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Defining "Co-Party" Within Federal Rule of Civil Procedure 13(g): Are Cross-Claims Between Original Defendants and Third-Party Defendants Allowable?

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INTRODUCTION

The courts cannot agree on whether the Federal Rules of Civil Procedure allow cross-claims between original defendants and third-party defendants. Some courts allow cross-claims between such parties,[1] while other courts restrict cross-claims to defendants on the same level of the caption.[2] Still other courts allow cross-claims between original defendants and third-party defendants only under certain circumstances.[3] At the heart of the controversy is the term "co-party," which the Federal Rules leave undefined.

A good starting point for the analysis of this issue is the case of *Jeub v. B/G Foods, Inc.*[4] In that case, the plaintiffs sought to recover damages against a restaurant for food poisoning. Defendant B/G Foods brought in its supplier, Swift and Co., as a third-party defendant under Federal Rule of Civil Procedure 14(a). B/G Foods' indemnification claim was based on an allegation that Swift had supplied B/G Foods with a contaminated ham that the defendant had subsequently served to the plaintiffs.[5] The *Jeub* court's holding that B/G Foods' third-party complaint against Swift should stand gave effect to the language of Rule 14(a), which permits the impleader of a party "who is or *may be* liable."[6] Concluding that Rule 14(a)'s purpose is to allow courts to determine the rights of all parties in one proceeding, the *Jeub* court recognized that the only alternative was to await the outcome of the plaintiffs' original suit before allowing B/G Foods to sue Swift for indemnification should the first suit prove successful.[7] The court brushed

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1. *See infra* notes 40-57 and accompanying text.
2. *See infra* notes 29-39 and accompanying text.
3. *See infra* notes 58-77 and accompanying text.
4. 2 F.R.D. 238 (D. Minn. 1942).
5. *Id.* at 239.
6. *Id.* at 240 (emphasis added).
7. *Id.* at 241.

aside that alternative, deciding that Rule 14(a) "was promulgated to avoid this very circuity of proceeding."[8]

Since *Jeub,* courts addressing the same question have uniformly held that a defendant may assert a claim against a third-party defendant pursuant to Rule 14(a) before the liability of the original defendant is established.[9] Likewise, it is undisputed that an original or third-party defendant may cross-claim against a co-defendant on the same level of the caption,[10] and that a third-party defendant may counterclaim against the defendant who originally brought in that third-party defendant.[11] However, a difficulty arises where plaintiffs like the ones in *Jeub* sue two defendants instead of one in their original action. In that situation, suppose that the plaintiffs had eaten at two independently owned restaurants—each with the same supplier—and that the plaintiffs were unaware of which restaurant caused their harm. Could the second defendant implead the supplier via Rule 14(a) if the first defendant had already done so?[12]

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8. *Id., see also* LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143, 146 (6th Cir. 1969) (Impleader is intended "to avoid circuity of action and to dispose of the entire subject matter arising from one set of facts in one action."); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 6.9 (1985) (describing the purpose of Rule 14).

9. *See, e.g.,* Colton v. Swain, 527 F.2d 296 (7th Cir. 1975); *LASA,* 414 F.2d 143; United States v. Acord, 209 F.2d 709 (10th Cir. 1954); Jones v. Waterman S.S. Corp., 155 F.2d 992 (3d Cir. 1946).

10. FED. R. CIV P 13(g); *see also* Ragland v. Swindell Dressler Corp., 186 F Supp. 769, 770 (W.D. Pa. 1960) (a defendant cannot recover a judgment against a co-defendant except by way of a cross-claim). Once proper, cross-claims remain so even if the party to whom they were addressed subsequently ceases to be a co-party. Fairview Park Excavating Co. v. Al Monzo Constr. Co., 560 F.2d 1122, 1126 (3d Cir. 1977); Aetna Ins. Co. v. Newton, 398 F.2d 729, 734 (3d Cir. 1968); Picou v. Rimrock Tidelands, Inc., 29 F.R.D. 188, 189-90 (E.D. La. 1962); Frommeyer v. L. & R. Constr. Co., 139 F Supp. 579, 586 (D.N.J. 1956); *cf.* Bell v. Owen Thomas, Inc., 115 F.R.D. 299, 301-02 (W.D. Va. 1987) (a cross-claim was allowed when it was filed before the parties were dismissed, even though leave was not granted until after dismissal).

11. FED. R. CIV P 14(a). Notably, the provisions of Rule 13(h) "should not be confused with impleader, which is governed by Rule 14." 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 13.39, at 13-230 (footnote omitted) (2d ed. 1990).

> Thus if *A* sues *X* and *Y* on a claim, Rule 13(h) does not authorize *X* to bring in *Z,* because *Z* is or may be liable to him. That situation is governed by Rule 14. On the other hand if *X* pleads a counterclaim against *A,* either compulsory or permissive, or pleads a cross-claim against *Y,* then [Rule 13(h)] applies, and if the presence of additional parties is required for the granting of complete relief in the determination of the counterclaim or the cross-claim, the court should order them to be brought in, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

3 J. MOORE, *supra,* ¶ 13.39, at 13-230 to 13-233 (footnotes omitted); *see infra* notes 13, 38, 114 (containing additional discussion of Rule 13(h)).

12. This question is posed in J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 8, at § 6.8, and is answered in the negative. *See also* 6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1431, at 238 (1990) (stating that the rule that "best reflects the original intent of the cross-claim provision" was articulated by the court in Murray v. Haverford

Under Rule 14(a), a defendant cannot implead another party unless that person is "not a party to the action."[13] Given this fact, can the second

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Hosp. Corp., 278 F Supp. 5 (E.D. Pa. 1968)). *Contra* cases cited *infra* at note 22; *see also* International Tools (1973), Ltd. v. Arctic Enters., Inc., 75 F.R.D. 70, 73 n.2 (E.D. Mich. 1977) ("[I]t is not clear that co-parties within the meaning of Rule 13(g) includes third-party defendants who have been impleaded by different third-party plaintiffs."); *cf.* Hansen v. Shearson/American Express, Inc., 116 F.R.D. 246, 250 (E.D. Pa. 1987) (footnote omitted) (emphasis in original) ("Neither the Wright and Miller treatise nor the case upon which it relies appears to have contemplated the situation in which there *is* no other procedural device to permit joinder."). Although *Hansen,* which was decided in 1987, stated that the Wright and Miller treatise did not contemplate the situation discussed in this Note, the 1990 edition of that treatise cited *Hansen* in a footnote under the category of "But compare." 6 C. WRIGHT, A. MILLER & M. KANE, *supra,* § 1435, at 272 n.3.

13. FED. R. CIV. P 14(a). Notably, some courts have held that two original defendants can implead the same third-party defendant under Rule 14(a) on the grounds that the third-party defendant is not a party to the original action, but only a party to the third-party action. *See, e.g.,* Ruston Gas Turbines, Inc. v. Pan Am. World Airways, Inc., No. 81-5345 (S.D.N.Y. Mar. 1, 1984) (LEXIS, Genfed library, Dist file) (citing Atlantic Aviation Corp. v. Estate of Costas, 332 F Supp. 1002, 1007 (E.D.N.Y. 1971)); Malaspina v. Farah Mfg. Co., 21 Fed. R. Serv. 2d (Callaghan) 129, 130 (S.D.N.Y. 1975); Novak v. Tigani, 49 Del. 106, 109-10, 110 A.2d 298, 299 (Super. Ct. 1954) (applying DEL. R. CIV P 14(a)) (The phrase "party to the action" in a Superior Court Rule, which provides that a defendant may move for leave as a third-party plaintiff to serve process and a complaint on 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, means a party to the original action only, and therefore the first defendant could implead, as third-party defendants, partners, who had already been impleaded as third-party defendants by the second defendant.); *see also* Stotsky v. Gerring Indus., Inc., 540 N.Y.S.2d 401 (Sup. Ct. 1988) (applying New York law) (A third-party defendant was not a "party" within the meaning of a discovery statute where the plaintiff never asserted any claim against the third-party defendant.).

This statutory construction makes little sense because Rule 14(a) does not distinguish between "original" and "third-party" actions. FED. R. CIV. P 14(a). Although Rule 13(g) states that a cross-claim must relate to "the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action," FED. R. CIV P 13(g), the "original action" language of Rule 13(g) cannot be read to prohibit cross-claims between original defendants and third-party defendants because claims between such parties often involve claims related to the subject matter of the original action. Even if the word "original" is read into Rule 14(a)'s "not a party to the action" language, a claim still could not be asserted by a third-party defendant against an original defendant because an original defendant is undoubtedly a party to the action.

Notably, the words "original action" do appear in Federal Rule 13(h). Rule 13(h), which is given the heading "Joinder of Additional Parties," provides: "Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20." FED. R. CIV P 13(h). According to the Wright and Miller treatise, when a defendant

> wishes to interpose a claim against both a codefendant and a third person not yet a party to the action, the correct procedure is to cross-claim against the existing codefendant under Rule 13(g), and to bring in the third person as a party defendant to the cross-claim under the procedure for joining additional parties in Rule 13(h). If the claim against the party to be added qualifies under Rule 14(a), however, that party also may be brought in by a third-party action.

6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1431, at 239 (footnote omitted).

