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# Note

## The Joinder of Claims to a Third-Party Impleader Without Independent Jurisdictional Ground— Herein Also of the Camel and His Pendent Fleas

### INTRODUCTION

Since 1965,<sup>1</sup> the federal district courts, especially those in Pennsylvania,<sup>2</sup> have had difficulty reaching uniform decisions on third-party practice, the joinder of claims, and the distinctions between “ancillary” and “pendent” jurisdiction. This problem reached a climax in 1971 when the Third Circuit in *Schwab v. Erie Lackawanna R. R.*<sup>3</sup> held that a defendant who properly impleads third-party defendants under rule 14 of the federal rules of civil procedure may include a separate claim against the impleaded party even though the claim is without independent jurisdictional basis.<sup>4</sup> This note will outline the conflicting judgments of the federal district courts in Pennsylvania, examine *Schwab* in the light of established interpretations of the federal rules, and expose the inherent problems of the appellate court’s decision.

### I. A SURVEY OF THE PLOT

Schwab, a Pennsylvania resident<sup>5</sup> and employee of Erie Lackawanna R. R., was injured when the train he was riding collided with a truck at a private railroad crossing. He brought an action against Erie, a Pennsylvania corporation, under the Federal Employers’ Liability Act<sup>6</sup> and against the owner of the railroad crossing for negligence.<sup>7</sup> The defendants impleaded<sup>8</sup> the owner of the truck, the estate of the driver of the truck,

<sup>1</sup> The federal rules of civil procedure discussed in this topic note were materially amended in 1966. It is these amendments which have caused the difficulties examined herein.

<sup>2</sup> While all the cases discussed herein originate in Pennsylvania, the problems inherent in these rules are common to all circuits. See note 127 *infra*.

<sup>3</sup> *Schwab v. Erie Lackawanna R. R.*, 438 F.2d 62 (3d Cir. 1971).

<sup>4</sup> *Id.*

<sup>5</sup> Complaint of Plaintiff Schwab, at 1; *Schwab v. Erie Lackawanna R. R.*, 303 F. Supp. 1398 (W.D. Pa. 1970).

<sup>6</sup> 45 U.S.C. § 51 (1964). See also Complaint of Plaintiff Schwab, *supra* note 5, at 1; 438 F.2d at 64.

<sup>7</sup> Complaint of Plaintiff Schwab, *supra* note 5, at 3; 438 F.2d at 64.

<sup>8</sup> FED. R. CIV. P. 14 as amended Feb. 1966: “At any time after the 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.” See also Third-Party Complaint of Defendants, *supra* note 5, § 7; 438 F.2d at 64.

and the company from which the truck was leased.<sup>9</sup> These third-party defendants were all Pennsylvania residents.<sup>10</sup> The plaintiff's motion to amend his complaint to assert a direct claim against the third-party defendants was denied because of lack of diversity.<sup>11</sup>

In its third-party complaint, Erie asserted a separate "counterclaim"<sup>12</sup> of less than \$10,000 against the impleaded third-party defendants for damages to the train. The third-party defendants moved to dismiss the separate claim alledging (a) lack of diversity, (b) lack of a sufficient amount in controversy, and (c) absence of a federal question.<sup>13</sup> The district court ruled the third-party defendants were not opposing parties against whom a counterclaim could be lodged.<sup>14</sup> The judge labeled the separate claim "pendent"<sup>15</sup> and, in his discretion, dismissed it.<sup>16</sup> The separate claim was further described as one which "offends . . . the mandate of Fed. R. Civ. P. 82"<sup>17</sup> by attempting to extend the jurisdiction of the court. The court stated: "Once the camel got his nose under the tent, we would have to make room for the entire animal including its pendent fleas."<sup>18</sup> From this ruling, Erie appealed to the Third Circuit which held a defendant who properly impleads third parties on the ground they "are or may be liable to him for all or part of the [original] plaintiff's claim against him"<sup>19</sup> may also include a separate claim against the impleaded party, based upon the same transaction, even though the claim is without independent jurisdictional basis. Since Erie's claim was not a counterclaim or a cross claim<sup>20</sup> within the scope of rule 13,<sup>21</sup> it was

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<sup>9</sup> 438 F.2d at 64. See Third-Party Complaint of Defendants, *supra* note 5, ¶ 2.

<sup>10</sup> Motion to Dismiss Counterclaim of Defendant and Third-Party Plaintiff, Erie Lackawanna R. R., *supra* note 5, at 1. While the appellate court mentions there is no diversity between the third-party plaintiff, Erie, and the third-party defendants, this fact becomes apparent only in the pleadings.

<sup>11</sup> 303 F. Supp. 1398. The court further stated there is a requirement of "independent jurisdictional grounds for the assertion of a claim by plaintiff against a third-party defendant . . . . Had plaintiff wished to assert a direct claim against all parties, he could have done so in the state court, where no such jurisdictional barriers exist." *Id.* at 1399. It is curious that the *Schwab* appellate court never discussed the plaintiff's motion of joinder. Nor does the court explain how the third-party separate claim could be ancillary to a claim which is jurisdictionally void.

