UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 49 | Number 3 Article 5

4-1-1971

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E. L. Kittrell Smith

NOTES

Civil Procedure—Ancillary Jurisdiction—The Third-Party Defendant's Claim Under Federal Rule 14(a)

"[A]ncillary jurisdiction—the child of necessity and sire of confusion"[1] will now support an impleaded third-party defendant's claim against the original plaintiff without requiring an independent jurisdictional basis. In *Revere Copper & Brass, Inc. v. Aetna Casualty & Surety Co.*,[2] the original defendant, surety on a performance contract, impleaded the contractor under Federal Rule 14(a).[3] The contractor in turn asserted a 14(a) claim against the plaintiff, alleging that plaintiff was responsible for the contractor's failure to complete construction on time. Since both the third-party defendant and original plaintiff were Maryland corporations, the plaintiff moved to dismiss the impleaded party's claim for lack of diversity of citizenship. The motion to dismiss was denied on the ground that the third party's claim was considered ancillary to the plaintiff's original claim. The ruling on the motion was certified for immediate appeal,[4] and the Court of Appeals for the Fifth Circuit, the first appellate court to review the jurisdictional requirements for the impleaded third party's claim, held that no independent jurisdictional basis was required.[5]

Federal courts may resolve those claims over which they have no subject-matter jurisdiction by invoking the concept of ancillary jurisdiction. The theory is that "a district court acquires jurisdiction of a case

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[1] Note, *Federal Practice: Jurisdiction of Third-Party Claims*, 11 OKLA. L. REV. 326, 329 (1958).

[2] 426 F.2d 709 (5th Cir. 1970).

[3] FED. R. CIV. P. 14(a) in pertinent part states:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . The person served with the summons and third-party complaint, hereinafter called the third-party defendant . . . may . . . 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. The plaintiff may assert any claim against the third-party defendant arising out of the 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. . . .

[4] 28 U.S.C. § 1292(b) (1964).

[5] 426 F.2d at 717.

or controversy as an entirety."[6] In the settlement of the principal controversy, claims may arise, which if sued upon alone, could not be presented in the federal court for failure to meet the subject-matter jurisdictional requirements. However, because the district court has jurisdiction over the principal claim, it may resolve those incidental matters that are part of the entire controversy.[7]

Initially the ancillary concept developed in response to necessity.[8] However, necessity could hardly justify the doctrine as it exists today, and the potential importance of the ancillary concept was not fully realized until the adoption of the Federal Rules of Civil Procedure with their liberal joinder provisions.[9] As the federal rules were applied, it became obvious that the purpose of the liberal joinder provisions would be partially defeated if the courts would not give an expansive interpretation to the ancillary jurisdiction concept.[10] In fact, the purposes behind the joinder provisions and the ancillary doctrine are indeed similar. Of prime consideration are the factors of avoiding untimely delays in the settlement of controversies, keeping the expense of litigation to a minimum, and increasing convenience to parties and witnesses to the dispute. Then too the avoiding of piecemeal litigation and the precluding of incongruous results on basically the same factual situations are desired objectives. On the other hand, Congress has clearly defined the jurisdiction of the federal courts,[11] and the purpose of the federal rules is certainly not to extend this jurisdiction.[12] Undoubtedly, every time the ancillary doctrine is applied, these congressional grants of authority are violated.

But is procedural convenience sufficient justification for the avoidance of these grants of jurisdiction?[13] Apparently so, for the majority of courts have held that the doctrine will support the compulsory counterclaim,[14]

[6] C. WRIGHT, LAW OF FEDERAL COURTS § 9, at 19 (2d ed. 1970) [hereinafter cited as WRIGHT].

[7] *Id.*

[8] For example, if property was in the custody of the federal court, any person having an interest in that property could assert his claim in that court without meeting any jurisdictional requirements. To hold otherwise would have been to deny those persons any forum, for the state court had no jurisdiction over property within the custody of the federal system. Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1860).

[9] *E.g.*, FED. R. CIV. P. 18, 20.

[10] WRIGHT § 76, at 336.

[11] *E.g.*, 28 U.S.C. §§ 1331, 1332 (1964).

[12] FED. R. CIV. P. 82.

[13] *See* WRIGHT § 9, at 20.

