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## Practice & Procedure: Counterclaims in Response to Cross-Claims

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## RECENT DEVELOPMENT

### *PRACTICE & PROCEDURE: Counterclaims in Response to Cross-claims*

Section 2013(G) of the Oklahoma Pleading Code<sup>1</sup> provides that a party may state as a cross-claim against any party to the action, except an opposing party, any claim that arises out of the transaction or occurrence that is the subject matter of either the original action or of a counterclaim therein, or that is related to any property that is the subject matter of the original action.<sup>2</sup> Thus, if a defendant has a claim against a codefendant that arises out of the claim that is the subject matter of the plaintiff's claim, it may be asserted as a cross-claim against the codefendant, but it is not required to be asserted in the pending action. However, if a defendant asserts a cross-claim against a codefendant, the defendants become opposing parties so that section 2013(A) of the Pleading Code applies.<sup>3</sup>

Section 2013(A) provides that a party must state as a counterclaim against an opposing party any claim which at that time he has against such party and that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.<sup>4</sup> Thus, a defendant against whom a cross-claim is asserted must assert any claim that he has against the defendant who is the cross-claim plaintiff and that arose out of the transaction or occurrence that is the subject matter of the cross-claim. This provision of the Pleading Code changed Oklahoma law because under the prior statutes counterclaims and setoffs in response to cross-claims were permissive rather than compulsory.<sup>5</sup> Therefore, cases that were decided before the adoption of the Oklahoma Pleading Code in 1984 are no longer authority in Oklahoma.

In one case that was decided before the adoption of the Pleading Code,<sup>6</sup> an administratrix sued Atlas Life Insurance Co. to recover the proceeds due under a life insurance policy and joined Roach, who was named in the policy as the beneficiary, as a defendant. Atlas interpleaded the plaintiff and Roach

1. 12 OKLA. STAT. § 2013(G) (Supp. 1988).

2. Section 2013(G), as originally passed in 1984, was the same as Federal Rule of Civil Procedure 13(g). It authorized a party to assert a cross-claim against a co-party, but in 1988, this subsection was amended to permit a party to assert a cross-claim against any party to the action except an opposing party.

3. 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 13.34, 209-10 (2d ed. 1988).

4. Section 2013(B) provides that a party may assert as a counterclaim against an opposing party any claim that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. Thus, under subsection (A) related claims are compulsory counterclaims, and under subsection (B) unrelated claims are permissive counterclaims.

5. 12 OKLA. STAT. § 275 (1981, repealed 1984). However, if a party failed to assert a counterclaim or a setoff, he could not recover his costs in a subsequent action.

6. For a discussion of this case see *Roach v. Atlas Life Ins. Co.*, 769 P.2d 158 (Okla. 1989).

by its answer, which constituted a counterclaim against the plaintiff and a cross-claim against codefendant Roach. Having determined that Roach could not recover under the policy, the trial court granted the plaintiff's motion for a summary judgment. Thereafter, Roach sued Atlas for its breach of duty to deal fairly with its insured. The Supreme Court of Oklahoma held that "although Roach might have asserted bad faith through the use of the cross-claim statute, failure to assert the right did not bar a subsequent action for bad faith," and that "the finality of an interpleader action does not ipso facto bar recovery for a subsequent bad faith breach of contract."<sup>7</sup> However, the court affirmed the granting of a summary judgment for Atlas in this action because the court's order in the prior interpleader action prevented Atlas from disbursing the policy proceeds to Roach.

Under the Pleading Code, Roach and Atlas would have been opposing parties when Atlas asserted a cross-claim in the nature of interpleader against Roach. Therefore, Roach would have been required to assert a counterclaim against Atlas for the policy proceeds because Roach's claim arose out of the transaction that was the subject matter of Atlas' cross-claim. However, having failed to assert a counterclaim, Roach would have been precluded from asserting his claim in a subsequent action.<sup>8</sup>

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7. *Id.* at 163.

8. The concurring opinion reached the same result under the statutes that were repealed by the Pleading Code by giving effect to the purpose of an interpleader action. 769 P.2d at 164. The majority opinion indicated that the issue of bad faith on the part of the insurer was not litigated in the interpleader action, but a finding that Roach was not entitled to the fund would suggest that the insurer did not act in bad faith in refusing to pay the policy proceeds to Roach. Moreover, the duty to pay the policy proceeds and the duty to deal fairly with the insured constitute one cause of action, which, ordinarily, the insured must enforce in one action. See *Christian v. American Home Assurance Co.*, 577 P.2d 899 (Okla. 1978).