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FEDERAL COURTS-USE OF A CROSS-CLAIM UNDER RULE 13(g) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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FEDERAL COURTS—USE OF A CROSS-CLAIM UNDER RULE 13(g) OF THE FEDERAL RULES OF CIVIL PROCEDURE—Under an ordinary automobile insurance policy, *P* insurance company promised to defend and indemnify Harvey for any suit arising from an accident involving his use of the insured truck. Collier sued Harvey in a state court alleging injuries due to the negligent use of the insured truck by two Harvey employees. Before judgment thereon, *P*, incorporated under the laws of Wisconsin, sued Harvey and Collier, citizens of Oklahoma, in the federal court. *P* sought a declaratory judgment on the grounds that (a) at the time of the accident the employees were under the control and supervision of the City of Seminole, and (b) Harvey had failed to give due notice of the accident. Harvey then filed a cross-claim against Collier requesting the court to declare him not liable for Collier's injuries. The trial court rendered a judgment exonerating *P* and Harvey from any liability for Collier's injuries as the negligent employees had been acting under the control of the City of Seminole at the time of the accident. On appeal, Collier asserted that the trial court did not have jurisdiction over the cross-claim as the questions raised by the cross-claim were not essentially ancillary to the subject matter of the original suit. *Held,* that the judgment on the cross-claim is affirmed insofar as it declared Harvey not liable for Collier's injuries on the grounds of the negligence of Harvey's employees. *Collier v. Harvey,* (10th Cir. 1949) 179 F. (2d) 664.

Rule 13(g) of the Federal Rules of Civil Procedure[1] is an evolutionary development of the old equity practice of cross-bills.[2] "The cross-bill is an auxiliary to the original suit and a dependency upon it."[3] Because of this relationship of dependency, the jurisdiction which supports the original suit will support the cross-claim.[4] The greatest difficulty has been in determining when the subject matter of the cross-claim is sufficiently "ancillary" to the main controversy to permit its adjudication without independent jurisdiction. Originally, the scope of the cross-claim was confined to matters in which the plaintiff had an "interest or concern,"[5] but this restriction was later abandoned.[6] The great majority of cases involving cross-claims prior to the adoption of the Federal Rules of Civil Procedure were controversies over title to a *res* which was before the court.[7] Here, the utility of the cross-claim was pronounced, for the court

[1] Rule 13(g), "Cross-Claim against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. . . ."

[2] STORY, EQUITY PLEADING §389 (1892).

[3] STREET, FEDERAL EQUITY PRACTICE §1234 (1909).

[4] First Nat. Bank of Salem v. Salem Capital Flour-Mills Co., (C.C. Ore. 1887) 31 F. 580; Ames Realty Co. v. Big Indian Mining Co., (C.C. Mont. 1906) 146 F. 166; Barnett v. Mapes, (C.C.A. 10th, 1930) 43 F. (2d) 521.

[5] Ayres v. Carver, 17 How. (58 U.S.) 591 (1854).

[6] Mathis v. Ligon, (C.C.A. 10th, 1930) 39 F. (2d) 455.

[7] Morgan's L. & T. R. & Steamship Co. v. Texas Cent. Ry. Co., 137 U.S. 171, 11 S.Ct. 96 (1890); Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., (C.C. Idaho 1909) 187 F. 474; Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258, 31 S.Ct. 11 (1910); The Fifth Circuit apparently holds that a cross-claim