[14] *E.g.*, United Artists Corp. v. Masterpiece Prod., Inc., 221 F.2d 213, 216 (2d Cir. 1955); Mayer v. Chase Nat'l Bank, 165 F. Supp. 287, 291 (S.D.N.Y. 1958).

the compulsory cross claim,[15] the interpleader action,[16] and the intervention as of right.[17] On the other hand, ancillary jurisdiction will not support the permissive counterclaim,[18] the permissive joinder of claims[19] unless they are considered pendent,[20] or permissive intervention.[21] From this empirical cross-section, it would appear that ancillary jurisdiction is expanding to support any permissive claim so long as that claim is not asserted by the original plaintiff in the action, and so long as the claim arises from the same transaction or occurrence that is the subject matter of the original claim.[22]

If the concept of ancillary jurisdiction is expanding to support any permissive claim arising out of the same transaction, it certainly has its place under the third-party practice of rule 14(a). The concept was first applied when the federal courts unanimously held that ancillary jurisdiction would support the claim asserted against the impleaded third-party.[23] The theory used to justify this result is that "claim" as used by the federal rules is broader in scope than the older legal phrase "cause of action"

[15] *E.g.*, Coastal Air Lines, Inc. v. Dockery, 180 F.2d 874, 877 (8th Cir. 1950); Hoosier Cas. Co. v. Fox, 102 F. Supp. 214, 228-29 (N.D. Iowa 1952).

[16] State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967); Haynes v. Felder, 239 F.2d 868, 872-74 (5th Cir. 1957).

[17] *E.g.*, Black v. Texas Emp. Ins. Ass'n, 326 F.2d 603, 604 (10th Cir. 1964); Fomulabs, Inc. v. Hartley Pen Co., 318 F.2d 485, 492 (9th Cir.), *cert. denied*, 375 U.S. 945 (1963).

[18] Measurements Corp. v. Ferris Inst. Corp., 159 F.2d 590, 594 (3d Cir. 1947); Hoosier Cas. Co. v. Fox, 102 F. Supp. 214, 226 (N.D. Iowa 1952).

[19] *E.g.*, Delman v. Federal Prod. Corp., 251 F.2d 123, 126 (1st Cir. 1958); Weintraub v. Fitzgerald Bros. Brewing Co., 40 F. Supp. 473, 475 (S.D.N.Y. 1941).

[20] UMW v. Gibbs, 383 U.S. 715, 725-27 (1966); Hurn v. Oursler, 289 U.S. 238, 246 (1933).

[21] *E.g.*, Hunt Tool Co. v. Moore, 212 F.2d 685, 688 (5th Cir. 1954); Olivieri v. Adams, 280 F. Supp. 428, 433 (E.D. Pa. 1968).

[22] That the claim must arise from the same transaction or occurrence has caused considerable trouble. Initially claims were considered as coming from the same transaction if they bore some *logical relationship* to one another. *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926). This relationship was said to exist if "separate trials on each [claim] . . . would involve a substantial duplication of effort and time by the parties and the courts." *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961). The court in *Revere* redefined this *logical relationship* by requiring either that the same set of operative facts be the basis for both claims, or that the facts giving rise to the original claim activate certain rights in the defendant that would have remained dormant. This redefinition was certainly gratuitous for the claim being asserted in *Revere* would have met even the initial test as one arising out of the same transaction. However, this new definition might be of some importance in considering the application of ancillary jurisdiction to future claims.

[23] *E.g.*, Stemler v. Burke, 344 F.2d 393, 395-96 (6th Cir. 1965); Huggins v. Graves, 337 F.2d 486, 488 (6th Cir. 1964). *See* WRIGHT § 76, at 336.

and means the aggregate of operative facts giving rise to a right enforceable in a court.[24] This claim gives rise to rights in the plaintiff against the defendant and to rights in the defendant against third parties to the action.[25] The defendant's rights, therefore, against third parties are merely a part of the aggregate of operative facts and thus should be considered ancillary.[26]

Once this third-party is impleaded, the original plaintiff may assert any claim against him that arises "out of the transaction or occurrence that is the subject matter of the plaintiff's [original] claim."[27] But here the courts have required an independent basis for federal jurisdiction[28] reasoning that plaintiff could be manufacturing jurisdiction through this third-party practice and through collusive joinder of parties could circumvent "the diversity rule by use of a friendly original defendant."[29]

This third-party also has a right under rule 14(a) to "assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's [original] claim . . . ."[30] The jurisdictional requirement for this particular claim was the problem before the court in *Revere*. A conflict had developed at the district court level with at least two cases supporting Professor Moore's proposition that an independent jurisdictional ground to support the impleaded party's claim against the plaintiff was required.[31] The language of rule 14(a) giving

[24] Original Ballet Russe v. Ballet Theatre, Inc., 133 F.2d 187, 189 (2d Cir. 1943); 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 424, at 653 (1960) [hereinafter cited as BARRON & HOLTZOFF].