<sup>12</sup> 438 F.2d at 64. See Third-Party Complaint of Erie Lackawanna, *supra* note 5, at 2, ¶ 8. For a discussion of this "counterclaim," see *Schwab v. Erie Lackawanna R.R.*, 48 F.R.D. 444 (1970) and 438 F.2d 65-66.

<sup>13</sup> 438 F.2d at 64. See Amended Motion to Dismiss for Lack of Jurisdiction, *supra* note 5.

<sup>14</sup> 48 F.R.D. at 444.

<sup>15</sup> 48 F.R.D. at 444-45. See note 30 *infra*.

<sup>16</sup> 48 F.R.D. 445.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See note 8 *supra*.

<sup>20</sup> 438 F.2d at 64-66.

<sup>21</sup> FED. R. CIV. P. 13.

categorized as a separate non-compulsory claim. Since the third-party defendants were properly impleaded under rule 14,<sup>22</sup> they were "parties" to the action and Erie could use rule 18<sup>23</sup> to assert any claims it had against any "opposing party."<sup>24</sup> Jurisdiction was viewed as either (a) ancillary to the original cause of action, or (b) ancillary to the impleaded action which was itself ancillary to the main cause of action.<sup>25</sup>

## II. PRE-SHWAB DECISIONS

Rule 18 was materially amended in 1966,<sup>26</sup> to settle substantial problems concerning third-party practice and the joinder of claims.<sup>27</sup> The "old rule"<sup>28</sup> contained ambiguous wording which led some courts to examine motions for the joinder of claims as if each claim were an individual request for relief subject to the rules pertaining to party joinder and jurisdiction. The 1966 amendment was designed to eliminate this vagueness and to bring certainty into the area of joinder of claims. Yet, despite the new rule and despite the notes of the Advisory Committee, federal district courts continued to render contradictory opinions.

As the following Pennsylvania cases illustrate, when the original complaint in *Schwab* was filed, confusion reigned supreme in third party practice.

*Case 1, Western District, Prior to the 1966 Amendment: In Gebhardt v. Edgar,*<sup>29</sup> A sued B for damages arising from an automobile accident in Pennsylvania. Diversity jurisdiction existed because a foreign administrator was appointed for the injured party, as allowed in Pennsylvania federal courts at that time. B impleaded C, a Pennsylvania resident, under rule 14 and asserted a separate claim against him. The court per-

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<sup>22</sup> See note 8 *supra*.

<sup>23</sup> FED. R. CIV. P. 18, as amended Feb. 1966: "(a) A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party."

<sup>24</sup> The appellate court in *Schwab* was careful to point out that through the use of rule 14 the third-party defendants had become "opposing parties." 438 F.2d at 66. In this way the requirements of rule 18 were satisfied; however, since the third-party defendants lodged no claims against Erie, there was no "opposing party's claim" to satisfy rule 13.

<sup>25</sup> 438 F.2d at 70.

<sup>26</sup> For the amended rule 18, see note 23 *supra*.

<sup>27</sup> For a discussion of the pre-1966 amended rule and the problems developed, see 3A J. MOORE, FEDERAL PRACTICE § 18.01 [1]-[3] (2d ed. 1970) [hereinafter cited as MOORE]. See also Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 7, 14-16 (1967). When reading the Cohn article, notice the similarity between it and the appellate court decision in *Schwab* even to the point of citing the same cases.

<sup>28</sup> FED. R. CIV. P. 18 (prior to the 1966 amendment) reads in part: "There may be a like joinder of claims when there are multiple parties if the requirements of rules 19 [necessary joinder of parties], 20 [permissive joinder of parties], and 22 [interpleader] are satisfied." See MOORE, § 18.01.

<sup>29</sup> *Gebhardt v. Edgar*, 251 F. Supp. 678 (W.D. Pa. 1966), Judge Weber presiding.

mitted the impleaded claim to remain because it was "ancillary"<sup>30</sup> to the plaintiff's original complaint, but B's separate claim against C was dismissed. The court allowed the impleader because of "the language of rule 14 which permits third-party claims for contribution or indemnity without regard to diversity."<sup>31</sup> The separate claim was subject, however, to "the limits of diversity imposed under rule 82. . . ."<sup>32</sup>

*Case 2, Eastern District, 1966:* In *Newman v. Freeman*,<sup>33</sup> A, a New Jersey resident and guardian for the injured minor plaintiff, sued B, a resident of Pennsylvania, for injuries occurring in an automobile accident. A amended his complaint to allow a claim for relief by the minor's father, also a Pennsylvania resident. The father's claim was classified as "pendent"<sup>34</sup> because it developed from "a common nucleus of operative