Although the *Hansen* court used Rule 13(h) to allow a claim between an original defendant

defendant assert any claim whatsoever against the supplier without having to file a separate summons and complaint? Obviously, the second defendant cannot assert a counterclaim against the supplier pursuant to Rule 13(a) or Rule 13(b), because the supplier is not yet an opposing party [14] Having already ruled out the possibility of a Rule 14(a) claim, the second defendant's only hope must lie with Rule 13(g), governing cross-claims.[15] Under Rule

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and a third-party defendant, *see supra* note 38, the heading and language of Rule 13(h) seems to prohibit that use of Rule 13(h). *See also* 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1435, at 272 (footnote omitted) (quoting FED. R. CIV P. 13(h)):

> Rule 13(h) explicitly authorizes only the joinder of "persons other than those made parties to the original action." As a result of this restriction, a person cannot be made an additional party under Rule 13(h) if he already is a party to the action. Rather, the party seeking relief may proceed directly against someone who is already before the court by using whatever procedural device is appropriate—counterclaim or cross-claim—depending on the alignment of the parties.

But see 3 J. MOORE, *supra* note 11, ¶ 13.39, at 13-229 & n.2. In the text, Moore asserts:

> [Rule 13(h)] was amended in 1966 to clarify the intent to include both compulsory and permissive joinder and to make specific reference to Rules 19 and 20. The 1966 amendment also makes clear that additional parties *plaintiff* to the counterclaim or cross-claim, as well as additional parties *defendant,* may be joined, if joined in accordance with the procedure and requirements of Rules 20 and 19.

Id. ¶ 13.39, at 13-229 (emphasis in original) (footnotes omitted). To support this assertion, Moore relies on the 1966 Advisory Committee note to Rule 13(h), which he cites in part in a footnote. *Id.* ¶ 13.39, at 13-229 n.2. The relevant portion of the Advisory Committee note provides:

> Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion.

FED. R. CIV P. 13 advisory committee's note. For additional discussion regarding Rule 13(h), see *supra* note 11 and *infra* notes 38 and 114.

Because Rule 13(h) was probably not intended to govern the scenario discussed in this Note, courts need to pay special attention to the mandate of Rule 1 in construing Rules 13(g) and 14(a). *Cf.* Winchell v. Lortscher, 377 F.2d 247, 252-53 (8th Cir. 1967) (The word "party," as used within the meaning of Federal Rule 73(a), is "a legal term and a word of art which must be viewed in the context of the rule in which it appears as well as in the context of the other relevant Federal Rules of Civil Procedure."). Furthermore, even if one accepts Moore's premise that Rule 13(h) authorizes the kind of claims discussed in this Note, it is not entirely clear that this route is preferable. For, "[a]lthough not required by Rule 13(h), the general practice is to obtain a court order to join an additional party." 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1434, at 270. *Compare id. with* 3 J. MOORE, *supra* note 11, ¶ 13.39, at 13-239 ("Under the 1966 revision of Rule 13(h), it is not clear whether leave of the court must be obtained before a defendant can bring in new parties as additional defendants to a counterclaim."). The mere possibility of an additional procedural step runs contrary to the spirit of Rule 1, which mandates the "just, speedy, and inexpensive determination of every action." FED. R. CIV P. 1.

14. FED. R. CIV P. 13(a)-(b).

15. Two of the Federal Rules establish the basis for cross-claims. Rule 13(g) governs cross-claims that grow out of the transaction or occurrence that is the subject matter of the original claim or of a counterclaim where the cross-claimant is a plaintiff. WEST'S FEDERAL PRACTICE MANUAL § 7985 (West Supp. 1989). Rule 18(a) applies if the cross-claim does not grow out of such transaction or occurrence. In a Rule 13(g) cross-claim, subject matter jurisdiction may

13(g), however, cross-claims only can be asserted against "co-parties."[16] Therefore, whether the second defendant will be able to claim against the supplier ultimately will depend on the definition given the term "co-party." If "co-party" encompasses the relationship between the second defendant and the supplier, a cross-claim can be asserted and the litigation can proceed without interruption. On the other hand, if that relationship is not a subset of "co-party," then the second defendant will have to file a separate complaint against the supplier. Although the second defendant can move to consolidate the proceedings under Rule 42(a),[17] this procedure will carry with it added expense and delay The movant will have to spend time and resources arguing a motion for consolidation, and the separate complaint will require the payment of an extra filing fee.[18]

The definition given the term "co-party" has real consequences for the litigation process. Part I of this Note discusses how courts have defined that term and highlights the relevant language of the Federal Rules. Part II explores existing authority to clarify the present state of the law. Part III focuses on the intent of the framers of the Federal Rules, and Part IV explores the relevant policy considerations connected to this issue. Finally, Part V of this Note proposes that the term "co-party" be defined explicitly under the Federal Rules. While the Note suggests that the term "co-party" can be defined legitimately under existing authority to allow cross-claims

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be ancillary whereas independent subject matter jurisdiction is required under Rule 18(a). *Id.* Rule 18(a) provides: "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party." FED. R. CIV P 18(a).

16. FED. R. CIV. P 13(g). "[C]are must be taken not to confuse the procedures and purposes of Rule 13(g), which are directed toward parties already in the action, with those of Rule 14(a), which provide for adding one or more third parties to the suit." 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1431, at 238.

17. Rule 42(a) provides:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

FED. R. CIV. P 42(a); *see also* Dobie, *The Federal Rules of Civil Procedure,* 25 VA. L. REV. 261, 283 (1939) (the author was a member of the Advisory Committee appointed to draft the Federal Rules) ("An exceedingly wide discretion is given to the court to consolidate separate actions pending before the court when these involve 'a common question of law or fact[.]'"). *See generally* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2381-86, at 252-76 (1971) (describing Rule 42(a) in greater detail).

18. Currently, it costs $120.00 to file a complaint in federal court. 28 U.S.C.A. § 1914(a) (West Supp. 1990). Also, although one court sarcastically noted that the resolution of this "burning issue" may be of "greater interest to lawyers and the academic community than to litigants," Capital Care Corp. v. Lifetime Corp., No. 88-2682 (E.D. Pa. Jan. 10, 1990) (LEXIS, Genfed library, Dist file), it is litigants who ultimately will bear their attorneys' expenses for extra procedural difficulty.

between original defendants and third-party defendants, it urges that the Federal Rules be amended to clear up potential confusion.

I. BACKGROUND

Federal Rule of Civil Procedure 13(g) provides that "[a] pleading may state as a cross-claim any claim by one party against a co-party . that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action."[19] Under existing precedent, courts disagree whether Rule 13(g)

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19. FED. R. CIV P 13(g). Several states have cross-claim rules which also contain the "co-party" language. *See* ALA. R. CIV P 13(g); ALASKA R. CIV P 13(g); ARIZ. R. CIV P 13(g); ARK. STAT. ANN. § 16-61-207(3) (1990); COLO. R. CIV P 13(g); DEL. R. CIV P 13(g); FLA. R. CIV P 1.170(g); GA. CODE ANN. § 9-11-13(g) (1989); HAW REV STAT. § 663-17(b) (1989); IDAHO R. CIV P 13(g); IND. TRIAL R. 13(G); IOWA R. CIV P 33; KAN. STAT. ANN. § 60-213(g)-(h) (1988); KY. R. CIV P 13.07; LA. CODE CIV PROC. ANN. art. 1071 (West 1986); ME. R. CIV P 13(g); MD. R. CIV P 3-331(b); MASS. R. CIV P 13(g); MICH. R. CIV. P 2.203(D); MINN. R. CIV P 13.07; MO. REV STAT. § 509.460 (1989); MONT. R. CIV. P 13(g); NEB. REV STAT. § 25-813 (1989); NEV R. CIV P 13(g); N.J. R. CIV P 4:7-5(a); N.M. R. CIV P 13(G); N.C. GEN. STAT. § 1A-1, Rule 13(g); N.D. R. CIV P 13(g); OHIO R. CIV P 13(G); R.I. R. CIV P 13(g); S.C. R. CIV P 13(g); S.D. CODIFIED LAWS ANN. § 15-6-13(g) (1984); TENN. R. CIV P 13.07; TEX. R. CIV P 97(e); UTAH R. CIV P 13(f); VT. R. CIV P 13(g); WASH. R. CIV P 13(g); W VA. R. CIV P 13(g); WIS. STAT. ANN. § 802.07(3) (West Supp. 1989); WYO. R. CIV P 13(g).

Other states do not use the term "co-party" in their cross-claim rules. *See, e.g.*, CAL. CIV. PROC. CODE § 428.10 (West 1990) ("A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth [a]ny cause of action he has against a person alleged to be liable thereon[.]"); N.Y. CIV PRAC. L. & R. 3019 (McKinney 1974) ("A cross-claim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more defendants, a person whom a defendant represents or a defendant and other persons alleged to be liable."); OKLA. STAT. ANN. tit. 12, § 2013(G) (West Supp. 1991) ("A pleading may state as a cross-claim any claim by one party against any party who is not an opposing party "); OR. R. CIV P 22B.(1) ("In any action where two or more parties are joined as defendants, any defendant may in such defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant[.]"); VA. R. CIV P 3:9 ("A defendant may plead as a cross-claim any cause of action that he has or may have against one or more other defendants growing out of any matter pleaded in the motion for judgment.").

