The Court stated:

> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . . [A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Id. at 682-83. *See also* Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933); 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 3, § 3564. In Hagans v. Lavine, 415 U.S. 528 (1974), the Supreme Court applied the *Bell* substantiality test, but admitted that it is an unworkable standard. *Id.* at 538.

[21] *See* Mindes v. Seaman, 453 F.2d 197, 198 (5th Cir. 1971) ("[T]he procedure of rendering a final dismissal for want of jurisdiction should be utilized sparingly."). When prior court decisions leave no doubt as to an alleged federal claim's unsoundness, the court lacks subject matter jurisdiction. *See* Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth., 270 F. Supp. 947, 950 (S.D.N.Y.), *aff'd*, 387 F.2d 259 (2d Cir. 1967). In Spector v. LQ Motor Inns, Inc., 517 F.2d 278, 284 (5th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976), the court held that the court below should have considered the merits of a federal securities fraud claim asserted in a novel factual setting before determining the question of subject matter jurisdiction.

Emery Co. v. Marcan Prods. Corp., 389 F.2d 11, 20 (2d Cir. 1968), *cert. denied*, 393 U.S. 835 (1968), illustrates the extent of the district court judge's discretionary power. The plaintiff brought suit on both a federal patent infringement theory and a state unfair competition theory. The plaintiff offered no evidence at trial on his federal theory of recovery. Nevertheless, the district court held for the plaintiff on the state claim. On appeal, the Second Circuit intimated that the district court should have been aware of the frivolity of the federal claim before trial, but held that the district court did not abuse its discretion in deciding the state claim. *Id.* at 21-22. Because appellate courts recognize that they have the benefit of hindsight, they rarely overrule lower courts' jurisdictional determinations.

Kavit v. A.L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974), provides another example of extreme deference to the district court. In *Kavit*, Judge Friendly stated,

> In retrospect it appears clear that this simple $3000 negligence claim by a customer against his broker should never have been tried in a federal court. Yet by the time [the judge] inherited the case for trial, the parties and the court

Under *Gibbs*, once a court determines that it has jurisdiction over a federal claim,[22] it can exercise pendent jurisdiction to hear a state claim only if both claims derive from "a common nucleus of operative fact"[23] and the plaintiff "would ordinarily be ex-

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had both invested a significant amount of time in it.

Id. at 1183. Upholding the trial court's decision to hear the state claim, Judge Friendly emphasized the judicial economy policy underlying pendent jurisdiction. *Id.*

[22] If the district court determines that it lacks subject matter jurisdiction, it has no power to hear either the underlying federal or the pendent state claim. Similarly, an appellate court reversal of a district court's determination of subject matter jurisdiction voids the judgment on both the federal and state claims, even after a full trial on the merits. Thus, competency is a requirement of central importance. *See* Broderick v. Associate Hosp. Servs., 536 F.2d 1, 8 n.25 (3d Cir. 1976) ("There is no question that a federal court has the power to entertain a pendent state claim where the federal claim has substance. . . . Having properly held that there was no federal subject matter jurisdiction, we cannot say that the district court erred in dismissing the entire action."); Elberti v. Kunsman, 376 F.2d 567, 568 (3d Cir. 1967) (reversing district court on jurisdictional issue) ("The retention of jurisdiction of the claim based on state law may be sustained as proper only if the federal question was substantial."); Foreman v. General Motors Corp., 473 F. Supp. 166, 181 (E.D. Mich. 1979) ("[T]he pendent claims . . . have no independent federal jurisdiction and cannot continue if the federal claims are dismissed [for lack of jurisdiction]."); Braden v. University of Pittsburgh, 343 F. Supp. 836, 840 (W.D. Pa. 1972) ("Lack of jurisdiction with respect to the [federal claims], however, precludes the assumption of pendent jurisdiction at this stage of the proceeding."), *vacated and remanded on other grounds*, 477 F.2d 1 (3d Cir. 1973); RESTATEMENT (SECOND) OF JUDGMENTS § 14 (Tent. Draft No. 5, 1978) [§ 11] ("A judgment may properly be rendered against a party only if the court has authority to adjudicate. . . .").

[23] United Mine Workers v. Gibbs, 383 U.S. at 725. Speaking for the Court, Justice Brennan stated:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever . . . the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case". . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then . . . there is *power* in federal courts to hear the whole.

Id. (footnote omitted) (emphasis in original).

In Southeastern Lumber Mfrs. Ass'n v. Walthour Agency, Inc., 486 F. Supp. 781, 784 (N.D. Ga. 1980), the court stated, "[T]he complaint alleges one loss and describes alternative theories as to who is responsible. This meets the requirement of a common nucleus of operative fact." The court also observed that when the federal courts have exclusive jurisdiction over an underlying federal claim, the argument for the exercise of pendent jurisdiction is strengthened, because the plaintiff can secure complete relief only in the federal forum. *Id.*

In re Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litigation, 467 F. Supp. 227 (W.D. Tex. 1979), presents an interesting example of a court's struggle with the "common nucleus of operative fact" test. The court refused to exercise pendent jurisdiction over some of the state claims alleged because they spanned a greater period of time than the federal claim. *Id.* at 248.