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<sup>30</sup> An understanding of the distinction between "pendent" and "ancillary" becomes critical to an appreciation of these conflicting pre-*Schwab* cases and to an appreciation of certain aspects of the *Schwab* decision. For pendent jurisdiction, there must be two claims; one claim is a federal issue and the second is a state claim. These two claims must "derive from a common nucleus of operative fact" and be such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 20, at 64 (2d ed. 1970) [hereinafter cited as WRIGHT]. In contrast, ancillary jurisdiction confers jurisdiction upon a court to hear an entire controversy, even if certain claims fall below normal jurisdictional standards. 1 BARRON & HOLTZOFF, FEDERAL PROCEDURE 23 (Wright ed. 1964); WRIGHT § 9. As a condition to being ancillary, the claim in question must be in "direct relation to property or assets actually or constructively drawn into the court's possession or control by the principle suit." *Fulton Nat'l Bank v. Hozier*, 267 U.S. 274, 276 (1925); WRIGHT § 9, at 20. For additional explanation as to the type of actions traditionally classified as ancillary, see WRIGHT, § 9, at 21 and the appropriate references. Note that the practical distinction between ancillary and pendent is that with a pendent claim, the court has discretionary power to dismiss or retain the claim. WRIGHT § 20. One of the major difficulties with *Schwab* is that the court never fully explains how the separate claim of Erie is ancillary when the claim fits all the conditions and definition of pendency. An immediate reaction is, that by classifying the claim as ancillary, the court may "assume" jurisdiction so as to leave open only the question of joinder. Additionally, pendent jurisdiction "refers only to the joinder of state and federal claims, though this concept is not unrelated to the doctrine of ancillary jurisdiction applicable in diversity litigation. The pendent jurisdiction concept applies only where the same parties are involved on the state and federal claims. It does not permit bringing an additional party to respond to a state claim on the ground that that claim is closely related to the federal claim against an existing party." *Wojtas v. Village of Niles*, 334 F.2d 797 (7th Cir. 1964); WRIGHT § 20, at 65. Compare this statement with the appellate court in *Schwab*: "Because the claim arises out of the same set of facts as the claim for liability-over [an FELA claim], . . . we find compelling the analogy to a compulsory counterclaim [which is ancillary] . . . [t]o be sure, a district court has a certain discretion in deciding how to dispose of multiple claims in a single action. But that discretion is not unlimited and cannot be enlarged by simply characterizing a claim as 'pendent' . . . ." 438 F.2d at 71.

<sup>31</sup> 251 F. Supp. at 681. The court also stated concerning third-party jurisdiction over rule 14 impleaders: "No diversity of citizenship is required here . . . under Fed. R. Civ. P. Rule 14(a) does not require diversity of citizenship between the defendant, third-party plaintiff, and the third-party defendant because such proceedings are regarded as 'ancillary.'" *Id.* at 679.

<sup>32</sup> *Id.* at 681.

<sup>33</sup> *Newman v. Freeman*, 262 F. Supp. 106 (E.D. Pa. 1966).

<sup>34</sup> See note 30 *supra*.

facts [and was joined with] a federal claim that . . . [was] properly within our power."<sup>35</sup> The court allowed the claim to be asserted.

*Case 3, Eastern District, 1967:* The facts in *McSparren v. Weist*<sup>36</sup> are essentially the same as those in case 2, above. The district court, however, granted the defendant's motion for dismissal of the parent's claim and commented: "[I]f the joinder of right referred to [by the plaintiff] is sustained on appeal, this court will face a staggering increase in 'artificial' jurisdiction. Injured parents, as well as the children, would be permitted to try their personal injury claims against their next door neighbor by use of this artifice . . . in dismissing this action, the writer hopes there will be an immediate appeal so that this question may be settled on its legal merits . . . ." <sup>37</sup> While the Third Circuit sustained this ruling, there was no judgment as to the use of rule 18 and the question as to the joinder of additional claims.

*Case 4, Western District, 1967:* The facts in *Obney v. Schmalzreid*<sup>38</sup> are the same as in case 2, above. The district court permitted the separate claim to remain "although no diversity existed between the plaintiff parents and the defendant."<sup>39</sup> In conclusion, the court commented: "If this overburdens the Federal Courts with actions which are essentially local, the remedy is either an enlargement of the Federal Court system or statutory limitation on diversity cases."<sup>40</sup>

*Case 5, Middle District, 1968:* With facts the same as those in case 2, above, the court in *Meyerhoffer v. Hanover Township School District*<sup>41</sup> dismissed the parent's claim and stated: "This court would not have jurisdiction over the father's claim since he and the defendants are all residents of Pennsylvania."<sup>42</sup>

*Case 6, Eastern District, 1968:* In *Oliveri v. Adams*,<sup>43</sup> again the facts are the same as in case 2, above. The additional claim by the parents was dismissed because the separate claim was *not* pendent.<sup>44</sup> In conclusion, the three-judge court stated: "In view of the crowded condition of this court's docket, we are not favorably disposed to encourage an

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<sup>35</sup> 262 F. Supp. at 107.

<sup>36</sup> *McSparren v. Weist*, 270 F. Supp. 421 (E.D. Pa. 1967), 402 F.2d 867 (3d Cir.), cert. denied, 395 U.S. 903 (1968).

<sup>37</sup> *Id.* at 422.

<sup>38</sup> *Obney v. Schmalzreid*, 273 F. Supp. 373 (W.D. Pa. 1967), Judge Weber presiding.

<sup>39</sup> *Id.* at 374.

<sup>40</sup> *Id.* Compare the "spirit" of this statement by Judge Weber with his statement quoted in Situation 1 and note 18 *supra*.

<sup>41</sup> *Meyerhoffer v. Hanover Township School District*, 280 F. Supp. 81 (M.D. Pa. 1968).

<sup>42</sup> *Id.* at 85.