In addition, the "co-party" language can be found in at least one federal statute:

> The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, *a co-party,* or a third-party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

28 U.S.C.A. § 2415(f) (West 1978) (emphasis added).

For a history of Federal Rule of Civil Procedure 13, see 3 J. MOORE, *supra* note 11, ¶ 13.01, at 13-7 to 13-12. *See also* Dobie, *supra* note 17, at 267 (the author was a member of the Advisory Committee appointed to draft the Federal Rules) ("Rule 13 makes generous and liberal provisions as to counterclaims and cross-claims, with the idea of settling in a single civil action the various claims of the parties."). For a general discussion of the development of the Federal Rules, see Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV 909 (1987).

allows cross-claims between original defendants and third-party defendants.[20] Some courts have interpreted "co-party" to mean parties having like status,[21] thereby precluding the use of cross-claims under such circumstances. Other courts have interpreted "co-party" broadly, allowing cross-claims against any party that is not an opposing party.[22] Yet another court has suggested that "co-parties" are those parties on the same side of the main litigation.[23]

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20. The definition of the term "co-party" is controversial enough for BLACK'S LAW DICTIONARY (6th ed. 1990) to list two different meanings. *Id.* at 335. *Compare* F JAMES & G. HAZARD, CIVIL PROCEDURE § 9.12 (3d ed. 1985) (defining co-parties as those parties "aligned together as codefendants or coplaintiffs") *with id.* at § 9.13 (footnote omitted) (defining a co-party as "one who is already subject to the court's jurisdiction"). While the hypothetical situation posed in the Introduction to this Note involved an original defendant attempting to cross-claim against a third-party defendant, the opposite scenario is also possible. For example, a third-party defendant might want to file a cross-claim against a co-defendant of the third-party plaintiff based on a contribution or indemnification theory. *See, e.g.*, American Gen. v. Equitable Gen., 87 F.R.D. 736, 737 (E.D. Va. 1980) (the third-party defendant sought to cross-claim against co-defendants of the third-party plaintiff for rescission of an insurance policy and restitution of premiums paid).

21. *See, e.g.*, Hansen v. Shearson/American Express, Inc., 116 F.R.D. 246 (E.D. Pa. 1987); Murray v. Haverford Hosp. Corp., 278 F Supp. 5 (E.D. Pa. 1968); Ruston Gas Turbines, Inc. v. Pan Am. World Airways, Inc., No. 81-5345 (S.D.N.Y. Mar. 1, 1984) (LEXIS, Genfed library, Dist file); Johnson Controls, Inc. v. Rowland Tompkins Corp., 585 F Supp. 969, 974 (S.D.N.Y. 1984) (citing *Johnson Controls,* No. 82-122 (S.D.N.Y. July 20, 1983) (LEXIS, Genfed library, Dist file)).

22. *See, e.g.*, Georgia Ports Auth. v. Construzioni Meccaniche Industriali Genovesi, S.P.A., 119 F.R.D. 693 (S.D. Ga. 1988); *cf.* Fogel v. United Gas Improvement Co., 32 F.R.D. 202 (E.D. Pa. 1963); Capital Care Corp. v. Lifetime Corp., No. 88-2682 (E.D. Pa. Jan. 10, 1990) (LEXIS, Genfed library, Dist file).

23. Stahl v. Ohio River Co., 424 F.2d 52, 55 (3d Cir. 1970); *see also In re* Queeny/Corinthos, 503 F Supp. 361, 364 (E.D. Pa. 1980) (adopting the *Stahl* definition of "co-party"); AAA Equipment & Rental, Inc. v. Bailey, 384 So. 2d 107, 109 (Ala. 1980) (applying ALA. R. CIV. P 13(g)) ("Co-parties occupy the same side in the principal, or initial, litigation."); Smith v. Lone Star Cadillac, Inc., 470 S.W.2d 791, 792 (Tex. Civ. App. 1971) (applying Texas law) (adopting the *Stahl* definition of "co-party"); Bunge v. Yager, 236 Minn. 245, 254, 52 N.W.2d 446, 451 (1952) (applying MINN. R. CIV P 13.07) (suggesting that co-parties be defined as those parties which are "aligned on the same side of the litigation"); United States *ex rel.* American Asphalt & Sealcoating Co. v. American Centennial Ins. Co., No. 84-4645 (N.D. Ill. Nov. 2, 1985) (LEXIS, Genfed library, Dist file) (adopting the *Stahl* definition of "co-party"). *But see* Schwab v. Erie Lackawanna R.R. Co., 438 F.2d 62, 66 (3d Cir. 1971) (co-parties defined as those parties sharing "like status").

As an aside, the Third Circuit, after its *Stahl* decision, later defined co-parties as those parties sharing "like status." *Schwab,* 438 F.2d at 66; *see also Hansen,* 116 F.R.D. at 248 (emphasis in original) ("[A]fter *Schwab,* the fact two parties are on the same side of the *main* litigation is not dispositive of the question of whether they are 'co-parties' who may, other requirements being met, bring cross-claims against one another."). For a discussion of the *Stahl* and *Schwab* holdings, see *Hansen,* 116 F.R.D. at 248. *See also* Capital Care Corp. v. Lifetime Corp., No. 88-2682 (E.D. Pa. Jan. 10, 1990) (LEXIS, Genfed library, Dist file) ("Third Circuit law on this subject is properly characterized as unsettled.").

Notably, one court appears to have adopted a hybrid form of the *Murray* and *Stahl* definitions of "co-party." *In re* Queeny/Corinthos, 503 F Supp. at 364 ("The Queeny interests and the products defendants are indeed co-parties sharing a like status on the same side of this litigation."). Yet another court has stated that Rule 13(g) "does not permit a cross claim against one who is not named as a defendant by the plaintiff at the time the suit is instituted." State v. Wood, 53 Del. 527, 533, 173 A.2d 327, 330 (1961) (applying DEL. R. CIV P 13(g)).

The Federal Rules do not define the term "co-party." Courts therefore must look to the intent of the framers of the Rules to determine whether cross-claims of the type outlined above should be permitted. To date, courts generally have examined the history of Rules 13(g) and 14(a), and the policy considerations behind the Federal Rules. Rule 14(a) provides, among other things, that a third-party defendant "shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants, as provided in Rule 13."[24] According to one court, at least, the language of Rule 14(a) "amply indicates the clear intent of the framers of the Federal Rules to characterize co-parties as parties having like status."[25] Under this authority, cross-claims cannot be asserted between original defendants and third-party defendants. Other courts, using the policy considerations of Rule 1[26] as their guide, favor allowing cross-claims between original defendants and third-party defendants,[27] while finding authority weak or lacking as to whether the framers of the Rules intended such cross-claims to be available.[28]

II. Existing Common Law Authority

A. Murray *and* Hansen: *Case Law Disallowing Cross-Claims Between Original Defendants and Third-Party Defendants*

According to one line of precedent, cross-claims may be asserted only between parties with the same or like status, such as co-defendants.[29] In

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24. Fed. R. Civ P 14(a). For a history of Rule 14, see 3 J. Moore, *supra* note 11, ¶ 14.01-14.02, at 14-5 to 14-20.

25. *Murray,* 278 F Supp. at 7

26. Rule 1 provides that the Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ P 1.

27 *See, e.g., American Gen.,* 87 F.R.D. at 737

28. *Id.* at 738.

29. *See, e.g.,* Schwab v. Erie Lackawanna R.R. Co., 438 F.2d 62, 65-66 (3d Cir. 1971); Paur v. Crookston Marine, Inc., 83 F.R.D. 466, 472 (D.N.D. 1979); Malaspina v. Farah Mfg. Co., 21 Fed. R. Serv. 2d (Callaghan) 129, 129 (S.D.N.Y 1975); Land v. Highway Constr. Co., 64 Haw. 545, 548, 645 P.2d 295, 297 (1982); *see also* Shafarman v. Ryder Truck Rental, Inc., 100 F.R.D. 454, 459 (S.D.N.Y. 1984) (citation omitted) ("co-parties are parties at the same level"). *But cf.* Travelers Ins. Co. v. First Nat'l Bank, 675 F.2d 633, 636 n.4 (5th Cir. 1982) (citation omitted) ("Because the competing claimants in an interpleader action are nominally all defendants, claims asserted by one interpleader claimant against another are considered cross-claims."); General Ins. Co. of Am. v. Hercules Constr. Co., 385 F.2d 13 (8th Cir. 1967) (There, a general contractor brought a diversity action against a subcontractor's surety on a performance bond. *Id.* at 16. Later, the subcontractor intervened, although the general contractor never amended its complaint to seek damages against the subcontractor because this would have destroyed diversity. While the surety never attempted to cross-claim against the subcontractor, the court stated in dicta that it could have done so under Rule 13(g). *Id.* at 18-19. Because the general contractor never sued both the subcontractor and the surety, the subcontractor and the surety were not parties of like status as defined by *Murray.* This is significant because the court in *Hercules* would have allowed such non-similar parties to bring cross-claims against one another pursuant to Rule 13(g).).

Murray v. Haverford Hospital Corp.,[30] for example, several defendants filed what they labelled a "cross claim" against a person whom the plaintiff had not sued.[31] The *Murray* court dismissed the complaint without prejudice,[32] stating:

> Third-party practice is specifically provided for in F.R.C.P 14, which provides, inter alia, that the third-party defendant "shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff *and cross-claims against other third-party defendants, as provided in Rule 13.*"
>
> The language quoted amply indicates the clear intent of the framers of the Federal Rules to characterize co-parties as parties having like status. Were the intent otherwise confusion would result, as in this case, with some defendants serving third-party complaints under Rule 14, *after obtaining leave of court,* and other defendants simply filing cross-claims purportedly under Rule 13(g), which does not require summons and complaint or, under any circumstances, leave of court to serve notice to the plaintiff upon motion and notice to all parties to the action.[33]

In *Hansen v Shearson/American Express, Inc.*,[34] the same federal court reaffirmed the rule it had delineated previously in *Murray*.[35] The *Hansen* court pointed out that, "[a]s originally drafted, Rule 14(a) provided that the third-party defendant was to bring counterclaims and cross-claims against 'the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13.'"[36] Noting that Rule 14(a) was amended in 1946 to provide for

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30. 278 F Supp. 5 (E.D. Pa. 1968). As the *Murray* case illustrates, some confusion exists about the difference between an indemnity cross-claim between co-defendants and a Rule 14 impleader claim for indemnity. *See* Gentry v. Wilmington Trust Co., 321 F Supp. 1379 (D. Del. 1970). "Any errors in nomenclature actually should not be significant, however, since both Rule 13(g) and Rule 14(a) claims come under the ancillary jurisdiction of the court and basically the same standards apply for determining whether to allow their assertion." 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1407, at 40. For a more complete discussion of ancillary jurisdiction, see *infra* note 70.