pected to try them . . . in one judicial proceeding."[24] The *Gibbs* Court's broad definition of a claim for pendent jurisdiction purposes closely resembles the *Restatement Second*'s definition of a claim for res judicata purposes.[25] The Court recognized that pendent jurisdiction and res judicata are inextricably linked, stating that a district court's express refusal to exercise pendent jurisdiction should not bar the plaintiff from reasserting a related state claim in a subsequent proceeding.[26]

The second component of pendent jurisdiction is discretion.[27] The *Gibbs* Court provided guidelines for district court judges to follow in exercising their discretion.[28] These guidelines rest on the policies of federal-state comity and judicial efficiency. First, federal courts should avoid needlessly deciding questions of state law.[29] Second, courts should not exercise pen-

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[24] 383 U.S. at 725; *see* note 23 *supra*. This requirement is conclusory and adds nothing to the "common nucleus of operative fact" criterion. *See* Southeastern Lumber Mfrs. Ass'n, Inc. v. Walthour Agency, Inc., 486 F. Supp. 781, 784 (N.D. Ga. 1980). *But see* Schenkier, *supra* note 12, at 266-72.

[25] *See* note 8 *supra*. FED. R. CIV. P. 13(a), concerning compulsory counterclaims, uses a "transaction or occurrence" definition of a claim. *See* note 14 *supra*. There is no principled distinction between these definitions; indeed, if they were significantly different, courts would be unable to readily determine the preclusive effect of a prior action. *But see* Schenkier, *supra* note 12, at 272-75.

[26] United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966) (dictim). If a federal court refuses to hear a pendent state claim, fairness dictates that the plaintiff have the opportunity to reassert the state claim in a later proceeding. *See In re* General Motors Corp. Engine Interchange Litigation. 594 F.2d 1106, 1134 (7th Cir. 1979) (allowing plaintiffs to pursue state remedies in subsequent proceedings; "[t]he [district] court, having declined jurisdiction over the state claims, was without power to extinguish them"); Bowers v. DeVito, 486 F. Supp. 742, 744 n.3 (N.D. Ill. 1980) (refusing to hear pendent claim; "the Court expresses no view as to the merits of plaintiff's state law claim. Plaintiff . . . remains free to file his state law claim in the appropriate state forum."); *cf.* Neeld v. National Hockey League, 594 F.2d 1297, 1301 (9th Cir. 1979) (denying plaintiff leave to amend complaint to include pendent state claim: "If these theories are presented [later] in a state court, that court can decide if *res judicata* applies.").

[27] United Mine Workers v. Gibbs, 383 U.S. at 726-27.

[28] *Id.* Under FED. R. CIV. P. 42(b), a district court may refuse to hear all claims in one proceeding and may order separation to further convenience or economy or to avoid prejudice. Because the policies promoted by rule 42(b) are similar to those promoted by pendent jurisdiction, the *Gibbs* guidelines may be relevant in the diversity context as well.

[29] "That power [to hear a pendent claim] need not be exercised in every case in which it is found to exist. . . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." United Mine Workers v. Gibbs, 383 U.S. at 726.

If a state claim presents important issues of state law that have not been resolved by that state's courts, federal courts should not exercise pendent jurisdiction. *See* Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc., 466 F. Supp. 800, 804-05 (D. Neb. 1979) ("Where the proper resolution of the state law question is unclear, a federal court may properly decline to address the pendent issue. . . . [T]his Court is ill-equipped . . . to analyze the intentions of the Wisconsin legislature when this law was passed and decisional trends in

dent jurisdiction if the state claim overwhelms the underlying federal claim.[30] Finally, the court must consider the potential of jury confusion if it tries the federal and state claims together.[31]

The *Gibbs* Court also emphasized the timing of the dismissal; when the court dismisses the federal claim before trial, it should dismiss the state claim as well.[32] Dismissal of the state claim in this situation avoids federal intrusion upon state judicial systems and discourages plaintiffs from asserting meritless federal claims to establish a basis for federal jurisdiction over their state claims. Even if the federal claim is substantial enough to confer the power to exercise pendent jurisdiction,[33] the court abuses its discretion by deciding the state claim. Later cases have reaffirmed

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the Wisconsin courts."); Grey v. European Health Spas, Inc., 428 F. Supp. 841, 848 (D. Conn. 1977) ("While this Court has the authority to exercise pendent jurisdiction, it is certainly under no obligation to do so. [W]here ... the state claim is one of first impression, it would be inappropriate to decide it."). The *Grey* court noted that the plaintiff could seek complete relief in a state court. *Id.* at 848. Thus, when the federal claim falls within the federal court's exclusive jurisdiction, the court might wish to hear the pendent state claim even if important issues of state law are involved, because only the federal court can adjudicate the entire controversy. *See* note 23 *supra.*

[30] United Mine Workers v. Gibbs, 383 U.S. at 726-27; *see* Mazzare v. Burroughs Corp., 473 F. Supp. 234, 241 (E.D. Pa. 1979) ("Proof of plaintiff's [state] claim ... would ... involve legal and factual issues different from those in connection with his [federal] claim.... [T]he entire scope of the trial would be enlarged.").

[31] United Mine Workers v. Gibbs, 383 U.S. at 727. The possibility of jury confusion increases when the plaintiff brings in additional parties using pendent-party jurisdiction. In Greene v. Emersons, Ltd., 86 F.R.D. 66 (S.D.N.Y. 1980), the court refused to exercise pendent jurisdiction over defendants who were not involved in the underlying federal claim. The court stated, "Although the claims against all defendants arise out of the same general factual background, the federal and state claims are sufficiently different in legal theory to give rise to risks of confusion or spill-over effect in the minds of the jury...." *Id.* at 74.