[25] *Id.*

[26] Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959), in which the court stated:

> The great weight of authority amongst the federal district courts is to the effect that when federal jurisdiction over the subject-matter of the main action once attaches the court has ancillary jurisdiction to decide a third-party dispute growing out of the same core of facts and hence within the scope of the Rule even though the dispute, separately considered, is lacking in the attributes of federal jurisdiction.

[27] FED. R. CIV. P. 14(a).

[28] *E.g.*, Friend v. Middle Atl. Transp. Co., 153 F.2d 778, 779 (2d Cir.), *cert. denied*, 328 U.S. 865 (1946); Corbi v. United States, 298 F. Supp. 521, 522 (W.D. Pa. 1969); WRIGHT § 76, at 337.

[29] Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305, 306 (E.D.N.Y. 1941); 3 J. MOORE, FEDERAL PRACTICE ¶ 14.27[1] (2d ed. 1968) [hereinafter cited as MOORE].

[30] FED. R. CIV. P. 14(a).

[31] *Compare* James King & Son, Inc. v. Indemnity Ins. Co. of N. America, 178 F. Supp. 146 (S.D.N.Y. 1959) *and* Shverha v. Maryland Cas. Co., 110 F. Supp. 173 (E.D. Pa. 1953) *with* Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co., 38 F.R.D. 486 (D. Neb. 1965) *and* Heintz & Co. v. Provident Tradesmens Bank & Trust Co., 30 F.R.D. 171 (E.D. Pa. 1962).

rise to the third-party defendant's claim is substantially identical to that describing plaintiff's assertion of a claim against the impleaded party,[32] and Professor Moore reasons that because an independent jurisdictional ground to support the plaintiff's claim is required, so too should there be a requirement of this same independent jurisdictional basis to support the impleaded party's claim against the plaintiff.[33] In conjunction with Professor Moore's argument is rule 82 of the Federal Rules of Civil Procedure which states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."[34]

Such an interpretation, however, tends to be rather restrictive in light of the policy behind the federal rules of settling as much in a single controversy as is possible. As could be expected, therefore, a line of cases began to develop at the district court level that did not require this independent jurisdictional ground for the third-party claim against original plaintiffs.[35] These district courts chose to disregard the language upon which Professor Moore relies. Rather the courts focused attention on the reasons supporting different jurisdictional requirements for these apparently identical claims.

To effectuate the purpose of rule 14(a), it would appear that a reason must exist for not allowing ancillary jurisdiction to support the claim. Regarding the original plaintiff's claim against the impleaded third-party this reason is apparent; there exists the possible threat that a plaintiff could manufacture jurisdiction through the use of a friendly defendant.[36] If no independent jurisdictional ground were required for plaintiff's assertion of a claim against the third-party, circumvention of jurisdictional requirements through abuse of rule 14(a) would be the result, and the plaintiff would be able to invoke jurisdiction indirectly when he could not have done so directly.[37] On the other hand this same threat of collusion does not exist in the claim asserted by the impleaded

[32] See text accompanying notes 27 & 30 *supra*.

[33] 3 MOORE ¶¶ 14.27[2].

[34] FED. R. CIV. P. 82. *See* James King & Son, Inc. v. Indemnity Ins. Co. of N. America, 178 F. Supp. 146, 148 (S.D.N.Y. 1959).

[35] 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); Bernstein v. N.V. Nederland-scheamerikaansche Stoomvaart-Maatschappij, 9 F.R.D. 557 (S.D.N.Y. 1949).

[36] *See, e.g.*, authorities cited note 29 *supra*.