could determine with finality the owner, or owners, of the *res* even as between co-defendants without the wasteful practice of subsequent, duplicitous trials. Therefore, when a determination of the issues of the main claim simultaneously resolved the controversy asserted in the cross-claim, the cross-claim was admissible.[8] Under rule 13(g) of the Federal Rules of Civil Procedure, the cross-claim is proper when it arises "out of the transaction or occurrence that is the subject matter . . . of the original claim . . . ."[9] In the principal case, a majority of the court held that the cross-claim was properly related to the subject matter of the principal claim because the same question of fact was presented in each controversy; namely, were the negligent employees acting under the supervision of Harvey, or the City of Seminole, at the time of the accident? However, a dissenting judge was of the opinion that the primary or main jurisdiction of the court was effectively and completely exerted without the adjudication of this question. The problem involved is the nature of the grounds upon which an insurer can maintain an independent suit against the insured and third-party claimants. Where the basis of the independent suit asserting the insurer's non-liability is the insured's failure to pay premiums,[10] or to make a renewal of the policy,[11] or some question going to the coverage of the policy,[12] proper adversity of interests exists between the insurer, and the insured and third parties. But, when the insurer's suit is based on a claim which would likewise free the insured from liability, there is an absence of adverse interests between insurer and insured, so realignment is necessary.[13] In most cases, as in the principal case, this would defeat the jurisdictional requirement of diversity of citizenship. Therefore, it is submitted that *P's* suit in the principal case should have been restricted by the court to a clarification of the scope of the insurer's obligation to defend and a determination of the absence, or presence, of due notice to the

is applicable only when the case involves a res. Republic National Bank & Trust Co. v. Mass. Bonding & Insurance Co., (C.C.A. 5th, 1934) 68 F. (2d) 445.

[8] Queenan v. Mays, (C.C.A. 10th, 1937) 90 F. (2d) 525; See Vanderveer v. Holcomb, 17 N. J. Eq. 87 (1864) where it is stated at p. 90: "Where a case is made out between defendants by evidence arising from pleadings and proofs between plaintiff and defendants, a court of equity is not only entitled to make a decree between the defendants, but is bound to do so."

[9] This language parallels the language in rule 13(a) of the Federal Rules of Civil Procedure, which is concerned with compulsory counterclaims, and if given similar construction would seem to widen appreciably the area of operation for the cross-claim. For a broad judicial interpretation of the scope of "transaction," see Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367 (1926). See also MOORE, FEDERAL PRACTICE UNDER THE NEW FEDERAL RULES §13.02 (1938) for further cases and comment.

[10] Hartford Accident & Indemnity Co. v. Segreto, (D.C. Mass. 1941) 37 F. Supp. 614.

[11] New Amsterdam Casualty Co. v. Berger, (D.C. Mich. 1945) 59 F. Supp. 994.

[12] Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 61 S.Ct. 510 (1941). The insurance policy covered only trucks "hired" by the insured. A third party was injured by insured's employee who, at the time of the accident, was driving a truck purchased by him from the insured on a conditional sale contract.

[13] Maryland Casualty Co. v. Boyle Construction Co., (C.C.A. 4th, 1941) 123 F. (2d) 558.

insurer of the accident.[14] In determining the scope of P's obligation to defend, it was totally unnecessary to adjudicate the facts respecting the control of the negligent employees at the time of the accident as P was bound to defend "any suit against the insured alleging such injury . . . even if such suit is groundless, false, or fraudulent."[15] Thus, the real question concerning the cross-claim was this: even though the scope of P's suit is restricted to the two issues noted above, should the cross-claim be held to have arisen out of the same transaction or occurrence that was the subject matter of P's claim? If "transaction" is held to encompass the total series of events which led up to, and induced, the assertion of P's claim for relief, then Harvey's cross-claim was proper.[16] It is to be noted, however, that the appellate court modified the judgment of the trial court against Collier on the cross-claim to a denial of Harvey's liability only insofar as the basis thereof was the negligence of Harvey's employees. Therefore, Collier was not precluded from maintaining a claim against Harvey on other grounds in the state court. This clearly indicates that the court held that the events which gave rise to Collier's original claim against Harvey were not sufficiently related to the subject matter of P's suit as to constitute a valid basis for bringing Collier's entire claim before the federal court. Thus, if the analysis made above respecting the scope of P's suit is sound, it logically follows that Harvey's cross-claim should have been denied.

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[14] The question of due notice became irrelevant when it was held that P had no duty to defend in Collier's suit in the state court.

[15] Principal case at 665.

[16] See note 8 supra, for a discussion of the scope of "transaction." In Till v. Hartford Accident & Indemnity Co., (C.C.A. 10th, 1941) 124 F. (2d) 405, under facts essentially similar to the principal case, the cross-claim of the insured was permitted. The issue as to the propriety of the cross-claim was apparently not raised, as the court did not treat it in their opinion.