[32] "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. at 726 (footnote omitted) (dictum).

[33] *See* note 20 *supra.* The distinction between a motion pursuant to FED. R. CIV. P. 12(b)(1) (no subject matter jurisdiction) and a motion pursuant to FED. R. CIV. P. 12(b)(6) (failure to state a cause of action) is important. In federal question cases, courts often blur the line between the two. When the court dismisses a federal claim pursuant to FED. R. CIV. P. 12(b)(1), it lacks power to hear the state claim and must dismiss it. When the court dismisses a federal claim prior to trial pursuant to FED. R. CIV. P. 12(b)(6), the court should dismiss the state claim as a matter of discretion. *See* Cahill v. Metallic Lathers Local 46, 473 F. Supp. 1326, 1328-29 (S.D.N.Y. 1979) (dismissing underlying federal claim for lack of jurisdiction and properly refusing to hear state claim; erroneously quoting *Gibbs* discretion language as support); Nolan v. Meyer, 520 F.2d 1276, 1280 (2d Cir. 1975) (affirming dismissal for lack of subject matter jurisdiction; noting that early dismissal under 12(b)(6) likewise calls for dismissal of state claim); note 32 *supra*; notes 63-74 and accompanying text *infra.*

the *Gibbs* rule with one qualification:[34] if compelling countervailing reasons,[35] such as the expenditure of substantial judicial resources before dismissal, support the exercise of pendent jurisdiction after a pretrial dismissal of the federal claim, the court may hear the state claim.[36] Absent such unusual circumstances, however, the federal courts have followed the *Gibbs* rule.[37]

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[34] In Rosado v. Wyman, 397 U.S. 397, 403-04 (1970), the plaintiff challenged a state welfare law as violative of the equal protection clause and as incompatible with the Social Security Act. The Court held that the district court properly heard the pendent federal claim after dismissing the constitutional claim before trial. The factual and procedural situation in *Rosado* provided strong reasons for the exercise of pendent jurisdiction. First, the pendent claim was a *federal* claim, thus undercutting typical arguments against exercising pendent jurisdiction such as respect for state judicial systems and federal-state comity. Because hearing the related federal claim promoted judicial economy, the court properly exercised pendent jurisdiction. Second, the court dismissed the underlying federal claim for mootness before trial, "after substantial time and energy [had] been expended." *Id.* at 404. The Court also noted, "We intimate no view as to whether the situation might have been different had the [underlying] claim become moot before the District Court had invested substantial time in its resolution." *Id.* at 404 n.4. For other cases illustrating the *Rosado* gloss on *Gibbs*, see note 36 *infra*.

[35] *See* Nolan v. Meyer, 520 F.2d 1276, 1280 (2d Cir. 1975) ("[W]e would be inclined to hold that the retention of jurisdiction for trial of a pendent state law claim on the basis of a federal question claim already disposed of by a Rule 12(b)(6) motion, would be an abuse of discretion absent unusual circumstances. . . ."). Thus, when the court dismisses the federal claim before trial, the fate of the pendent claim depends on the surrrounding circumstances. *See, e.g., In re* Carter, 618 F.2d 1093, 1105 (5th Cir. 1980) (remanding state claim for determination on pendent jurisdiction although federal claim dismissed before trial: "We . . . return the case to the district court for consideration of whether, under all the surrounding circumstances, it should accept the state law claim under a discretionary exercise of pendent jurisdiction thus avoiding further duplicious [*sic*] judicial efforts."); Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 480 (3d Cir. 1979) (affirming exercise of pendent jurisdiction after federal claim dismissed on morning of trial: "We believe that the district court could properly have concluded that under these facts, the interests of convenience and judicial economy outweighed the state interest in adjudicating its own claims."); GEM Corrugated Box Corp. v. National Kraft Container Corp., 427 F.2d 499, 501 (2d Cir. 1970) (affirming exercise of pendent jurisdiction after federal claim dismissed before trial by parties' stipulation); Morris v. Frank IX & Sons, Inc., 486 F. Supp. 728, 735 (W.D. Va. 1980) (refusing to exercise pendent jurisdiction after disposing of federal claim by summary judgment); Catterson v. Caso, 472 F. Supp. 833, 839 (E.D.N.Y. 1979) (exercising pendent jurisdiction after disposing of federal claims by summary judgment); Toensing v. Brown, 374 F. Supp. 191, 205 (N.D. Cal. 1974) (refusing to exercise pendent jurisdiction after disposing of federal claim by summary judgment), *aff'd*, 528 F.2d 69 (9th Cir. 1975). Unfortunately, many of the opinions cited above do not fully explain the rationale for their holdings.

[36] *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 404 (1970); *In re* Carter, 618 F.2d 1093, 1105 (5th Cir. 1980); Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 480 (3d Cir. 1979).