31. *Murray,* 278 F Supp. at 6.

32. *Id.* at 7. The order preserved the defendants' right to file and serve a third-party complaint in compliance with Rule 14(a). *Id.*

33. *Id.* at 6-7 (emphasis in original). *But see* Capital Care Corp. v. Lifetime Corp., No. 88-2682 (E.D. Pa. 1990) (LEXIS, Genfed library, Dist file) (allowing cross-claims by third-party defendants against original defendants).

34. 116 F.R.D. 246 (E.D. Pa. 1987). The *Hansen* case began as a suit by Elizabeth Hansen against the brokerage firm of Shearson/American Express and two of its brokers, C. Joseph Manfredo and S. Paul Palmer. *Id.* at 247. Hansen alleged that the defendants had mishandled her securities account. Shearson filed a third-party complaint against Arthur L. Guptill, the plaintiff's brother-in-law, alleging that Guptill had ratified the allegedly improper transactions. Guptill then filed claims, which he captioned as "counterclaims and crossclaims," against Shearson, Manfredo and A.G. Edwards & Sons, Inc. In 1984, Hansen resolved her claims against Shearson, Manfredo and Palmer. Likewise, Guptill resolved his claims against Shearson and Edwards in 1985. Thus, the only claim remaining in the case in 1987 when the *Hansen* case was decided was Guptill's claim against Manfredo. *Id.* "The difficult question posed by Manfredo's motion to dismiss is whether such a claim is proper." *Id.* at 248 (footnote omitted).

35. *Id.*

36. *Id.* at 249.

"'counterclaims against the third-party plaintiff, and cross-claims *against other third-party defendants* as provided in Rule 13'[,]"[37] the *Hansen* court held that "a claim by a third-party defendant against a co-defendant of the third-party plaintiff may not properly be characterized as a cross-claim."[38]

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37 *Id.* (emphasis in original).

38. *Id.* The court also concluded that "Guptill's claim against Manfredo is not properly characterized as a counterclaim—at least not in its own right." *Id.* In the words of the court: "Manfredo had filed no claim against Guptill which would have rendered Guptill an 'opposing party' with the meaning of Rule 13." *Id.* (citations omitted). However, emphasizing that Guptill had also brought a claim against Shearson—the defendant who had brought Guptill into the action—the court held that "the relationship between Guptill's counterclaim against Shearson and Guptill's claim against Manfredo is sufficiently close to permit joinder under Rule 20(a)." *Id.* at 250 (citation omitted). See *supra* note 34 for a more detailed description of the facts of *Hansen.*

According to the court in *Hansen*:

> Rule 13(h) of the Federal Rules of Civil Procedure, which incorporates Rules 19 and 20 by reference, provides for the joinder of parties to permit full adjudication of counterclaims in one proceeding. Under Fed.R.Civ.P 20(a), parties may be joined "if there is asserted against them any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." Rule 13(h), unlike Rule 13(g), does not require that the claim against the additional party arise out of the "transaction or occurrence that is the subject matter of the original action or of a counterclaim therein."

Hansen, 116 F.R.D. at 250 (quoting FED. R. CIV P 20(a)). Stressing that Rule 13(h) "pertains by its terms only to the joinder of '[p]ersons other than those made parties to the original action,'" the *Hansen* court noted that the Federal Rules "make no express provision for a situation, like the one before us, in which a counterclaimant seeks to add to his counterclaim a party who might properly have been joined under Rule 13(h) but who is already a party to the action." *Hansen,* 116 F.R.D. at 250 (quoting FED. R. CIV P 13(h)). The *Hansen* court pointed out that there are "few decided cases on this question," and further noted that "the leading commentators are divided." *Hansen,* 116 F.R.D. at 250. As the *Hansen* court quoted directly from the Wright and Miller treatise:

> "Rule 13(h) explicitly authorizes only the joinder of 'persons other than those made parties to the original action.' As a result of this restriction, a person cannot be made an additional party under Rule 13(h) if he already is a party to the action. Rather, the party seeking relief may proceed directly against someone who is already before the court by using whatever procedural device is appropriate—counterclaim or cross-claim—depending on the alignment of the parties."

Hansen, 116 F.R.D. at 250 (quoting 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1435, at 189 (footnote omitted) (1971) (quoting FED. R. CIV P 13(h))). "The Moore treatise suggests, however, that one who is already a party to the underlying litigation may be treated as an additional party to a counterclaim under Rule 13(h)." *Hansen,* 116 F.R.D. at 250 (citing 3 J. MOORE, *supra* note 11, ¶ 14.17, at 14-95 to 14-96, in which Moore approves of the use of Rule 13(h) for a third-party defendant to join a plaintiff where the third-party defendant wants to counterclaim jointly against the plaintiff and a defendant). *Compare* 6 C. WRIGHT & A. MILLER, *supra,* § 1435, at 189 *and* 3 J. MOORE, *supra* note 11, ¶ 13.39, at 13-229 (footnote omitted) (emphasis in original) ("The 1966 amendment [to Rule 13(h)] also makes clear that additional parties *plaintiff* to the counterclaim or cross-claim, as well as additional parties *defendant,* may be joined, if joined in accordance with the procedure and requirements of Rules 20 and 19.") *with* G. SHREVE & P RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 55, at 221 n.1 (1989) ("[W]hile Rule 13(h) indicates that one may join a party in order to make a counterclaim or cross-claim, the provision makes clear that such expansion must separately satisfy rules pertaining to party joinder[.]"). *See also supra* notes

The court emphasized that the amendment to Rule 14(a) was not "specifically explained" by the Advisory Committee and declared:

> The Advisory Committee notes to the 1946 amendment state that changes not specifically explained were meant to be "verbal or conforming." It would thus appear that, in the view of the Advisory Committee, the specification that the "other part[ies]" against whom a third-party defendant might bring cross-claims were "other third-party defendants" was not viewed as a substantive change in Rule 14(a).[39]

B. Fogel *and* Georgia Ports Authority: *Case Law Allowing Cross-Claims Between Original Defendants and Third-Party Defendants*

Another line of authority supports the assertion of cross-claims between original defendants and third-party defendants.[40] In *Fogel v United Gas Improvement Co.*,[41] for instance, the plaintiff's decedent was killed by a gas explosion. The plaintiff sued both the owner of the gas main and the contractor who was laying the main. The contractor joined the engineering firm as a third-party defendant. The owner of the gas main filed a cross-claim against the engineering firm for indemnification in the event that the owner should be held liable to the plaintiff.[42] Holding the cross-claim permissible, the court noted: "'Co' is a prefix which 'signifies in general *with, together, in conjunction, jointly.*' Even though [the third-party defendant's] position in the case is somewhat different from the positions of the

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11 & 13 and *infra* note 114 (containing additional discussion of Rule 13(h)); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1434, at 267-70 (distinguishing the application and purposes of Rule 13(h) from that of Rule 14(a)).

Thus, in the end, despite the unwillingness of the *Hansen* court to characterize the claim at issue as a "cross-claim," it ultimately allowed the litigation to proceed without interruption. In addition to citing Rule 1, the court concluded:

> We are of the view that the purpose of Rule 13(h), which "is to dispose of an action in its entirety and to grant complete relief to all the concerned parties," would best be served by resolving what appears to be an oversight in the Rules in favor of permitting one who might properly have been joined pursuant to Rule 13(h), but who is already a party to the litigation, to be joined in the adjudication of a permissive counterclaim brought by a third-party defendant. In such a situation, we see no purpose in requiring the third-party defendant to serve process on the party to be joined in the same manner as would be required had that party not already been a party to the action.

Hansen, 116 F.R.D. at 250-51 (citations omitted) (quoting 6 C. WRIGHT & A. MILLER, *supra*, § 1434, at 188).

39. *Hansen*, 116 F.R.D. at 249. Actually, the Advisory Committee's notes to the 1946 amendment do not actually state that changes not specifically explained were meant to be "verbal or conforming." See *infra* note 83 for the precise language of the Advisory Committee's note of 1946.

40. *See* cases cited *supra* note 22.

41. 32 F.R.D. 202 (E.D. Pa. 1963).

42. *Id.* at 203.

original defendants, it is a co-party within the meaning of Rule 13(g)."[43]

Similarly, in *Georgia Ports Authority v. Construzioni Meccaniche Industriali Genovesi, S.P.A.*,[44] a federal district court reached the same conclusion.[45] In *Georgia Ports Authority*, the plaintiff sued a contractor and its surety alleging breach of contract. The surety then filed a third-party complaint against the subcontractor responsible for the work at issue.[46] The court allowed the contractor to file a subsequent cross-claim against the subcontractor,[47] noting that the cases disallowing cross-claims by an original defendant against a third-party defendant had also assumed that the claim could be asserted alternatively as a third-party complaint under Rule 14(a).[48] Emphasizing that a claim under Rule 14(a) may be asserted only against a person not a party to the action,[49] the court in *Georgia Ports Authority* rejected the *Murray* construction of "co-party "[50] The court noted that, under *Murray*'s interpretation of "co-party," the contractor's only option would be to file an independent action against the subcontractor.[51] Furthermore, following the *Murray* rule would result in a Catch-22 situation.[52] Under *Murray*, the contractor could not assert a third-party complaint under Rule 14(a) because the subcontractor was a party to the action before the contractor lodged its claim against the subcontractor; yet, because the subcontractor and the contractor were not "co-parties" as defined under *Murray*, a cross-claim could not be asserted under Rule 13(g).[53] "Co-defendants [would be] forced to race to be the first defendant to implead a particular third-party defendant."[54]

> The Court cannot accept that such a result was intended by the Federal Rules. The Rules are to "be construed to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ P 1. To construe Rule 13(g) as not encompassing claims asserted by original defendants against third party defendants would force additional, independent actions to be filed. Joinder would then be proper. This only accomplishes the creation of an extra file. Here, where trial is only a

43. *Id.* at 204 (emphasis in original) (quoting WEBSTER'S UNABRIDGED DICTIONARY 510 (2d ed. 1948)).