<sup>43</sup> *Oliveri v. Adams*, 280 F. Supp. 428 (E.D. Pa. 1968).

<sup>44</sup> *Id.* at 433.

increase here of state law claims on "artificial" diversity grounds. . . .<sup>45</sup> We have no desire to open potential floodgates of additional state claim litigation in this court."<sup>46</sup>

*Case 7, Eastern District, 1968: In Weber v. Weber,*<sup>47</sup> A sued B for damages arising from a Pennsylvania accident. B impleaded C under rule 14. C filed a claim against B for personal injuries. The third-party defendant's claim against the third-party plaintiff was held to be an independent cause of action involving "many of the same factual issues"<sup>48</sup> as the original plaintiff's cause of action; therefore, the claim was an "offshot of the same basic controversy between the parties"<sup>49</sup> such that it was a "compulsory counterclaim" within Fed. R. Civ. P. 13. Thus, the jurisdiction was ancillary to that of the original cause of action.

If rule 18 was amended in 1966 to bring certainty into the Federal Rules of Civil Procedure and eliminate substantive investigations regarding "necessary" or "compulsory" parties,<sup>50</sup> no such certainty existed at the time *Schwab* was filed. Given the same fact situation, one court would classify the joinder issue as "pendent," while another court labelled the issue "ancillary." In dicta, judges urged parties to seek immediate appellate review of the joinder issues; however, the only appellate review which materialized dealt with the appointment of a foreign guardian to achieve diversity. Fears were voiced that use of rule 18 would lead to increased litigation between residents of the same state in federal court. A full circle was completed by one judge. First, he dismissed, for want of jurisdiction, any claim that was not compulsory. Subsequently, he urged an enlargement of the federal court system to permit claims between residents of the same state if joined with a "genuine" federal diversity action. Finally, this same judge reverted to his original position, dismissing claims, which he labelled "pendent." While the preceding cases are not all third-party actions, they are illustrative of the foregoing circumlocution and present many of the diverse opinions present when *Schwab* was filed. Indeed, in addition to the obvious confusion which dominated the district courts at that time, one wonders why the district courts refused to adhere to the appellate

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<sup>45</sup> The "artificial" jurisdiction referred to by the court is partly a reference to the practice in Pennsylvania of appointing foreign guardians to represent injured minors so as to obtain federal jurisdiction. See generally Daniels, *Use of Assignments and Appointments to Create or Destroy Federal Diversity Jurisdiction*, 1 LOYOLA U.L.J. (Chicago) 111 (1970); Note, 1 ST. MARY'S L.J. 125 (1969). A further aspect of "artificial" jurisdiction will be discussed subsequently.

<sup>46</sup> 280 F. Supp. at 433.

<sup>47</sup> *Weber v. Weber*, 44 F.R.D. 227 (E.D. Pa. 1968).

<sup>48</sup> *Id.* at 230.

<sup>49</sup> *Id.*

<sup>50</sup> See note 27 *supra*.

decision in *McSparren* and why the district courts continued to foster a petty provincial squabble over joinder claims for relief.

### III. THE SCHWAB SOLUTION

The appellate court in *Schwab* presents a novel solution to what the court considers to be the singular issue of the joinder of a separate claim for relief to a third-party indemnification action. The court rejected any thought that, acting independently, rules 13,<sup>51</sup> 14,<sup>52</sup> or 18<sup>53</sup> will permit the joinder in question. "[This] does not end our inquiry. Both as a matter of policy and logic, Erie should be permitted to assert its separate claim . . . . What remains for us to determine is whether there exists a procedural approach . . . for asserting the claim."<sup>54</sup>

Working backwards,<sup>55</sup> the court rationalized that the demand for relief within the separate claim is one that normally would be within rule 18. "The rule assumes, of course, the existence of jurisdiction over the claim . . . ."<sup>56</sup> Thus, the court centered the decision on the question of joinder rather than upon the question of jurisdiction, and commented only that "we are also convinced that the concept of ancillary jurisdiction is broad enough to encompass this claim."<sup>57</sup> By "ancillary" the court stated that the separate claim may be viewed as "ancillary to the main claim or ancillary to the third-party claim which is itself ancillary to the original claim against the railroad."<sup>58</sup> To arrive at the conclusion that rule 18 encompasses the separate claim by Erie, the court determined that use of rule 14 makes the third-party defendants "parties" to the action.<sup>59</sup> Once the third-party defendants are "parties," rule 18(a) provides that "a party asserting a claim to relief as . . . [a] third-party claim, may join, either as independent or as alternate claims, as many claims . . . as he has against an opposing party. . . ."<sup>60</sup> Under these circumstances, we conclude that Rule 14 must be read in conjunction with Rule 18(a), as amended, and read together, these two rules give the

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<sup>51</sup> 438 F.2d at 64-65.

<sup>52</sup> *Id.* at 68.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> The customary practice when a claim is placed before a federal court is to determine whether jurisdiction exists; however, in *Schwab* jurisdiction was assumed (with respect to rule 18) (438 F.2d 68-69) and the primary focus was upon the question of joinder.

<sup>56</sup> 438 F.2d at 68-69.

<sup>57</sup> *Id.* at 69; see note 30 *supra*.

<sup>58</sup> 438 F.2d at 70.