[37] *See, e.g.*, Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 616 (8th Cir. 1980); Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 72 (2d Cir. 1976); CES Publishing Corp. v. St. Regis Publications, Inc., 531 F.2d 11, 15 (2d Cir. 1975); Iroquois Indus., Inc. v. Syracuse China Corp., 417 F.2d 963, 970 (2d Cir. 1969), *cert. denied*, 399 U.S. 909

II

APPLICATION OF THE *RESTATEMENT SECOND* RULE

When the plaintiff omits a related state claim[38] from his federal suit and later asserts it in state court, the *Restatement Second* requires that the state court determine whether the federal court would have had the power to decide the state claim and

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(1970); Cummings v. Virginia School of Cosmetology, Inc., 466 F. Supp. 780, 783 (E.D. Va. 1979); *cf.* Hudak v. Economic Research Analysts, Inc., 499 F.2d 996, 1001 (5th Cir. 1974) (dismissal under rule 12(b)(6) on appeal); Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123, 129 (7th Cir. 1972) ("The parties would be greatly inconvenienced by having to retry the [state claim]. It also would be unfair to the parties, who have litigated the issues in a three day trial in the district court . . . especially in view of the 'federal judicial resources' already committed.").

[38] The *Restatement Second* does not directly address the effect of a federal court's express refusal to hear an asserted pendent claim. Nevertheless, the RESTATEMENT (SECOND) OF JUDGMENTS § 61.1, Comment e (Tent. Draft No. 5, 1978) [§ 25], the language of *Gibbs*, *see* note 26 and accompanying text *supra*, and the policy of fairness dictate that the state court permit the plaintiff to reassert his state claim in a subsequent action. *See* Nichols v. Canoga Indus., 83 Cal. App. 3d 956, 966, 148 Cal. Rptr. 459, 466 (1978); Penn Mart Realty Co. v. Becker, 298 A.2d 349, 352 (Del. Ch. 1972); Ferger v. Local 483, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 94 N.J. Super. 554, 565, 229 A.2d 532, 539 (Super. Ct. Ch. Div.), *aff'd*, 97 N.J. Super. 505, 235 A.2d 483 (Super. Ct. App. Div. 1967); Salwen Paper Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 72 A.D.2d 385, 389-92, 424 N.Y.S.2d 918, 921-23 (1980); Calhoun v. Supreme Court, 61 Ohio App. 2d 1, 399 N.E.2d 559 (1978); *cf.* Pottern v. Bache Halsey Stuart, Inc., 589 P.2d 1378, 1379 (Colo. App. 1978) (permitting subsequent state action because state claim required different degree of culpability than federal claim). *But see* Mattson v. City of Costa Mesa, 106 Cal. App. 3d 441, 445, 164 Cal. Rptr. 913, 922 (1980) (holding that once district court refuses to exercise pendent jurisdiction, plaintiff must seek dismissal of federal claim and take both claims to state court to preserve state claim).

The *Mattson* court incorrectly looked to RESTATEMENT (SECOND) OF JUDGMENTS § 61, Comment g (Tent. Draft No. 5, 1978) [§ 24] to support its holding. This comment concerns a plaintiff who asserts a claim in a court that cannot render a judgment for the full amount of his claim, such as an inferior state court, and thus assumes that the plaintiff could obtain complete relief in another court in the same judicial system. Thus, Comment g did not apply to the *Mattson* plaintiff, who could not have obtained full relief in any other federal court.

The predicament of the plaintiff in *Mattson* is similar to that of a plaintiff who files suit in state court on a state claim and omits a related federal claim that falls within exclusive federal jurisdiction. Although complete relief may be available to this plaintiff in federal court, the *Restatement Second* does not force him into that forum. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 61.2(I)(c) (Tent. Draft No. 5, 1978) [§ 26]; *id.* Comment c. Similarly, the *Mattson* plaintiff, who can secure relief only on his federal claim in federal court, should not be required to sue in state court to preserve his state claim.

A further problem arises when the federal court fails to state its reason for dismissing a pendent state claim. Under FED. R. CIV. P. 41(b), unless the dismissal is for lack of jurisdiction, improper venue, or failure to join an indispensable party, it operates with prejudice if the court does not otherwise specify. Thus, when a court dismisses a pendent claim without comment under its discretionary powers, rule 41(b) provides that the dismissal is with prejudice; consequently, federal judges should explicitly state that the dismissal is without prejudice. *See* McLearn v. Cowen & Co., 48 N.Y.2d 696, 697-99, 397 N.E.2d

whether it would have decided it as a matter of discretion.[39] If both claims derive from "a common nucleus of operative fact,"[40] the state court must look to the ground on which the federal court disposed of the federal claim to determine whether that court had power to hear the state claim. Next, to decide whether the federal court would have exercised its pendent jurisdiction as a matter of discretion, the state court should look to the timing of the dismissal of the federal claim to measure the judicial resources expended, as well as other factors.[41] If the state court decides, based on these factors, that the federal court would have heard the state claim, res judicata bars the plaintiff in the second action.

A. *Full Litigation*

When the plaintiff fully litigates his federal claim in federal court, that court clearly has the power to hear a closely related pendent claim[42] and will usually choose to exercise pendent jurisdiction. Unless the plaintiff can persuade the state court that the federal court would have declined pendent jurisdiction because of the importance of the state claim or because of possible jury confusion,[43] the state court must bar him from bringing a second action.[44] Although courts will not always exercise their discretion to hear a pendent claim, the *Restatement Second* forces the plaintiff to assert his state claim in federal court, or risk forfeiting his right to pursue it in any other forum.

