A THIRD PARTY DEFENDANT'S CLAIM AGAINST PLAINTIFF UPHELD DESPITE ABSENCE OF INDEPENDENT JURISDICTIONAL GROUNDS

Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co. 426 F.2d 709 (5th Cir. 1970)

Revere brought a diversity action against Aetna on a performance bond executed by the latter on behalf of the George A. Fuller Co. Aetna impleaded Fuller alleging an indemnity agreement. Fuller, as third-party defendant, filed a claim against Revere pursuant to Rule 14(a)[1] whereupon Revere moved to dismiss for lack of diversity between itself and Fuller. The trial court overruled the motion. On interlocutory appeal, *held:* A third-party defendant's assertion of a claim against a plaintiff under Rule 14(a) arising out of the transaction or occurrence that is the subject matter of the original claim does not require independent grounds of federal jurisdiction.[2]

Although conflicting district court decisions exist on the issue presented in *Revere*, it is one of first impression at the court of appeals level. As noted in *Revere*, prior decisions which have required an independent basis of jurisdiction under facts similar to those presented to the fifth circuit have supported their holdings on two grounds. First, employing a theory of jurisdictional mutuality developed by Professor Moore,[3] it is argued that, because independent grounds of jurisdiction are required when a plaintiff asserts a claim against a third-party defendant, that same requirement should apply to a third-party defendant who asserts a claim against the plaintiff.[4] Second, two district courts construed Rule 82[5] to prohibit jurisdiction for any non-

1. FED. R. CIV. P. 14(a) provides in part: "The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

2. Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970). The Fifth Circuit in *Revere* uses the term "counterclaim" to designate Fuller's third-party complaint against Revere. This designation seems incorrect and confusing. First, Rule 14(a), quoted *supra*, note 1, uses the term "claim" to designate such a complaint. Second, Rule 14(a) provides that the third-party shall assert his counterclaims "as provided in Rule 13." Third, Fuller's third-party complaint is not within the meaning of the term "counterclaim" because Revere is technically not an "opposing party" as required in Rule 13 until it asserts a claim against Fuller. *Accord,* Morris, Wheeler & Co. v. Rust Engineering, 4 F.R.D. 307 (D. Del. 1945). For the above reasons, the term "claim" is used *infra* to designate Fuller's third-party complaint against Revere.

3. 3 J MOORE, FEDERAL PRACTICE ¶ 14.27 (2d ed. 1948).

4. Shverha v. Maryland Cas. Co., 110 F. Supp. 173, 174 (E.D. Pa. 1953) (court adopted Moore's theory); James King & Son, Inc. v. Indemnity Ins. Co., 178 F. Supp. 146, 148 (S.D. N.Y. 1959) (FED R CIV P. 82 was also considered, with Rule 14. Court relied upon *Shverha*). *See also* Note, *Rule 14: Federal Third-Party Practice,* 58 COLUM. L. REV. 532, 542-43 (1958).

5. *See* note 32 *infra.*

federal claim by a third-party defendant against the plaintiff under Rule 14(a) if those parties lack diversity.[6] On the other hand, those district court decisions which foreshadow the holding in *Revere* rely upon the application of ancillary jurisdiction developed in analogous situations arising under Rules 13(a) and 24(c).[7]

The fifth circuit in *Revere* bases its decision on the concept of ancillary jurisdiction.[8] Even though notoriously illusive,[9] that concept is regarded as a necessity if the object of the Federal Rules to adjudicate all claims arising from a single litigous situation[10] is to be achieved without expanding the jurisdiction of the district courts.[11] The doctrine of ancillary jurisdiction is routinely applied under Rule 13(a) to allow compulsory counterclaims without independent grounds of jurisdiction.[12] Because of the similarity between compulsory counterclaims under Rule 13(a) and claims by a third-party defendant under Rule 14(a), the fifth circuit in *Revere* and two district courts[13] have reasoned that an extension of ancillary jurisdiction to claims under 14(a) is logical. Both compulsory counterclaims under Rule

6. James King & Son, Inc. v. Indemnity Ins. Co., 178 F. Supp. 146, 148 (S.D. N.Y. 1959); Morris, Wheeler & Co. v. Rust Engineering Co., 4 F.R.D. 307 (D. Del. 1945) (dictum).

7. Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486 (D. Neb. 1965); Heintz & Co. v. Provident Tradesmens Bank & Trust Co., 30 F.R.D. 171 (E.D. Pa. 1962) [*noted in* 62 COLUM. L. REV. 1513 (1962); 8 UTAH L. REV. 145 (1962)]. *See also* Bernstein v. N.V. Nederlandische-Americaansche Stoomvaart-Maatschappig, 9 F.R.D. 557 (S.D. N.Y. 1949); Note, *Federal Courts-Third Party Practice*, 18 TEXAS L. REV. 198 (1940).