44. 119 F.R.D. 693 (S.D. Ga. 1988).

45. *Id.* at 695.

46. *Id.* at 694.

47. *Id.* at 695.

48. *Id.* at 694. Even in cases where cross-claims were not allowed between original defendants and third-party defendants, the attempted claims were regularly dismissed without prejudice. *See, e.g.*, Ruston Gas Turbines, Inc. v. Pan Am. World Airways, Inc., No. 81-5345 (S.D.N.Y Mar. 1, 1984) (LEXIS, Genfed library, Dist file); *Paur*, 83 F.R.D. at 474; *Malaspina*, 21 Fed. R. Serv. 2d (Callaghan) at 130; *Murray*, 278 F Supp. at 7.

49. *Georgia Ports Auth.*, 119 F.R.D. at 694.

50. *Id.* at 695.

51. *Id.* at 694.

52. *Id.*

53. *Id.* at 694-95.

54. *Id.* at 695.

few weeks away, delay and duplication of expense could also be accomplished.[55]

Concluding that the term "co-party" within Rule 13(g) means "any party that is not an opposing party,"[56] the court in *Georgia Ports Authority* criticized the common law opposing this result. The court stated:

> In some of the cases holding that an original defendant may not assert a cross-claim against a third-party defendant, it has been suggested that such parties are not "co-parties" because they are adverse. This concern is absurd: anytime a cross-claim is filed, the parties are necessarily adverse (one of the parties is suing the other!). The very fact that cross-claims are allowed contemplates the presence of adversity between cross-claim plaintiffs and cross-claim defendants, and therefore, between "co-parties."[57]

C. American General: *Case Law Allowing Cross-Claims Between Original Defendants and Third-Party Defendants Under Certain Circumstances*

In *American General v. Equitable General,*[58] American General Insurance Co. filed a complaint alleging securities acts violations against Equitable General Corp. and its directors.[59] After Gulf Life Insurance Co. was substituted by an order of the court as a party defendant in place of Equitable General,[60] the court granted Gulf Life's motion for leave to bring cross-claims against two of the named directors, Phillips and Eslinger, and a third-party complaint against Continental Casualty Co.[61] The court also granted leave for Phillips and Eslinger to bring third-party complaints against Continental.[62] Gulf Life subsequently filed cross-claims against Phillips and Eslinger and a third-party complaint against Continental. Phillips and Eslinger also filed a third-party complaint against Continental.[63] A short time later, Continental filed answers to Gulf Life's substituted amended third-party complaint, Phillips' first amended third-party complaint and Eslinger's third-party complaint.[64] Continental also filed counterclaims against Gulf Life, Phillips and Eslinger, and cross-claims against the other named directors.[65] In its counterclaims and cross-claims, Continental sought rescission

55. *Id.*
56. *Id.*
57. *Id.* (citations omitted).
58. 87 F.R.D. 736 (E.D. Va. 1980).
59. *Id.* at 736.
60. *Id.* at 736 n.1.
61. *Id.* at 737.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

of a Continental insurance policy purportedly covering the named defendants and restitution of the premiums paid.[66] The issue presented to the court—by way of a motion to dismiss brought by the other named directors, Willard, Sanders, Boddiger and Chatelain—was whether Rules 13(g) and 14(a) permitted the third-party defendant, Continental, to file cross-claims against co-defendants, the four director-movants, of the third-party plaintiffs, Gulf Life and directors Phillips and Eslinger.[67]

After noting that no benefit would be gained by dismissing the cross-claims, the *American General* court held that, absent a showing of prejudice, cross-claims brought by a third-party defendant against co-defendants of the third-party plaintiffs would stand.[68] Particularly, the court asserted that an examination of the history of Rule 14(a) does not indicate a clear intention to prohibit the filing of such cross-claims. Thus, absent some showing of prejudice, the court did not feel "specifically prohibited by Rule from permitting the filing of [such] cross-claims."[69] Only if the movants could show lack of diversity or an inability to obtain service of process, for example, would the court have disallowed the cross-claims brought by Continental, the third-party defendant, against the four directors.[70]

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66. *Id.*

67. *Id.* at 736.

68. *Id.* at 739; *see also* International Tools (1973), Ltd. v. Arctic Enters., Inc., 75 F.R.D. 70, 72 n.2 (E.D. Mich. 1977) (allowing claims asserted by a third-party defendant against third-party defendants impleaded by different third-party plaintiffs to stand despite the court's statement that "it is not clear that co-parties within the meaning of Rule 13(g)" includes such parties).

69. *American Gen.*, 87 F.R.D. at 738.

70. *Id.* According to the *American General* court:

> Permitting a cross-claim rather than requiring the filing of an original complaint might affect the movants with respect to the jurisdiction of the Court and with respect to service of process. A requirement for filing a complaint in federal court is independent federal jurisdiction. This is not a requirement for the filing of a cross-claim, since it arises out of the same transaction and, therefore, is ancillary to the main cause of action. Also, the filing of a complaint requires that the plaintiff obtain service of process over the defendants pursuant to Fed.R.Civ.P 4 while the filing of a cross-claim requires no additional service of process. Had the movants alleged that there was a lack of complete diversity between them and Continental, or that Continental could not have obtained service of process over the movants, the movants clearly would have been prejudiced by allowing the cross-claims to stand. Under such circumstances, the Court would not have hesitated to grant the motion to dismiss.

Id. (citation omitted).

However, ancillary jurisdiction of cross-claims between original defendants and third-party defendants is proper—indeed favored—under the law. According to one source:

> With regard to cross-claims few jurisdictional problems are encountered. Under the federal rules a cross-claim must relate to the transaction sued on in the complaint. This relationship in turn is a basis of ancillary federal jurisdiction. Ordinarily no problem of personal jurisdiction is presented, for a cross-claim by definition is against a coparty, i.e., one who is already subject to the court's

The *American General* court was willing to give effect to the decisions typified by *Murray* if the movant could establish

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jurisdiction.

F JAMES & G. HAZARD, *supra* note 20, § 9.13, at 496-97 (footnotes omitted). As another source has explained:

> Once the court determines that complete justice between the parties with respect to the original action requires the adjudication of the cross-claim, then it is quite logical to take the additional step and hold that jurisdiction to entertain the complaint includes the power to consider the cross-claim, even though jurisdiction would not exist if the claim were brought as an independent action.

6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1433, at 256. "[S]ince cross-claims are subject to basically the same transactional test as compulsory counterclaims under Rule 13(a), the two should be treated similarly for jurisdictional purposes." 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1433, at 256 (footnote omitted).

In United Mine Workers v. Gibbs, 383 U.S. 715, 722 (1966), the U.S. Supreme Court was faced with the question of whether the federal courts have jurisdiction over a state claim in the absence of diversity. The Court held that constitutional power exists to decide a state claim whenever it is so related to the federal claim that "the entire action before the court comprises but one constitutional 'case.'" *Id.* at 725 (footnote omitted). As part of the test set forth in *Gibbs,* the federal and state claims must derive from "a common nucleus of operative fact." *Id., see also* G. SHREVE & P RAVEN-HANSEN, *supra* note 38, § 31, at 122-23 (suggesting *Gibbs* has a three-part test for "constitutional case"). In so holding, "the Court expressly recognized that the view of the drafters of the Federal Rules as to the scope of a lawsuit was relevant." 3 J. MOORE, *supra* note 11, ¶ 14.26, at 14-118 (citing *Gibbs,* 383 U.S. at 725 n.13); *see also* Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction,* 28 STAN. L. REV 395, 418 (1976) (The *Gibbs* case "acknowledged the extent to which the procedural policies of the new Federal Rules influenced its decision."). *Compare id. with* C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1433, at 253-56 (footnote omitted) ("The practice of treating cross-claims as part of the court's ancillary jurisdiction came into existence even prior to the federal rules.").

Although *Gibbs* presented a case of pendent jurisdiction rather than ancillary jurisdiction, *Gibbs* emphasized that, "[u]nder the [Federal] Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *Gibbs,* 383 U.S. at 724; *see also* G. SHREVE & P RAVEN-HANSEN, *supra* note 38, § 30, at 119-21 (explaining the difference between pendent and ancillary jurisdiction). Indeed, the only major case restricting the availability of ancillary jurisdiction is Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). *See generally* Berch, *The Erection of a Barrier Against Assertion of Ancillary Claims: An Examination of* Owen Equipment and Erection Company v. Kroger, 1979 ARIZ. ST. L.J. 253, 260-62 (suggesting that *Kroger* may be of limited significance).