750, 751-52, 422 N.Y.S.2d 60, 61-62 (1979) (*mem.*) (district court dismissed federal claim on pleadings and dismissed state claim without comment; state court held plaintiff's subsequent state suit barred). Even without an explicit statement, however, courts should interpret a discretionary dismissal of a pendent claim as without prejudice to ensure that the *Restatement Second*, the federal rules, and the *Gibbs* doctrine mesh properly.

[39] RESTATEMENT (SECOND) OF JUDGMENTS § 61.1, Comment e (Tent. Draft No. 5, 1978) [§ 25]; *see* note 6 *supra*.

[40] United Mine Workers v. Gibbs, 383 U.S. at 725; *see* note 23 *supra*.

[41] *See* notes 27-31 and accompanying text *supra*; notes 43-44 and accompanying text *infra*.

[42] *See* notes 18-24 and accompanying text *supra*.

[43] *See* notes 27-31 and accompanying text *supra*. The plaintiff bears the burden of proof on this matter. *See, e.g.*, Pope v. City of Atlanta, 240 Ga. 177, 179-80, 240 S.E.2d 241, 243 (1977) (plaintiff persuaded state court that federal court would not have heard omitted state constitutional claim of first impression).

[44] *See* Woods Expl. & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1312-16 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); City of Los Angeles v. Superior Court, 85 Cal. App. 3d 143, 154, 149 Cal. Rptr. 320, 326 (1978); Ford Motor Co. v. Superior Court, 35 Cal. App. 3d 676, 681, 110 Cal. Rptr. 59, 62 (1973); McCann v. Whitney, 25 N.Y.S.2d 354, 357 (Sup. Ct. 1941). *But see* Agarwal v. Johnson, 25 Cal. 3d 932, 955-56, 603 P.2d 58, 72, 160 Cal. Rptr. 141, 155 (1979) (court improperly looked to state res judicata law to determine dimensions of claim and allowed plaintiff to pursue state claim in state

Several policies strongly support precluding the plaintiff in this context. First, fairness dictates that the plaintiff should not have two opportunities to pursue one claim.[45] Second, the federal rules liberally allow amendment of pleadings[46] and joinder of claims,[47] giving the plaintiff every chance to assert his related state claim in the federal action. Furthermore, because the plaintiff chose the federal forum,[48] it is fair to require him to litigate his

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court); City of Chicago v. Illinois Fair Empl. Prac. Comm., 87 Ill. App.3d 597, 602-04, 410 N.E.2d 136, 141-42 (1980) (court incorrectly held that res judicata cannot apply if federal statute does not preempt state law remedy); McKean v. Campbell, 372 So. 2d 652, 654 (La. Ct. App. 1979) (court improperly looked to state res judicata law to determine dimensions of claim and allowed plaintiff to pursue state claim in state court.).

McCann v. Whitney, 25 N.Y.S.2d 354 (Sup. Ct. 1941) illustrates the proper application of the *Restatement Second* rule. Plaintiff initially filed suit in federal court alleging violations of federal antitrust law. After losing two federal actions, plaintiff asserted a state antitrust claim in state court. The court barred the plaintiff's second action. *Id.* at 357.

One commentator has argued that the preclusive effect of the federal action in *McCann* was too harsh in light of the uncertain state of the law of pendent jurisdiction. *See* Loss, *The SEC Proxy Rules And State Law*, 73 HARV. L. REV. 1249, 1293-94 (1960). The state court may wish to give the plaintiff special consideration if the plaintiff commenced the federal action prior to *Gibbs*. *See* Hughes v. Trans World Airlines, Inc., 336 A.2d 572 (Del.), *cert. denied*, 423 U.S. 841 (1975). In *Hughes*, the plaintiffs commenced a federal antitrust action in 1961. After numerous delays and protracted litigation, the United States Supreme Court reversed the plaintiffs' judgment in 1973. *Id.* at 574. The plaintiffs then brought to trial a common law claim that had been dormant in state court for over ten years. The Supreme Court of Delaware denied the defendant's motion to dismiss for res judicata. *Id.* at 575. The court stressed that the issue of liability was never litigated in the federal courts because of the defendant's default. *Id.* The court failed to realize that claim preclusion does not require actual litigation of issues. *See* Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 469 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951). The only justification for the *Hughes* decision today is that the federal action had been commenced prior to *Gibbs*. The *Hughes* court, however, did not consider this fact conclusive. 336 A.2d at 577.

[45] Claim preclusion problems do not arise only when the plaintiff loses his initial suit. In Brady v. Trans World Airlines, Inc., 274 A.2d 146 (Del. Super. Ct.), *aff'd per curiam*, 282 A.2d 620 (Del. 1971), the plaintiff won his initial federal claim and later commenced an action in state court to recover punitive damages. Res judicata barred the plaintiff from bringing the subsequent action. *Id.* at 147-48.

[46] *See* FED. R. CIV. P. 15.

[47] *See* FED. R. CIV. P. 18.