8. The rationale of the doctrine of ancillary jurisdiction is that once a federal court acquires jurisdiction of an action it may entertain other claims not independently capable of conferring jurisdiction "as an incident to disposition of a matter properly before it." C. WRIGHT, LAW OF FEDERAL COURTS § 9 (1970).

9. C. WRIGHT, LAW OF FEDERAL COURTS §§ 9, 19 (1970); Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 45 (1964); Note, *Federal Practice: Jurisdiction of Third-Party Claims*, 11 OKLA. L. REV. 326, 329 (1958). *Compare* Fulton Nat'l Bank of Atlanta v. Hozier, 267 U.S. 276 (1925); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) *with* Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329 (1887).

10. Clark & Moore, *A New Federal Civil Procedure: II. Pleadings and Parties*, 44 YALE L.J. 1291, 1322 (1932); Lesnik v. Public Industrials Corp., 144 F.2d 968, 973 (2d Cir. 1944); United States v. Aetna Life Ins. Co., 46 F. Supp. 30, 34 (D. Conn. 1942); Note, *The Ancillary Concept and the Federal Rules*, 64 HARV. L. REV. 968 (1951).

11. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), holds that there must be diversity between each plaintiff and each defendant. Hurn v. Oursler, 289 U.S. 238 (1933) stated that federal jurisdiction may not be expanded by a rule of court. FED. R. CIV. P. 82 provides that the federal rules shall not be construed to extend the jurisdiction of district courts.

12. 3 J. MOORE, FEDERAL PRACTICE ¶ 13.15 (2d ed. 1948); 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 392 (Wright ed. 1960) and cases cited at n. 25 therein.

13. Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486 (D. Neb. 1965); Heintz & Co. v. Provident Tradesmens Bank & Trust Co., 30 F.R.D. 171 (E.D. Pa. 1962).

13(a)[14] and third-party defendant claims against the plaintiff under Rule 14(a) must arise out of the transaction or occurrence that is the subject of the original claim. The Supreme Court held in *Moore v. New York Cotton Exchange*[15] that a compulsory counterclaim under old Equity Rule 30 was ancillary *because* it arose out of the transaction which was the subject of the original claim—defining transaction as comprehending "a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."[16] The third circuit has held[17] that the issue of ancillary jurisdiction and the issue of whether a counterclaim is compulsory are both answered by the "logical relation" test established in *Moore*. The only distinction between a compulsory counterclaim and a third-party claim against the plaintiff is that the former "must" be pleaded and the latter "may" be pleaded. This is a distinction without a difference, for the claim does not become ancillary because it must be pleaded but because of its relation to the transaction upon which the original claim is based.[18] The *Revere* court found the analogy between the Rule 14(a) claim and the Rule 13(a) compulsory counterclaim "persuasive"[19] in determining whether Rule 14(a) claims by the third-party defendant are ancillary. In support of this position it should be pointed out that, since the 1946 Amendment to Rule 14(a)[20] was intended to give the third-party defendant the *procedural* right to assert a claim against the plaintiff previously unassertable under 13(a),[21] those claims under Rule 14(a) as amended, arguably, should be governed by the same principles of federal jurisdiction applicable under Rule 13(a). Based on the concept of ancillary jurisdiction and the similarities between Rules 13(a) and 14(a), the *Revere* position seems justified.

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14. FED. R. CIV. P. 13(a) provides in part:
A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against an opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction . . .

15. 270 U.S. 593 (1962).

16. *Id.* at 610.

17. Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633 (3d Cir. 1961).

18. Heintz & Co. v. Provident Tradesmens Bank & Trust Co., 30 F.R.D. 171, 174 (E.D. Pa. 1962).

19. Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970).

20. FED. R. CIV. P. 14(a) was amended in 1946 to include the language quoted in note 1, *supra*. Bernstein v. N.V. Nederlandische-Amerikaansche Stoomvaart-Maatschappig, 9 F.R.D. 557, 558 (S.D N.Y. 1949).