In *Kroger,* the Supreme Court addressed the question, "In an action in which federal jurisdiction is based on diversity of citizenship, may the plaintiff assert a claim against a third-party defendant when there is no independent basis for federal jurisdiction over that claim?" *Kroger,* 437 U.S. at 367. Deciding that a plaintiff may not assert such a claim, the Court started with the assumption that the plaintiff's claims against the nondiverse third-party defendant and the plaintiff's claims against the original, diverse defendant arose from a "common nucleus of operative fact." *Id.* at 371 n.10. However, the Court held that that was sufficient only to bring the nondiverse claim within the "constitutional limits of federal judicial power." *Id.* at 371. It did not necessarily follow, the Court stated, that the nondiverse claim was within the statutory grant of federal jurisdiction made by 28 U.S.C. § 1332(a)(1), as expanded by the concept of ancillary jurisdiction. *Kroger,* 437 U.S. at 371-72. "Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited also by Acts of Congress." *Id.* at 372. Holding that the "context" in which a

prejudice,[71] but found no such prejudice in that case.[72] Aside from finding that the intent of the framers of the Federal Rules under Rule 13(g) is unclear,[73] this case is significant for two reasons. First, like the court in *Georgia Ports Authority,* the *American General* court adopted Rule 1 as its guide to the framers' intent.[74] Second, because *American General* allowed arguably improper cross-claims to stand,[75] the case suggests that litigation involving otherwise illegitimate cross-claims between original defendants and

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nondiverse claim is asserted is "crucial," *id.* at 376, the *Kroger* Court noted two major differences between the plaintiff's attempted claim against the nondiverse third-party defendant in its case and those nondiverse claims routinely held to be within a federal court's ancillary jurisdiction. First, the plaintiff's proposed claim against the nondiverse third-party defendant

> was simply not ancillary to the federal one in the same sense that, for example, the impleader by a defendant of a third-party defendant always is. A third-party complaint depends at least in part upon the resolution of the primary lawsuit. Its relation to the original complaint is thus not mere factual similarity but logical dependence.

Id. (citation omitted). Second, it was the plaintiff in *Kroger* who was attempting to assert the nondiverse claim. *Id.*

> By contrast, ancillary jurisdiction typically involves claims by a defending party haled into court against his will A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations.

Id.

As many scholars have noted, the U.S. Supreme Court's analysis of ancillary jurisdiction in *Kroger* explains the doctrine's extension to cross-claims under Rule 13(g) and impleader claims under Rule 14. *See, e.g.,* G. SHREVE & P RAVEN-HANSEN, *supra* note 38, § 32, at 128 ("Each of these kinds of joinder requires a transactional nexus under the rules between the joined and the anchor claim (thus satisfying the common nucleus requirement), and each is invoked defensively by a defendant or another party who has no practical choice of forum.").

Since both original defendants and third-party defendants are in defensive legal postures, construing "co-party" to allow claims between such parties would be consistent with *Kroger* and the doctrine of ancillary jurisdiction. Indeed, as the Supreme Court stated in *Kroger,* "[i]t is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit." *Kroger,* 437 U.S. at 377.

Thus, *American General,* by requiring a party to file an independent action where prejudice is found to exist, runs contrary to the trend of federal courts in allowing the use of ancillary jurisdiction. Moreover, the approach of *American General* ignores the congressionally approved mandate of Rule 1 that the Federal Rules be construed to secure the "just, speedy, and inexpensive determination of every action." FED. R. CIV P 1; *see also* Goldberg, *supra,* at 442-43 (discussing the interaction of Rule 1 and Rule 82).

71. *American Gen.,* 87 F.R.D. at 738.

72. *Id.* at 739.

73. *Id.* at 738.

74. *Id.* at 739; *see also* Capital Care Corp. v. Lifetime Corp., No. 88-2682 (E.D. Pa. Jan. 10, 1990) (LEXIS, Genfed library, Dist file) ("[G]iven the encouragement" of Federal Rule 1, "it does not make sense to interpret the Rules of Civil Procedure as precluding the third-party defendant from filing a third-party complaint against the other (i.e., non-third-party plaintiff) defendants on the ground that they are already parties to the action, hence not covered by Rule 14[.]").

75. *See Hansen,* 116 F.R.D. at 248 n.2.

third-party defendants could be allowed to continue without interruption so long as the cross-claims were within the subject matter of the original action and did not prejudice the parties against whom they were brought.[76] In other words, if a court finds that an "illegitimate" cross-claim would have been properly consolidated with the original action had the correct procedure been followed, a court could exercise its broad equitable powers to allow the cross-claim to stand.[77]

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76. Another approach, adopted by some courts, is to sever a plaintiff's claims against two defendants pursuant to Rule 21, so that both defendants can implead the same third-party defendant under Rule 14(a). *See* 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1446, at 375; 3 J. MOORE, *supra* note 11, ¶ 14.14, at 14-84 to 14-87; *see also* Field v. Volkswagenwerk AG, 626 F.2d 293, 298 n.9 (3d Cir. 1980) (citations omitted) ("[M]ost courts that have considered the problem have resolved it by using [Rule] 14(a) in conjunction with their broad severance powers under Civil Rule 21."); Henz v. Superior Trucking Co., 96 F.R.D. 219, 221 (M.D. Pa. 1982) (the defendant in a personal injury action brought by a husband and wife was held entitled to sever the claims of the husband and wife so that the defendant could pursue an action for contribution and indemnity against the husband as a third-party defendant); Slavics v. Wood, 36 F.R.D. 47, 47 (E.D. Pa. 1964) (emphasis in original) (quoting FED. R. CIV. P 14(a)) ("It is necessary to resort to Rule 21, because Rule 14 only allows a defendant to join as a third-party defendant '* * *a person not a party to the action* *'"); *cf.* Campbell v. Meadow Gold Prods. Co., 52 F.R.D. 165, 169 (E.D. Pa. 1971) (when the defendant removed a state action to a federal court and sought to counterclaim for contribution against one plaintiff, the proper procedure would have been severance and joinder under Rules 21 and 14(a) respectively). Not only does this approach avoid the problem of defendants having to race to be the first to implead a third-party, but the two proceedings can then be consolidated pursuant to Rule 42.

However, this approach seems inconsistent with Rule 1's mandate that the Federal Rules be construed to secure the "just, speedy, and inexpensive determination of every action." *Georgia Ports Auth.*, 119 F.R.D. at 695 n.2. Notably, although this severance procedure is supported by a literal reading of Rule 14(a), at least three scholars endorse the approach of a Minnesota federal district court, which allowed impleader as an initial matter without going through the ritual of severance followed by impleader and joinder, to avoid this cumbersome procedure. 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1446, at 376 & n.30 (citing United States *ex rel.* Westinghouse Elec. Supply Co. v. Nicholas, 28 F.R.D. 8, 10-11 (D. Minn. 1961)); *see also* Novak v. Tigani, 49 Del. 106, 109, 110 A.2d 298, 299 (Super. Ct. 1954) (applying DEL. R. CIV. P 14(a)) (citation omitted) (the court was "unwilling to conclude that the authors of Civil Rule 14, and of Rule 14 of the Federal Rules of Civil Procedure, from which our Rule was taken, intended the circuitous and awkward method of severance, third-party action and consolidation").

77. Courts have used analogous theories to keep claims alive in cases where a pleading improperly designated a defense as a counterclaim or a counterclaim as a defense, or in cases where counterclaims or cross-claims have been mislabelled. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1275, at 457-60 (1990); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1407, at 39-40; *see also* FED. R. CIV. P 8(c) ("When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."); Kwong v. Occidental Life Ins. Co., 273 F.2d 691, 693 n.2 (5th Cir. 1960) (a "cross-claim" filed by defendants against an insurer would be treated as a compulsory counterclaim); Sachs v. Sachs, 265 F.2d 31, 33 (3d Cir. 1959) (where a wife's prayer for support payments appeared under the heading of a separate defense in her husband's divorce action, the trial court properly treated the request as a counterclaim); United States v. Summ, 282 F Supp. 628, 631 (D.N.J. 1968) (a defendant's counterclaim could be treated as claim for recoupment); Falciani v. Philadelphia Transp. Co., 189 F Supp. 203, 204 (E.D. Pa. 1960)

III. THE INTENT OF THE FRAMERS OF THE FEDERAL RULES

In *Murray,* the court declared that the language of Rule 14(a) amply indicates the clear intent of the framers to prohibit cross-claims by original defendants against third-party defendants.[78] Similarly, the *Hansen* court held that cross-claims could not be asserted by third-party defendants against co-defendants of third-party plaintiffs.[79] Both these rulings rely on an amendment to Rule 14(a) that was never explained by the Advisory Committee.[80] Before this 1946 amendment, a third-party defendant under Rule 14(a) was to bring counterclaims and cross-claims against "the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13."[81] After the amendment, counterclaims were to be brought against the plaintiff and the third-party plaintiff, and cross-claims were to be brought "against other third-party defendants as provided in Rule 13."[82] Relying on the silence of the Advisory Committee notes to the 1946 amendment on this point and the statement that changes that were not specifically explained were meant to be "verbal or conforming,"[83] the *Hansen* court concluded that the Advisory Committee intended no substantive change to Rule 14(a) when "other part[ies]" was amended to read "other third-party defendants."[84] In short, the court concluded that, prior to the 1946 amendment, original defendants had not been included among "other part[ies]" against whom a third-party defendant could bring cross-claims.

(a bus owner might assert a claim against an automobile driver for damage to a bus regardless of whether the claim was called a counterclaim or a cross-claim).

Furthermore, one court has noted that, even if "co-party" is defined so that cross-claims are only allowed between parties of exactly similar status, any technical objection to an "improper" cross-claim would be waived if a party delayed in asserting it. *Georgia Ports Auth.,* 119 F.R.D. at 695 n.2.