[48] When the defendant exercises his right of removal, *see* 28 U.S.C. § 1441 (1976), and thereby forces the plaintiff into federal court, a different rule might be appropriate; however, many factors support a bar rule in the removal context. First, a no-bar rule might burden the right of removal; defendants desiring to litigate in federal court might not seek removal if the plaintiff could later assert a related state claim. Second, the general policies behind res judicata—finality, efficiency, and preventing vexatious litigation—favor barring the plaintiff. Third, the Federal Rules of Civil Procedure grant the federal court its full powers in an action removed from state court. *See* FED. R. CIV. P. 81(c). By implication, the preclusive effect of the court's judgment should not change because the judgment was rendered in a removed action. Thus, even though removal upsets the plaintiff's choice of forum, other considerations indicate that the occurrence of removal should be irrelevant to the proper application of the *Restatement Second* rule.

entire claim there.[49] Finally, barring the second action conserves judicial resources that might otherwise be spent in duplicating the federal court's efforts.

B. *Default Judgment*

A default judgment for the plaintiff on a federal claim[50] should preclude a subsequent state court action on an omitted, related state claim. This result is consistent with the general rule that default judgments are entitled to full res judicata effect.[51] The fairness policies that support a rule of bar when the federal claim is fully litigated[52] also apply in the default context. Furthermore, in a simple default situation,[53] the federal court would not have fully analyzed the merits of exercising pendent jurisdiction.[54] Consequently, had the plaintiff initially asserted

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[49] One commentator has argued that the general rule of barring the plaintiff in a subsequent action defeats access to the federal courts. *See* Schenkier, *supra* note 12, at 272-75. The *Restatement Second* rule, on the contrary, simply provides symmetry. If the plaintiff had chosen to litigate his state claim in state court while omitting a related federal claim (assuming federal jurisdiction is not exclusive), ordinary rules of res judicata would bar a subsequent action. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 61.1, Comment e, Illustration 11 (Tent. Draft No. 5, 1978) [§25].

[50] *See* FED. R. CIV. P. 55(b). This discussion assumes a simple default, where the defendant fails to answer within 20 days after service of the complaint. If the defendant collaterally attacked the judgment successfully, the judgment would be void, and the plaintiff would be free to bring both claims in either federal or state court. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 113-116 (Tent. Draft No. 6, 1979) [§§ 65-68]. The defendant could also request the rendering court to provide equitable relief from the default judgment. *See* FED. R. CIV. P. 60(b). If the court grants the motion and reinstates the case for trial, the state court should treat the omitted state claim as if there had been no default judgment.

[51] *See* Kapp v. Naturelle, Inc., 611 F.2d 703, 707 (8th Cir. 1979) ("[E]ven a default judgment operates as res judicata and is conclusive of whatever is essential to support the judgment."); Slattery v. Maykut, 176 Conn. 147, 157, 405 A.2d 76, 82 (1978) ("[A] judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata in the absence of fraud or collusion even if obtained by default. . . ."); Zalobowski v. New England Teamsters & Trucking Indus. Pension Fund, 410 A.2d 436, 437 (Del. 1980) ("The fact that the original action resulted in a default judgment does not render it any less conclusive an adjudication for purposes of res judicata than a judgment rendered in an answered case."); Menconi v. Davison, 80 Ill. App. 2d 1, 6, 225 N.E.2d 139, 142 (1967); Perry & Derrick Co. v. King, 24 Mich. App. 616, 620, 180 N.W.2d 483, 485-86 (1970); Collins v. Bertram Yacht Corp., 53 A.D.2d 527, 384 N.Y.S.2d 186 (1976). Apparently, no court has dealt with the issues of pendent jurisdiction and claim preclusion together in the default context. Although a default judgment precludes a second suit on the same claim, it cannot serve as a basis for issue preclusion in an action on a different claim, because no substantive issues could have been actually litigated in the initial action. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment e (Tent. Draft No. 4, 1977) [§ 27].

[52] *See* notes 45-48 and accompanying text *supra*.

[53] *See* note 50 *supra*.

[54] *See generally* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2685 (1973 & Cum. Supp. 1980).

the state claim, the federal court would most likely have entered a default judgment on both claims.

C. *Dismissal for Lack of Jurisdiction, Improper Venue, or Failure to Join an Indispensable Party*

If the federal court dismisses the federal claim for lack of personal[55] or subject matter jurisdiction,[56] it has no power to entertain a pendent claim. The *Restatement Second* would require the state court to allow the plaintiff to pursue his omitted state claim in a subsequent action.[57] Because the federal rules permit the plaintiff to reassert his federal claim after a dismissal for lack of jurisdiction,[58] fairness dictates that the plaintiff may also assert an omitted state claim in a subsequent state suit. The same rule should apply when a judgment is reversed on appeal for lack of jurisdiction; regardless of the judicial resources expended on a full trial, the trial court lacked the power to hear any pendent claim the plaintiff might have asserted.

Similarly, when the federal court dismisses the federal claim for improper venue[59] or for failure to join an indispensable party,[60] the state court should not bar the plaintiff from asserting

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[55] *See* FED. R. CIV. P. 12(b)(2). FED. R. CIV. P. 12(b)(4) and 12(b)(5), motions to dismiss for insufficiency of process and service, are not treated separately in this Note because notice, like personal jurisdiction, is constitutionally required. *See* Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 4 (Tent. Draft No. 5, 1978) [§ 1]. Thus, a dismissal under rule 12(b)(4) or 12(b)(5) should be treated the same as a dismissal for lack of personal jurisdiction.

[56] *See* FED. R. CIV. P. 12(b)(1); notes 20-21 and accompanying text *supra*.