<sup>59</sup> "Rule 14(a) now, of course, limits the impleaded party to one who is or may be liable to (the original defendant) for all or part of the plaintiff's claim against him, and, in so doing, establishes third-party litigants as opposing parties." 438 F.2d at 66.

<sup>60</sup> 438 F.2d at 68, citing FED. R. CIV. P. 18(a).



third-party plaintiff a proper procedural route for asserting his affirmative claim for damages."<sup>61</sup> The court continued admitting: "[We] realize that we are furrowing new ground,"<sup>62</sup> but "it is difficult to perceive any prejudice to the plaintiff."<sup>63</sup>

The usual rules governing the joinder of parties are rule 19<sup>64</sup> (joinder of parties needed for just adjudication) and rule 20<sup>65</sup> (permissive joinder of parties). Rule 14<sup>66</sup> operates, however, as an exception to the general and customary rules of party joinder.<sup>67</sup> That is, rule 14 is used solely to eliminate a separate indemnification action by the original defendant against third parties. As the Advisory Committee stated: "[The purpose of rule 14 is] to avoid two actions which should be tried together to save time and cost of reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him and a judgment in his favor against the third-party."<sup>68</sup> Rule 14 is *not* to be interpreted, however, as "a device for bringing into an action any controversy which may happen to have some relationship to it."<sup>69</sup> Thus, because rule 14 is a permissive rule<sup>70</sup> specially designed to eliminate a duplication of litigation, the jurisdiction of a claim for indemnification is ancillary to the main cause of action,<sup>71</sup> assuming the claim is truly one for indemnification "arising from one set of facts in one action . . . ."<sup>72</sup> This does not mean that rule 14 can be used to expand the jurisdiction of the court or to allow separate claims.<sup>73</sup> As the appellate court correctly stated in *Schwab*: "Rule 14 limits third-party complaints to actions over for part or all of the plaintiff's claim. It does not allow for other damages."<sup>74</sup> Therefore, concerning Erie's separate claim: "[A] defendant cannot assert an entirely separate claim against a third party under rule 14, even though it arises out of the same general set of facts as the main claim . . . ."<sup>75</sup>

<sup>61</sup> *Id.* at 70.

<sup>62</sup> *Id.* at 71.

<sup>63</sup> *Id.* at 69.

<sup>64</sup> FED. R. CIV. P. 19.

<sup>65</sup> FED. R. CIV. P. 20.

<sup>66</sup> *Supra* note 8.

<sup>67</sup> WRIGHT, § 76.

<sup>68</sup> MOORE, § 14.04 at 71; *see also* WRIGHT, at 333.

<sup>69</sup> MOORE, § 18.01.

<sup>70</sup> MOORE, § 14.06; WRIGHT, at 333.

<sup>71</sup> MOORE, § 14.26; WRIGHT, at 334.

<sup>72</sup> 1A BARRON & HOLTZOFF, FEDERAL PROCEDURE § 422 (Wright ed., 1960); WRIGHT at 333.

<sup>73</sup> MOORE, § 14.03; WRIGHT at 334.

<sup>74</sup> 438 F.2d at 68. Subsequently, the court stated: "[W]e too must reject the view that Rule 14 permits recovery of damages in excess of, or different from, that sought by the original plaintiff in his main claim." *Id.*

<sup>75</sup> MOORE, § 14.07, at 512, *cited in Schwab*, 438 F.2d at 68.

If the third-party defendants had been joined, under rules 19 or 20 and the requirements of jurisdiction had been properly satisfied, then rule 18 could have been freely used to assert any other claims between parties. If, however, the third-party defendants are "parties" solely by virtue of rule 14 (as was the case in *Schwab*), the joinder of claims is restricted until independent jurisdictional ground is established.<sup>76</sup> Hence, it has been noted that "full utilization of this type of impleader may not be possible. . . ."<sup>77</sup> Neither can rule 18 be envisioned as permitting the joinder of "parties." "The joinder of parties is governed by other rules acting independently. . . . [A]mended rule 18(a), like the rule prior to its amendment, does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of impleading."<sup>78</sup> Therefore, despite any reference to previously joined "parties" in rule 18(a) the rule becomes operative only after parties are properly joined and after jurisdiction has been established.<sup>79</sup> The natural limitations "are those imposed by principles relating to federal jurisdiction and venue."<sup>80</sup> Additional limitations upon the operation of rule 18 are imposed if the "party" is a "party" solely pursuant to rule 14. That is, a claim may be properly before the court as a matter of pleading, but other rules may render the additional claim void. Professor Wright comments that despite the use of rule 14, "questions of federal jurisdiction may still limit this kind of joinder"<sup>81</sup> so that rule 18 will not allow the assertion of separate claims.<sup>82</sup>

Assuming for the moment that the third-party defendants were properly before the court as "parties" to the action, the critical question of jurisdiction remains. Rule 14 confers jurisdiction solely upon the action for indemnification.<sup>83</sup> Rule 18 cannot be used to confer jurisdiction upon any claim as "amended rule 18(a), like the rule prior to its amendment, does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading."<sup>84</sup> Indeed, rule 18 is even subordinate to the rules concerning the

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<sup>76</sup> *Supra* notes 74, 75.