[37] Note, *Federal Third-Party Practice—Ancillary Jurisdiction Supports Third-Party Defendant's Claim Against Plaintiff*, 8 UTAH L. REV. 145, 148 (1962). *But see* Frazer, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 42 (1963) [hereinafter cited as Frazer]

party, for the parties asserting these claims enter the lawsuit in different postures. The plaintiff, in bringing the action submits "himself to all claims arising out of the transaction which is the subject matter of the litigation,"[38] while "[t]he third-party defendant, on the other hand, is before the court involuntarily, and in all fairness he ought to be able to assert all claims arising out of the subject matter of the original action which he may have against the plaintiff."[39] Therefore, the policy considerations supporting ancillary jurisdiction call for its application to support the claim of the impleaded third-party against the plaintiff. Sufficient differences exist between these claims and plaintiff's claims against the third-party defendant to warrant different jurisdictional requirements.

Therefore, in *Revere* the court's extension of ancillary jurisdiction was absolutely correct, but several problems are inherent in the decision that need consideration. The first problem is how the plaintiff's response to the impleaded party's claim is to be categorized. Logically the response should be treated as a compulsory counterclaim under rule 13(a)[40] which, according to a majority of courts, would be supported by ancillary jurisdiction.[41] But here again the plaintiff will have succeeded in manufacturing his jurisdiction. A second inevitable problem is whether the threat of the collusive manufacturing of jurisdiction is so predominant as to require the avoidance of all other policy considerations supporting rule 14(a).[42] A pretrial agreement between the plaintiff and defendant to implead a third party is undoubtedly remote,[43] and such collusive alignment of parties to affect federal jurisdiction could be easily detected at the

[38] Note, 11 OKLA. L. REV., *supra* note 1, at 328.

[39] *Id.*

[40] FED. R. CIV. P. 13(a).

[41] *E.g.*, Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961); United Artists Corp. v. Masterpiece Prod., Inc., 221 F.2d 213, 216 (2d Cir. 1955); 1A BARRON & HOLTZOFF § 392, at 548.

[42] Frazer at 42-43, where the author argues for an extension of ancillary jurisdiction to support plaintiff's claim against an impleaded party and concludes:

> Once a third-party defendant is brought into an action the court should be able to settle all claims arising out of the transaction that is the basis of the action, and it should be immaterial which party asserts the claim because the desirability of avoiding piecemeal litigation of disputes is as great whether the claim is asserted by a defendant or by a plaintiff. The parties and the facts are already before the court so that the burden on the court will not be increased by holding that the plaintiff's claim against the third-party defendant is ancillary.

[43] "That there may be collusion between the original parties in some cases should not prevent plaintiffs from asserting claims against third-party defendants in all cases. The courts should only dismiss the claim when collusion actually exists." *Id.* at 42.

initial stages of trial.[44] However, because of over-emphasis on the threat of jurisdictional collusion, precedent has developed requiring an independent jurisdictional ground.[45] Therefore, the extension of ancillary jurisdiction to cover the original plaintiff's claim against the impleaded party is less certain but arguably necessary if effect is to be given the policy behind the federal rules and if the courts are going to perform their primary function of settling the entire dispute.

E. L. KITTRELL SMITH

Constitutional Law—Right of Police to Retain Arrest Records

The advent of the computer, proposals for a new National Data Bank,[1] development of means for rapid and efficient interchange of information, and highly publicized incidents of police and military surveillance have crystallized public concern over the information retention activities of government agencies. This developing wariness of records would seem to germinate from their accelerated capacity for harm. At present, masses of records may be conveniently stored in computers subject to almost instantaneous recall. The data retained by one organization may be expeditiously conveyed to another on request.[2] The total effect of these technological advances is an increased potentiality for evil as well as good. The accuracy and validity of records that are damaging in nature must, therefore, be laboriously scrutinized if the interests of individuals are not to be crushed by a newly mechanized bureaucracy.

A recent federal case, *Menard v. Mitchell*,[3] outlined many of the competing considerations involved in the right of the police to keep records of arrests. The plaintiff brought an action seeking to compel the Attorney General and the Director of the Federal Bureau of Investigation to ex-

[44] At least another potential problem area has been avoided where the main claim is dismissed leaving only the third-party defendant's claim which lacks an independent jurisdictional base, for "[j]urisdiction once acquired is not lost by changes in the situation leaving only ancillary matters for determination." 1A BARRON & HOLTZOFF § 424, at 658.

[45] See note 29 *supra*.

[1] For an analysis of the advisability of a National Data Bank see generally J. ROSENBERG, THE DEATH OF PRIVACY (1969) [hereinafter cited as ROSENBERG].

[2] *Id.* 64-68.

[3] 430 F.2d 486 (D.C. Cir. 1970).