The state court must exercise great care in determining the ground for dismissal of the federal claim. In Belliston v. Texaco, Inc., 521 P.2d 379 (Utah 1974), the plaintiffs asserted an unfair price discrimination claim in state court after losing a prior federal action. The circuit court had reversed the district court's judgment for the plaintiff on the ground that the plaintiff failed to state a valid cause of action, but carelessly used the term "jurisdiction" in its opinion. The Utah court properly determined that the federal court could have decided the state claim had it been asserted and barred the plaintiff from bringing the second suit. *Id.* at 382.

[57] *See* Mann v. City of Marshalltown, 265 N.W.2d 307, 311 (Iowa 1978); McAuliffe v. Colonial Imports, Inc., 116 N.H. 398, 399, 359 A.2d 630, 631 (1976); Gallo v. Mayer, 50 Misc. 2d 385, 387, 270 N.Y.S.2d 295, 299 (Sup. Ct. 1966) ("Trial of the common-law fraud action will not be foreclosed by a verdict for defendants in the Federal action if the basis of that verdict is the failure to prove a jurisdictional requirement. . . .").

[58] FED. R. CIV. P. 41(b); Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 874-75 (3d Cir. 1972); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 48.1 (Tent. Draft No. 1, 1973) [§ 20].

[59] *See* FED. R. CIV. P. 12(b)(3).

[60] *See id.* 12(b)(7).

the omitted state claim in a subsequent proceeding. Courts typically make these determinations during the pretrial stage, before they have expended considerable resources. Yet even when the court dismisses the claim during trial,[61] federal procedure allows the plaintiff to reassert the dismissed federal claim.[62] Likewise, such a dismissal should not bar the omitted state claim.

D. *Dismissal for Failure to State a Claim or Pursuant to a Motion for Summary Judgment*

When the federal court dismisses the federal claim on the pleadings for failure to state a claim upon which relief can be granted,[63] res judicata should not bar the plaintiff from later asserting the omitted state claim in state court.[64] Allowing the plaintiff's subsequent suit reflects the *Gibbs* guideline that urges courts to dismiss pendent claims when the underlying federal claim is dismissed before trial.[65] Because the court disposed of the federal claim without a significant expenditure of its resources, the judicial economy policy behind res judicata cannot justify barring the subsequent suit.[66] Furthermore, considerations of fairness also dictate this result. Had the federal court not dismissed the claim at the pleading stage, the plaintiff might have amended his complaint to include the state claim. The *Restatement*

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[61] *See id.* 12(h)(2).

[62] *Id.* 41(b).

[63] *See id.* 12(b)(6). Disposition of the federal claim pursuant to a motion for judgment on the pleadings, *see id.* 12(c), resembles a dismissal pursuant to rule 12(b)(6). Because the same policies apply in both cases, a judgment on the pleadings on the federal claim should not bar a subsequent suit on the state claim.

[64] *See* Cureton v. Lyman S. Ayers & Co., 153 Ind. App. 495, 502, 287 N.E.2d 904, 908 (1972). In *Cureton*, the federal court had dismissed the federal claim on the pleadings for failure to state a cause of action. The state court permitted a subsequent action on a state claim for false imprisonment. The court stated:

> In the case at bar, the *pleadings* in the Federal Court failed to state a cause of action, the action was dismissed for that reason, and no trial was had on the merits.
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> . . . .
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> In this case, there would be no justification for [the federal judge] to hear the state claim if no federal claim was found and no trial on the merits was held. Indeed, in our opinion, the federal court would have been abusing its discretion if it had invoked pendent jurisdiction.

Id. at 502-03, 287 N.E.2d at 908.

[65] *See* notes 32-37 and accompanying text *supra*.

[66] In the default context, *see* notes 50-54 and accompanying text *supra*, the judicial economy argument would support a rule of no-bar. Nevertheless, courts have apparently never held that default judgments should be accorded less than full preclusive effect. *See* note 51 *supra*.

Second fully supports allowing the plaintiff a chance to litigate the omitted state claim in these circumstances.[67]

Determining the proper application of the *Restatement Second* rule is most difficult when the dismissal of the federal claim occurs after the pleading stage. Such a dismissal may follow a motion to dismiss for failure to state a claim under rule 12(b)(6)[68] or a motion for summary judgment under rule 56.[69] Federal courts have great leeway in exercising pendent jurisdiction in these circumstances,[70] so the state court's decision whether to bar the plaintiff's suit on the omitted state claim is particularly difficult.

When the federal dismissal occurs before trial, the state court should presume that the federal court would have declined to exercise pendent jurisdiction had the plaintiff initially asserted the state claim and thus allow the plaintiff to bring a second suit.[71] Although the federal court might, in some instances, choose to hear the pendent claim after dismissing the underlying federal claim before trial,[72] the suggested presumption is consistent with the *Gibbs* guideline[73] and provides state courts with a workable standard for applying the *Restatement Second* rule. Barring the plaintiff's subsequent suit regardless of the timing of the federal dismissal would encourage the plaintiff to assert both claims in the first action; however, such a rule is inconsistent with the discretionary aspect of pendent jurisdiction and is too harsh toward an unsuspecting plaintiff. Under the suggested approach, only the

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[67] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 61.1, Comment e, Illustration 10 (Tent. Draft No. 5, 1978) [§ 25] ("unless it is clear that the federal court would have declined as a matter of discretion to exercise [pendent] jurisdiction (for example, because the federal claim, though substantial, was dismissed in advance of trial), the state action is barred").