<sup>77</sup> RULES OF CIVIL PROCEDURE FOR THE USDC: PRELIMINARY DRAFT OF PROPOSED AMENDMENTS 18 (1964).

<sup>78</sup> MOORE, § 18.01, at 1814.

<sup>79</sup> MOORE, § 18.04; WRIGHT, at 76.

<sup>80</sup> MOORE, § 18.04.

<sup>81</sup> WRIGHT, at 334; Wright, *Recent Changes in the Federal Rules of Procedure*, 42 F.R.D. 552, 559-61 (1962).

<sup>82</sup> WRIGHT, at 334; *see also* MOORE, § 18.07. It is interesting to note that the court's citation of Wright (438 F.2d 69) stops just short of the critical language which specifies the satisfaction of the federal jurisdictional requirement before rule 18 can be used with rule 14 to allow separate claims.

<sup>83</sup> MOORE, § 14.26; WRIGHT, at 334. *See also supra* notes 74, 75.

<sup>84</sup> *Supra* note 78.

joinder of parties: "The joinder of parties is governed by other rules acting independently."<sup>85</sup>

There is an intralocking relationship of the federal rules wherein rules act both independently and, yet, connect to form a network of procedural standards. This relationship may not be sidestepped by saying "the drafters of the Federal Rules were not simply acting as a collective Linneaus of the Law."<sup>86</sup> It follows that separate claims between parties, other than those of the original plaintiff and defendant, are limited by those principles "relating to federal jurisdiction and venue."<sup>87</sup>

Erie attempted to avoid these problems by denominating its separate claim a "counterclaim."<sup>88</sup> The court correctly held otherwise, ruling that since the third-party defendants had lodged no complaint against Erie, the requirements for rule 13 had not been satisfied.<sup>89</sup> The court stated that the federal rules, as drafted, would not permit the separate claim to remain; however, policy prevails over established interpretations of the rules to allow the action to continue.

In order to appreciate the court's decision, a brief recapitulation is necessary. Plaintiff sued Erie under the FELA and a co-defendant under common law negligence. These defendants impleaded the third-party defendant under rule 14. The original plaintiff attempted to amend his pleading to allow a claim for relief against the third-party defendant. This amendment was not allowed for want of diversity. Erie, by virtue of the Third Circuit decision, was permitted to assert a separate claim against the third-party defendant. *If* the separate claim<sup>90</sup> is viewed as ancillary to the original plaintiff's claim against Erie, an FELA action, *then* the jurisdictional ground for the separate claim will fail. "[J]urisdiction over a claim against a defendant by virtue of a federal matter will not support jurisdiction over a separate" nonfederal claim.<sup>91</sup> *If* the separate claim is viewed as ancillary to the impleaded action by Erie, *then* the jurisdictional ground will also fail since "rule 14 limits third-party complaints to actions over for part or all of the plaintiff's claim. It does not allow for other damages."<sup>92</sup> *If* the separate claim had been lodged by Erie's codefendant, *then* the jurisdictional ground would fail for want of a sufficient amount in controversy. Thus, the original plaintiff could not have lodged a claim against the third-party defendant.<sup>93</sup>

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<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> 438 F.2d at 64.

<sup>87</sup> *Supra* note 80.

<sup>88</sup> 438 F.2d at 64.

<sup>89</sup> 438 F.2d at 64-65. *See* note 24 *supra*.

<sup>90</sup> 438 F.2d at 64.

<sup>91</sup> MOORE, § 20.07; WRIGHT, at 62-65.

<sup>92</sup> *Supra* note 75.

<sup>93</sup> *Supra* note 11.

The separate claim cannot be ancillary to the rule 14 impleader;<sup>94</sup> nor could the separate claim be ancillary to the original FELA action against Erie.<sup>95</sup> Yet, the court insists: “[W]e are also convinced that the concept of ancillary jurisdiction is broad enough to encompass this claim . . . [with the separate claim] ancillary to the main claim or ancillary to the third-party claim which is itself ancillary to the original claim against the railroad.”<sup>96</sup>

The court appeared first to determine that the joinder of the separate claim is permissible and, then, to attach a jurisdictional label which eliminated an investigation into the nature of the claims.<sup>97</sup> In so doing, the natural restraints of the federal rules were overlooked: “This general, conditional rule of federal jurisdiction, often seriously restricts the successful joinder of plaintiff and defendant.”<sup>98</sup>

#### IV. POST SCHWAB PROBLEMS

In light of the confusion which existed prior to *Schwab*, and in light of the vast authority which contradicts elements of the *Schwab* opinion, an analysis of these elements is in order to appreciate the full impact of *Schwab* with respect to the areas of “artificial” jurisdiction and res judicata.

##### A. Artificial Jurisdiction.

Some federal district judges in Pennsylvania have questioned any expansion of rule 18 because of the danger of “a staggering increase in ‘artificial’ jurisdiction”<sup>99</sup> which would permit persons to “try their personal injury litigation against [their] next door neighbor in federal court.”<sup>100</sup> Others have warned that expanded use of rule 18 will “encourage an increase . . . in state law claims on ‘artificial’ diversity grounds.”<sup>101</sup> Consider this hypothetical situation:

A of Texas designs an aircraft braking system but is unable to obtain a patent due to obviousness. A shows the system to B Co. of Texas hoping B Co. will manufacture the system and pay royalties based upon sales. B Co. executes a contract and begins manufacture but pays A nothing. A has a friend C, of Oklahoma, file an action in federal court in Texas falsely alleging that A breached a contract to supply the system. A impleads B Co. under

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<sup>94</sup> See notes 92, 74 and 73 *supra*.