78. Murray v. Haverford Hosp. Corp., 278 F Supp. 5, 7 (E.D. Pa. 1968). *But see* Hansen v. Shearson/American Express, Inc., 116 F.R.D. 246, 248 (E.D. Pa. 1987) ("The meaning of the term 'co-party' is not self-evident, even with [the] interpretive gloss placed on it by the court in *Murray.*").

79. *Hansen,* 116 F.R.D. at 249.

80. See *infra* note 83 for the precise language of the Advisory Committee's note of 1946 to Rule 14.

81. Fed. R. Civ. P 14(a), 28 U.S.C. (1941).

82. FED. R. CIV P 14(a).

83. Contrary to the *Hansen* court's suggestion, the Advisory Committee's note of 1946 does not contain the exact "verbal or conforming" language. This language appears to come from a scholar's interpretation of the history of Rule 14(a). Although the 1990 edition of *Moore's Federal Practice* no longer contains such a reference, the language does appear in that treatise as late as the 1989 edition. 3 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 14.01[1], at 14-8 (2d ed. 1989) ("Other changes were verbal or conforming."). The Advisory Committee's note of 1946 to Rule 14 actually reads: "The elimination of the words 'the third-party plaintiff, or any other party' from the second sentence of Rule 14(a), together with the insertion of the new phrases therein, are not changes of substance but are merely for the purpose of clarification." FED. R. CIV P 14 advisory committee's note.

84. *Hansen,* 116 F.R.D. at 249.

However, by focusing solely on an unexplained amendment to Rule 14(a), the *Hansen* court may have interpreted incorrectly the term "co-party." First, this approach simply ignores the fact that the Rules contain no explicit definition of "co-party." While courts must give meaning to this word, logic hardly compels that a term found only in Rule 13(g) should be defined solely on the basis of an unexplained change to a different rule.[85]

Second, the unexplained amendment to Rule 14(a) is open to more than one reasonable interpretation. While the *Hansen* conclusion is certainly a possibility, the unexplained change may have also manifested the intent of the framers of the Federal Rules to allow such cross-claims. The framers may have replaced "any other party" with "other third-party defendants" simply to eliminate superfluous words.[86] It is possible that the framers of the Rules recognized that Rule 13(g)'s use of the term "co-party" already embraced the original defendant/third-party defendant relationship and that therefore any language authorizing such claims in Rule 14(a) was unnecessary.[87] Arguably, the lack of any explicit Advisory Committee explanation

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85. Where the literal reading of a statutory term would "compel an odd result," Green v. Bock Laundry Machine Co., 109 S. Ct. 1981, 1984 (1989), the Supreme Court has held that it "must search for other evidence of congressional intent to lend the term its proper scope." Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558, 2566 (1989) (citations omitted). "'The circumstances of the enactment of particular legislation,' for example, 'may persuade a court that Congress did not intend words of common meaning to have their literal effect.'" *Id.* (quoting Watt v. Alaska, 451 U.S. 259, 266 (1981)).

> Even though, as Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Public Citizen, 109 S. Ct. at 2566 (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

> Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."

Public Citizen, 109 S. Ct. at 2566 (citation omitted) (quoting Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928)). *Compare* Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV 20, 22-46 (discussing textualism versus intentionalism) *with* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV 1299 (1975).

86. The Advisory Committee's notes appear to confirm this reading. *See supra* note 83.

87. *Cf.* Capital Care Corp. v. Lifetime Corp., No. 88-2682 (E.D. Pa. Jan. 10, 1990) (LEXIS, Genfed library, Dist file):

> The problem is that F.R.Civ.P 14 permits third-party defendants to file "any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13" and provides that the third-party defendant "may also assert any claim against the plaintiff arising out of the transaction or occurrence " The same rule also provides: "A third-party defendant may proceed under this rule against any person not a party to the

cuts in favor of this interpretation. One would assume that the Advisory Committee would have felt compelled to elucidate the reason for the change—from the broader language of "any other party" to the seemingly more restrictive language of "other third-party defendants"—if it were intended to be substantive. The lack of such an explanation suggests that the Advisory Committee did not intend to restrict the availability of cross-claims between original defendants and third-party defendants whatsoever.[88]

Even assuming that the Advisory Committee notes lean in favor of forbidding cross-claims between original defendants and third-party defendants, that conclusion is not dispositive. The United States Supreme Court has said that the Committee's notes should be given weight in determining the validity, meaning or consistency of the Federal Rules but that they are not binding authority [89] Furthermore, reliance solely upon either Rule 14(a) or the Committee notes would in some instances—notably this one—conflict with the mandate of Rule 1.

Rule 1 requires that the Federal Rules be "construed to secure the just, speedy, and inexpensive determination of every action."[90] The courts have applied Rule 1 broadly to many procedural questions under many different rules.[91] In *Herbert v Lando,*[92] for example, the Supreme Court held that Rule 26 must be construed subject to the decree of Rule 1.[93] Likewise, in

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action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant."

Thus, a claim by a third-party defendant against someone who is not a plaintiff, a third-party plaintiff, or a non-party to the action, is not authorized by Rule 14.

88. Another explanation is that the Advisory Committee simply overlooked the effect of the Rule 14(a) amendment on the Federal Rules. *See, e.g.,* Capital Care Corp. v. Lifetime Corp., No. 88-2682 (E.D. Pa. Jan. 10, 1990) (LEXIS, Genfed library, Dist file) (citing *Hansen,* 116 F.R.D. at 251).

89. Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946); *see also* C. J. Wieland & Son Dairy Prods. Co. v. Wickard, 4 F.R.D. 250, 252 (E.D. Wis. 1945) (the Advisory Committee's notes are persuasive but cannot be accepted as authority).

90. FED. R. CIV P 1.

91. *See, e.g.,* Nasser v. Isthmian Lines, 331 F.2d 124, 127 (2d Cir. 1964) (The Federal Rules "were intended to embody a unitary concept of efficient and meaningful judicial procedure, and no single Rule can consequently be considered in a vacuum."); Canister Co. v. Leahy, 182 F.2d 510, 514 (3d Cir. 1950) (The Rules "must be considered in relation to one another."); National Bondholders Corp. v. McClintic, 99 F.2d 595, 599 (4th Cir. 1938) (The procedure under Rule 26 of these Rules "is entitled to be liberally construed in accordance with" Rule 1.); United States v. Pinto, 44 F.R.D. 357, 359 (W.D. Mich. 1968) (The Federal Rules "are to be interpreted in light of Rule 1."); United States v. Purdome, 30 F.R.D. 338, 339 (W.D. Mo. 1962) ("Each separate rule is related to the general plan of the others and must be so construed."); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1432, at 253 ("Rule 13(g) must be read in conjunction with the other federal rules.").

92. 441 U.S. 153 (1979).

93. *Id.* at 177 In *Herbert,* the plaintiff sought an order compelling discovery in a defamation action. *Id.* at 156-57. In holding that judges should not hesitate to exercise appropriate control over the discovery process, the Court stated: "[T]he discovery provisions,

Foman v. Davis,[94] the Supreme Court noted the mandate of Rule 1 in holding that it is contrary to the spirit of the Federal Rules for a court to avoid a decision on the basis of "mere technicalities."[95] However, the Supreme Court has also made clear that, although the Rules should be "liberally construed, . . . they should not be expanded by disregarding plainly expressed limitations."[96] Thus, only if the intent of the framers of the Federal Rules is ambiguous regarding the definition of "co-party" would it be legitimate to look to policy considerations to resolve the cross-claim debate.

IV POLICY CONSIDERATIONS

Because this Note concludes from the discussion above that the intent of the framers of the Federal Rules *is* ambiguous regarding the definition of "co-party," a diversion into the realm of policy is inevitable. Historically, the primary reasons behind allowing cross-claims have been to avoid multiple suits and to encourage determination of an entire controversy with the fewest procedural steps.[97] Consistent with these policies, courts generally have construed Rule 13(g) broadly in order to settle as many related claims as possible in a single proceeding.[98] Although the liberal use of cross-claims increases the risk that an action will become too complicated, courts can

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like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy,* and *inexpensive* determination of every action.'" *Id.* at 177 (emphasis in original). Thus, "the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense '" *Id.*

94. 371 U.S. 178 (1962).

95. *Id.* at 181-82. In *Foman,* a party filed a notice of appeal in federal court from a judgment dismissing his complaint and subsequently filed a notice of appeal from a second judgment denying his motions to vacate the first judgment and to amend the complaint. *Id.* at 179. The Supreme Court decided that, where the first notice of appeal is held to be premature, the appeal from the second judgment should be treated as an effective attempt to appeal from the first judgment. *Id.* at 181.

96. Schlagenhauf v. Holder, 379 U.S. 104, 121 (1964).

97. 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1431, at 229 & n.5. Similar purposes underlie third-party claims under Rule 14. *See, e.g.,* 3 J. MOORE, *supra* note 11, ¶ 14.04, at 14-29 (footnote omitted) ("[I]mpleader allows the court to resolve the ultimate liabilities in one suit instead of two. This inclusive packaging spares the judicial system and at least some of the parties the waste and expense of multiple suits. Concomitantly, it avoids the possibility of inconsistent judgments.").