[68] FED. R. CIV. P. 12(b)(6).

[69] *Id.* 56. FED. R. CIV. P. 12(d) permits the court to postpone its decision on a pretrial motion until trial. The timing of the dismissal, rather than the timing of the motion, is relevant because the discretionary exercise of pendent jurisdiction depends largely on the amount of judicial resources expended.

[70] *See* notes 32-37 and accompanying text *supra.*

[71] *See* Merry v. Coast Community College Dist., 97 Cal. App. 3d 214, 229-30, 158 Cal. Rptr. 603, 612-13 (1979); Ron Tonkin Gran Turismo, Inc. v. Wakehouse Motors, Inc., 46 Or. App. 199, 611 P.2d 658, 662 (1980). *But see* Maldonado v. Flynn, 417 A.2d 378, 383-84 (Del. Ch. 1980) (discussed at note 76 *infra*). In *Merry*, the court considered at length the res judicata effect of a summary judgment on a federal claim before trial. The court held that the federal judgment did not bar the subsequent state proceeding. 97 Cal. App. 3d at 232, 158 Cal. Rptr. at 614. The court stated, "[W]e have concluded that since it clearly appears that the federal court would have declined to exercise its pendent jurisdiction to adjudicate plaintiff's state claims had they been raised, the [federal court] summary judgment is not a bar to the maintenance of the instant action." *Id.* at 222, 158 Cal. Rptr. at 607-08.

[72] *See* note 35 *supra.*

[73] *See* notes 32-37 and accompanying text *supra.*

presumption for or against preclusion shifts with the timing of the dismissal.[74]

When the court dismisses the federal claim during trial, on the other hand, the state court should presume that the federal court would have exercised pendent jurisdiction and bar the plaintiff's subsequent action.[75] The policy of judicial economy, promoted by both pendent jurisdiction and the doctrine of res judicata, supports preclusion in this situation, because a trial consumes a substantial amount of judicial resources. The strength of the presumptions for and against preclusion may depend upon how much time and energy the court actually expended before dismissing the case.[76]

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[74] For example, the state court would bar the plaintiff's second suit following a federal pretrial dismissal if the defendant showed that the federal court invested substantial time in the case before dismissal and the plaintiff failed to present proof of countervailing factors. *See* note 76 *infra.*

[75] The plaintiff would not be barred, of course, if he showed that the federal court would have refused to hear the state claim because of potential jury confusion or because of the predominantly state nature of the case. *See* note 43 *supra.*

[76] *See* Maldonado v. Flynn, 417 A.2d 378 (Del. Ch. 1980). *Maldonado* presents a complicated procedural situation in which the court reversed the usual presumption of no-bar when summary judgment is entered before trial. The plaintiff in *Maldonado* first instituted a state court action, and then a federal action. While the state suit was pending, the plaintiff asserted both his state and federal claims in federal court. The court dismissed the federal claims pursuant to a rule 12(b)(6) motion and dismissed the state claims because no federal claims remained. *Id.* at 380. On appeal, the Second Circuit reversed the lower court's dismissal of one federal claim and remanded with instuctions to the district court to determine whether to exercise pendent jurisdiction over the state claims. On remand, the plaintiff amended his complaint to delete his state claims before the court decided the pendent jurisdiction question. The defendant then moved for summary judgment on the federal claim; the court granted the motion. *Id.* at 380-81.

Subsequently, in the state court, the defendant raised the res judicata defense. The court held the plaintiff's action barred, placing the burden of showing that the federal court would not have exercised pendent jurisdiction on the plaintiff. *Id.* at 384. This aberration from the suggested presumption of no-bar is justified by two factors which the state court could glean from the record itself. First, the plaintiff intentionally deleted his state claims from the federal complaint, apparently attempting to insure that he would have two opportunities to litigate one claim. Second, the district court and the court of appeals had spent considerable time on the case; thus, the district court would probably have heard the state claims to avoid needless waste of judicial resources.

The *Maldonado* court, however, went somewhat astray on one point. It asserted that the plaintiff always "must . . . show that there was some impediment to the presentation of his entire claim . . . in the [federal] . . . forum." *Id.* Although the particular facts of the case before it justified the court's statement, the presumption should not always be in favor of the defendant. *See* notes 71-74 and accompanying text *supra.*

Conclusion

The difficulties state courts encounter in determining the preclusive effect of federal actions in which the plaintiff omitted a related state claim derive from the complexities of the *Gibbs* doctrine. Although the *Restatement Second* does not eliminate these complexities, it provides courts with a concise statement of the relationship between pendent jurisdiction and res judicata. In dealing with the problem of the omitted state claim, state courts should look first to the ground on which the federal court disposed of the federal claim to determine whether that court had the power to exercise pendent jurisdiction. If the federal court reached the merits of the federal claim, the state court should examine the timing of the dismissal to gauge the judicial resources expended in the initial action. Dismissal on the pleadings and judgment following a full trial stand at opposite ends of the spectrum; cases falling between these extremes will continue to trouble state courts, but the above suggestions, based on the policy of judicial economy, should assist courts in reaching principled and fair decisions.

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