<sup>95</sup> *Supra* note 91.

<sup>96</sup> See notes 57, 58 *supra*. See also note 30 *supra*.

<sup>97</sup> See note 27 *supra*.

<sup>98</sup> MOORE, § 19.04 [2].

<sup>99</sup> *Supra* note 37.

<sup>100</sup> *Id.*

<sup>101</sup> *Supra* note 46.

rule 14 and on the basis of *Schwab* asserts a separate non-federal claim against B Co. for breach of contract.<sup>102</sup> C and A fraudulently settle, leaving A's claim against B in federal court without diversity jurisdiction.

Such "absurd" events do occur. For example, in *Black & White Taxicab v. Brown & Yellow Taxicab*<sup>103</sup> wherein the plaintiff reincorporated in an adjoining state to establish diversity and, thereby, avoid state court decisions which might have been harmful to its "monopolistic" desires.<sup>104</sup> Arguably, the *Erie-Guaranty Trust* approach<sup>105</sup> to federal procedure seeks to eliminate "forum shopping;"<sup>106</sup> however, *Schwab* appears to encourage the juggling of claims to obtain federal jurisdiction.

### B. *Res Judicata.*

Aside from getting into court, the second impact of *Schwab* lies in the area of res judicata. The traditional rule in the federal system is that failure to implead through rule 14 or failure to join a noncompulsory claim will not operate as a bar to a subsequent action.<sup>107</sup> Thus, in *Schwab*, had the appellate court affirmed the district court's decision and prohibited Erie's separate claim, it would have been brought in a subsequent state action. Pennsylvania, like some other states,<sup>108</sup> is careful, however, to insist that plaintiffs avoid a duplication of litigation. As established by the Pennsylvania Supreme Court in *London v. City*,<sup>109</sup> a claim which could have been presented in a prior federal court action will be barred as violative of the principles of res judicata should subsequent action be maintained in a Pennsylvania state court. In *London*,<sup>110</sup> A was involved in an automobile accident which resulted in injury to B and C. They sued the owner of the other vehicle, D. He impleaded A under rule 14. D recovered \$10,000 contribution from A. During the pendency of the action, A maintained an action in state court against D. The Pennsylvania Supreme Court ruled that the action was barred. The claim asserted by A was one within the scope of rule 13 and, hence, must be pleaded in the prior federal court litigation. The supreme court was careful, however, to indicate that despite the compulsory nature of

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<sup>102</sup> For two cases with similar fact situations, see *Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763 (1958); *K & G Tool & Serv. Co. v. G & G Tool Serv.*, 158 Tex. 594, 314 S.W.2d 782 (1958).

<sup>103</sup> *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

<sup>104</sup> WRIGHT, at 74, n.12.

<sup>105</sup> WRIGHT, § 55; 1 BARRON & HOLTZOFF, FEDERAL PROCEDURE §§ 8, 138 (Wright ed. 1960).

<sup>106</sup> *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); WRIGHT, at 228.

<sup>107</sup> MOORE, §§ 14.06, 18.04; WRIGHT, at 347-49, 343.

<sup>108</sup> WRIGHT, at 347.

<sup>109</sup> *London v. City of Philadelphia*, 412 Pa. 496, 294 A.2d 901 (1963).

<sup>110</sup> *Id.*

London's claim,<sup>111</sup> failure to assert *any* claim which can be construed as ancillary to the original cause of action will operate as *res judicata* in subsequent state action.<sup>112</sup> The appellate court decision in *Schwab* has, therefore, placed Pennsylvania state judges in an awkward position. The state judges must now make value judgments whether in a prior federal action a claim *might* have been considered ancillary. If so, *London* will impose *res judicata*. This position is contrary however, to the federal rules which do not impart an element of "compulsoriness" upon all ancillary claims.<sup>113</sup> That is, had the court in *Schwab* refused to permit the separate claim, then only compulsory rule 13 claims would trigger *res judicata*—as is currently the principle in federal practice.<sup>114</sup> However, by allowing the separate claim, *Schwab* opens Pandora's box for subjective inquiries as to how federal courts might have ruled on prior nonexistent pleadings.<sup>115</sup> Consider the following illustrative situation:

A, the owner of a small airport repair shop in Maine, purchases a lathe from B Co. of Pennsylvania. C, a resident of Texas, is visiting the plant while his plane is being repaired, when a guard rail on the lathe breaks causing physical injury. C sues A in federal court in Maine. A impleads B Co. under rule 14. [Under *Schwab*, A could, also, maintain a separate action for damage to the plant from the accident.] C recovers and B Co. is ordered to indemnify A. Subsequently, A sues B Co. in Pennsylvania state court for property damage under Restatement of Torts § 402A. C, citing *Schwab* and *London*, successfully interposes *res judicata* to avoid the litigation.