21. Morris, Wheeler & Co. v. Rust Engineering, 4 F.R.D. 307 (D. Del. 1945).

Persuaded by the analogy to Rule 13(a), the fifth circuit removed "any substantial doubt"[22] it had concerning the jurisdictional problem by reasoning that, since Fuller could have intervened under Rule 24(a)[23] and have counterclaimed without independent grounds of jurisdiction, it would be "anomalous"[24] to require independent grounds for the claim under Rule 14(a) against the plaintiff when Fuller was impleaded. In a factual situation indistinguishable from *Revere,* the second circuit,[25] in a case heavily relied upon in *Revere,* allowed intervention as of right without diversity and, on the basis of *Moore,* allowed a counterclaim against the plaintiff without diversity. The counterclaim was based on the alleged breach of the same contract originally sued on and was allowed, not because it was filed subsequent to a claim by intervention of right, but because it met the "logical relationship" test established in *Moore.*[26] The argument that Fuller could have intervened under Rule 24(a) and counterclaimed against Revere without independent jurisdictional grounds is of itself unpersuasive when it is realized that the requirements of Rule 13(a), not 24(a), would cause the claim to be ancillary. Moreover, the analogy to Rule 24(a) is speculative because apparently no decisions exist on the question of ancillary jurisdiction under Rule 24(a)[27] since the scope of that rule was broadened in 1966, making it difficult to determine what result will be reached by the courts.[28]

Rule 14(a) also provides that a plaintiff may take the initiative and assert a claim against a third-party defendant arising out of the transaction or occurrence that is the subject matter of the original claim.[29] As indicated, Professor Moore argued that, because

22. Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970).

23. FED. R. CIV. P. 24(a) provides:

(a) Intervention of Right, upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the act may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

24. 426 F.2d at 716.

25. United States *ex rel.* Foster Wheeler Corp. v. American Sur. Co., 142 F.2d 726 (2d Cir. 1944).

26. *Id.* at 728.

27. 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 593 (Wright ed. cum. supp. 1969); C. WRIGHT, LAW OF FEDERAL COURTS 75 (1970).

28. C. WRIGHT, LAW OF FEDERAL COURTS 75 (1970).

29. FED. R. CIV. P. 14(a) provides in part:

The plaintiff may assert any claim against the third-party defendant arising out of the

independent grounds of jurisdiction are required when a plaintiff asserts a claim against a third-party defendant, the same requirement should apply when a third-party defendant asserts a claim against the plaintiff.[30] This argument is only as strong as the initial proposition that the plaintiff's claim requires independent grounds of jurisdiction. Although that proposition is generally accepted,[31] authority to the contrary[32] weakens Professor Moore's argument. Moore correctly points out that the arguments based on the purpose of Rule 14 to settle related matters in the same action and the arguments based on the discretionary power of judges to prevent actual collusion can be made to support a no-independent-grounds requirement for claims between the plaintiff and third-party defendant initiated by either one under Rule 14(a).[33] However, this fails to support his argument by further weakening his initial proposition and making the argument for jurisdictional mutuality less than compelling.

While the decision in *Revere* will give a larger number of nondiverse claims access to a federal forum, the problem remains whether this application of ancillary jurisdiction is proper under either Rule 82[34] or the diversity requirements of the Constitution.[35] The fifth circuit correctly notes that ancillary jurisdiction was well established before the Federal Rules became effective and does not extend federal diversity jurisdiction.[36] It is argued in *Revere* that the decision merely provides an opportunity for properly involving the doctrine in an additional situation. The Federal Rules use the term "claim"[37] to denote a score of operative facts giving rise to legal rights.[38] Since Rule 14(a) requires the third-party claim against the plaintiff to arise out of the same transaction and occurrence as the original claim, no new "claim" is

transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13.

30. 3 J. MOORE, FEDERAL PRACTICE, ¶ 14.27 (2d ed. 1948).

31. 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 424 (Wright ed. cum. supp. 1969) and cases cited at n.31a therein.

32. *Id.*

33. 3 J. MOORE, FEDERAL PRACTICE ¶ 14.27 [2] (2d ed. 1968).

34. FED. R. CIV. P. 82 provides in part:

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of action therein.

35. U.S. CONST. art. III, § 2, clause 2; 28 U.S.C. §§ 1331-32 (1958).

36. *See* Comment, 62 COLUM. L. REV. 1513 (1962) cases and materials cited at n. 2 therein.

37. FED. R. CIV. P. 8(a).

38. Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959); Original Ballet Russe v. Ballet Theatre, 133 F.2d 187, 189 (2d Cir. 1943).

introduced. Obviously, no new parties are introduced to the action, for the third-party was previously drawn into the action by impleader.

The decision in *Revere* leads to the resolution of all claims in one action. Substantial authority, however, suggests that the diversity jurisdiction of federal courts should be restricted as a general policy.[39] Since the question of the restriction of diversity jurisdiction as a *policy* remains unresolved, the decision in *Revere* seems clearly warranted in light of the analogous application of the doctrine of ancillary jurisdiction under Rule 13(a), the less persuasive arguments to the contrary based on Rule 82 and the theory of jurisdictional mutuality.

39. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 1 (1969).