In Texas, however, the same situation would produce a different result.<sup>116</sup> Therefore, *Schwab* creates two further areas of concern. First, *Schwab* leads to forum shopping to avoid (or to take advantage of) the application of the *Schwab-London* principle of *res judicata*. Second, in states such as Pennsylvania which adhere to *London* type evaluations of prior litigation, *Schwab* transforms what are normally permissive pleading practices<sup>117</sup> into compulsory pleading requirements.

### A PROGNOSIS

As an unappealed judgment of the United States Court of Appeals *Schwab* stands as "good law" in Pennsylvania and will be cited as

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<sup>111</sup> *Id.* at 902.

<sup>112</sup> *Id.*

<sup>113</sup> See note 107 *supra*.

<sup>114</sup> WRIGHT, § 79.

<sup>115</sup> Judge Weber, the trial court judge in *Schwab*, *Obney* and *Gebhardt*, had previously recognized the danger of *London*, see 251 F. Supp. at 781. This may have been another reason for his reluctance to term Erie's claims ancillary.

<sup>116</sup> See generally 34 TEX. JUR. 2d "JUDGMENTS," at § 372 (1968).

<sup>117</sup> See note 107 *supra*.

"authoritative law" in other circuits. Yet, with the discrepancies which exist between the decision and other authorities, with the radical transformation of certain aspects of permissive party pleading into compulsory party pleading, and with the novel sidestepping of federal jurisdiction, this writer "hope[d] there [would have been] an immediate appeal so that this question may be settled on its legal merits"<sup>118</sup> rather than upon "policy."<sup>119</sup> Yet, it is virtually impossible for an attorney to receive funds from a client to maintain a certiorari action on a purely procedural matter in which the amount in controversy is less than \$6000. Indeed, in *Schwab* there has not even been a trial on the merits,

In a broader view, however, it is evident that *Schwab* is contrary to the trend toward a restriction of diversity actions.<sup>120</sup> If anything, the court's mandate that rules 14 and 18 automatically confer jurisdiction upon the claims of opposing parties residing in the same state will expand and encourage "artificial" diversity actions. In this way, *Schwab* served to "open the potential floodgates of additional state claim litigation"<sup>121</sup> in federal courts.

The *Schwab* decision would be much more palatable had there been no available alternatives; however, slight modifications in perspective present interesting results. The court could have simply affirmed the district court's dismissal of the separate claim. In this event, neither the *Schwab-London* problem nor the FELA difficulty would arise. On the other hand, the court could have classified the separate claim as ancillary. There is authority for this approach.<sup>122</sup> Third, the court could have classified the separate claim a crossclaim within rule 13(g)<sup>123</sup> in which case "independent jurisdictional grounds are not required and there can be no venue objections."<sup>124</sup>

Instead, the court places itself, federal courts in general, and Pennsyl-

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<sup>118</sup> See note 37 *supra*.

<sup>119</sup> *Supra* note 54.

<sup>120</sup> Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185 (1969); Marden, *Reshaping Diversity Jurisdiction: A Plea For Study by the Bar*, 54 A.B.A.J. 453 (1968). As an example of the decrease in diversity actions, Wright states that in 1968, 21,609 diversity actions were maintained while under the A.L.I. proposals that number would be cut to 10,000. Wright, *id.*, at 194.

<sup>121</sup> *Supra* note 46.

<sup>122</sup> See *United States v. Heywood-Robinson Co.*, 430 F.2d 1077 (2d Cir. 1970); *Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709 (5th Cir. 1970); *Noland Co. v. Graver Tank & Mfg. Co.*, 301 F.2d 43 (4th Cir. 1962) (the court specifically rejected *Noland*, 438 F.2d at 68); WRIGHT, at 62-65; Comment, 59 Ky. L.J. 506 (1970-71); Note, 45 N.Y.U.L. REV. 1303 (1970); Note, 1970 WASH. U.L.Q. 511 (1970).

<sup>123</sup> FED. R. CIV. P. 13(g). The court had classified the third-party defendant as an opposing party by virtue of the rule 14 impleader (438 F.2d at 66); hence, if the claim were labelled a "cross-claim" jurisdiction would be ancillary. Yet, the *London* problem would not arise because rule 13(g) is not compulsory. See generally WRIGHT, § 80.

<sup>124</sup> WRIGHT, § 80.

vania courts in particular, in an awkward position. The court's interpretation of the federal rules ignores the trend toward a limitation on diversity jurisdiction, encourages forum shopping and artificial jurisdiction,<sup>125</sup> and creates a holding that will probably be either ignored<sup>126</sup> or overturned upon the first opportunity.<sup>127</sup> Despite the "policy" argument, *Schwab* raises serious questions concerning the dominant authority of the Federal Rules of Civil Procedure and civil practice in the federal courts.

*Van P. Carter*

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<sup>125</sup> See note 120 *supra*.

<sup>126</sup> See note 54 *supra*.

<sup>127</sup> See *Benazet v. Atlantic Coast Line R.R.*, 442 F.2d 694 (2d Cir. 1971). A, a railroad employee, sued B for injuries resulting in the course of his employment. B impleaded Erie in language fitting under rule 14. The claims were both dismissed. The court so ruled without a discussion of *Schwab* and, of course, Erie was silent as to the *Schwab* holding.