98. 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1431, at 230 n.6. Because cross-claims are always permissive and never compulsory under the Federal Rules, "a defendant must decide whether it is best to litigate his claim in the same suit or whether it is better to bring a separate action." WEST'S FEDERAL PRACTICE MANUAL § 7985 (1979) (footnote omitted). *But see* KAN. STAT. ANN. § 60-213(g)-(h) (1988) (containing provisions for both compulsory and permissive cross-claims). Courts should not usurp the ability of defendants to make this tactical decision by narrowly construing Federal Rule 13(g).

readily alleviate this problem by ordering separate trials under Rule 13(i).[99] For this reason, most scholars encourage broad joinder of claims at the pleading stage.[100]

The policy reasons for allowing cross-claims between co-defendants on the same level of the caption also apply in the context of cross-claims between original defendants and third-party defendants. First, by allowing such cross-claims, all related matters can be litigated in one proceeding with the fewest procedural steps. Parties need not file separate complaints against one another, and motions to consolidate proceedings via Rule 42(a), at least in this respect, become unnecessary Just as the widespread use of counter-claims and third-party claims under Rule 13(a)-(b) and Rule 14(a) lowers filing expenses and accelerates litigation, so too would the liberal use of cross-claims under Rule 13(g) reduce costs and streamline the judicial machinery

Second, if cross-claims of the type discussed in this Note are not allowed, courts will create an entire category of cases where related matters cannot be litigated in one proceeding without extra procedural difficulty. Shrewd lawyers will delay proceedings by challenging claims brought under the wrong procedural mechanism, and abuses may result if lawyers wait to assert challenges until close to trial[101] or solely for the purpose of embarrassing opposing counsel. Courts have cautioned in the past that a lawsuit should no longer be viewed "as if it were 'in the nature of a cock-fight,' so that 'the litigant who wishes to succeed must try and get an advocate

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99. Rule 13(i) provides:

> If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

FED. R. CIV P 13(i); *see also* 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1437, at 281-82 (describing Rule 13(i) in greater detail). Thus, under Rule 13(i), a court has discretion to invoke Rule 42(b) and order separate trials of the claims in a given matter.

Rule 42(b) provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

FED. R. CIV P 42(b); *see also* 9 C. WRIGHT & A. MILLER, *supra* note 17, §§ 2387-91, at 277-304 (describing Rule 42(b) in greater detail).

100. *See, e.g.*, 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1431, at 230.

101. *But see* Georgia Ports Auth. v. Construzioni Meccaniche Industriali Genovesi, S.P.A., 119 F.R.D. 693, 695 n.2 (S.D. Ga. 1988) ("[E]ven if Falcon's construction of Rule 13(g) is correct, any technical objection to CMI's cross-claim would appear to have been waived by delay in pressing it.").

who is a game bird with the best pluck and the sharpest spurs.'"[102] The Federal Rules were intended to supersede this "sporting theory of justice."[103]

As the court in *Georgia Ports Authority* suggested, the Federal Rules envision three types of claims that defendants may assert: counterclaims, third-party claims and cross-claims.[104] Rule 13(a)-(b) provides that counterclaims may be brought against opposing parties.[105] Rule 14(a) provides that third-party complaints may be brought against persons not already parties.[106] And Rule 13(g) provides that cross-claims may be asserted against co-parties.[107]

Assuming that the framers of the Rules intended that these be the only three types of claims defendants could bring and that every such claim should fit into one of these three categories, one question remains: how would the framers of the Rules define these categories? To accomplish their purpose, the best method would be to create a system fitting every claim into one of the three categories. To do this within the definitional framework laid out in *Georgia Ports Authority,* the first step would be to distinguish claims against parties to a lawsuit from claims against parties not involved in a lawsuit. All possible claims must fit in one of these two groups: claims against parties and claims against non-parties. Because Rule 14(a) provides for assertion of a third-party complaint against any "person *not a party* to the action,"[108] the only way to assure that all claims will be categorized in one of the three categories is to allow "cross-claims" or "counterclaims" against any person *already a party* to an action. For, unless the universe of claims is divided into two perfect halves in this way, the temptation will exist for courts to create by default yet a fourth category of claims.

To illustrate the logic underlying this temptation, suppose one needed to know how many lollipops out of ten Jackie perceived to be red. The best method is to ask Jackie whether she thinks each lollipop is "red" or "not red." Otherwise, if an open-ended question is asked, the questioner may have to deal with an answer like "vermillion." Did Jackie intend the "vermillion" response to be taken as a subset of red, a subset of orange or a subset of neither?

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102. Barnett v. Jaspan (*In re* Barnett), 124 F.2d 1005, 1010 (2d Cir. 1942) (footnote omitted) (quoting Manson, *Cross-Examination: A Socratic Fragment,* 8 LAW Q. REV 160, 161 (1892)).

103. *See, e.g.,* Hoffman v. Palmer, 129 F.2d 976, 996 (2d Cir. 1942). "'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" Foman v. Davis, 371 U.S. 178, 181-82 (1962) (quoting Conley v. Gibson, 355 U.S. 41, 48 (1957)).

104. *Georgia Ports Auth.,* 119 F.R.D. at 695.

105. FED. R. CIV. P 13(a)-(b).

106. FED. R. CIV. P 14(a).

107. FED. R. CIV P 13(g).

108. FED. R. CIV P 14(a) (emphasis added).

If this line of logic is the best way to solve the problem at hand, then every court, except the *Georgia Ports Authority* court, has gone about defining "co-party" in the wrong way Instead of focusing on the framers' probable purpose—to classify all claims by defendants either as third-party claims, counterclaims or cross-claims—courts have tended to divine the meaning of "co-party" from the word itself. For example, in *Schwab v. Erie Lackawanna Railroad Co. v Sauers,*[109] the court concentrated on the adversarial relationship between the defendant and the third-party defendant.[110] Because of this mistaken focus, the court concluded that these two parties could not be co-parties within the meaning of Rule 13(g). Even the court in *Fogel,* which reached the same conclusion as does this Note, focused on the prefix "co-" rather than on the purpose of the Federal Rules as articulated by Rule 1.[111]

Rather than attempting to define "co-party" by looking at the word itself,[112] a sounder approach is to define the term within the context of the

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109. 438 F.2d 62 (3d Cir. 1971).

110. *Id.* at 66; *see also* McWhirter Distrib. Co. v. Texaco Inc., 668 F.2d 511, 527 (Temp. Emer. Ct. App. 1981) (citing *Schwab*) ("Texaco and DOE were adverse parties rather than co-parties."); Stahl v. Ohio River Co., 424 F.2d 52, 55 (3d Cir. 1970) (emphasis in original) ("[C]ross-claims are filed against *co-parties* and not against *adverse* parties."); Capital Care Corp. v. Lifetime Corp., No. 88-2682 (E.D. Pa. Jan. 10, 1990) (LEXIS, Genfed library, Dist file) ("[B]efore the third-party defendants filed their crossclaims, their relationship to the non-suing defendants was sufficiently non-adverse to qualify the latter as co-parties."); Pitcavage v. Mastercraft Boat Co., 632 F Supp. 842, 849 (M.D. Pa. 1985) (citing *Stahl*) ("Cross-claims are filed against co-parties and not against adverse parties."). *But see Georgia Ports Auth.,* 119 F.R.D. at 695 (criticizing the suggestion of some courts that original defendants and third-party defendants are not "co-parties" because they are adverse).

111. Fogel v. United Gas Improvement Co., 32 F.R.D. 202, 204 (E.D. Pa. 1963). The *Fogel* court did not mention Rule 1 or the 1946 amendment to Rule 14(a) in its opinion. When faced with the contention that "co-party" meant "equal party, as for instance one of several original defendants," the court stated simply that "[t]his contention is incorrect." *Id.* Citing the dictionary definition of the prefix "co-" was the only support the *Fogel* court gave for its decision. *Id.*

112. If courts insist on focusing on the term "co-party," the *Fogel* court arguably was correct in construing it to allow cross-claims between original defendants and third-party defendants. BLACK'S LAW DICTIONARY (6th ed. 1990) defines "co-" as "[a] prefix meaning with, in conjunction, joint, jointly, unitedly, and not separately[.]" *Id.* at 256. That source further defines "party" as follows:

> A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A "party" to an action is a person whose name is designated on record as plaintiff or defendant. Term, in general, means one having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from judgment.

Id. at 1122 (citations omitted).

Both original defendants and third-party defendants can be considered to be participating "in conjunction with" a given proceeding. Both such parties have control over legal proceedings and are designated on record with the court. In fact, in the case of an indemnity claim, an allegation between an original defendant and a third-party defendant is one in which one party asserts that the other party must stand in its shoes if liability is found to attach. Thus, in the case of an indemnity claim by an original defendant against a third-party defendant, it would

Federal Rules. If Rule 14(a) third-party claims are categorized as "not party to the action" claims, all other claims assertable by defendants need only be categorized either as counterclaims or cross-claims. To do this, the universe of remaining claims should be divided once again according to a "something"/"not something" classification system. Without this division, the problems associated with any definition of "co-party" are immediately foreseeable. For instance, the *Stahl* court's definition of "co-parties" as "parties on the same side of the main litigation"[113] may leave some claims uncategorized because this definition and the standard definition of a counterclaim are not mutually exclusive.[114] Likewise, because the existing

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be unfair to procedurally inhibit such a claim—by requiring the filing of an independent action—merely because of the fortuitous circumstance that the plaintiff did not sue the third-party defendant in the original action.

113. *Stahl,* 424 F.2d at 55; *see also* Rochester Am. Ins. Co. v. Cassell Truck Lines, Inc., 195 Kan. 51, 54, 402 P.2d 782, 784 (1965) (applying KAN. STAT. ANN. § 60-213(g)) (stating cross-claims are "between parties on the same side of the case"); Bunge v. Yager, 236 Minn. 245, 255, 52 N.W.2d 446, 451 (1952) (applying MINN. R. CIV. P 13.07) (suggesting that co-parties be defined as those parties which are "aligned on the same side of the litigation").

114. The *Stahl* court's definition of "co-party" is unattractive for three reasons. First, determining which parties are on the same side of the main litigation is extremely difficult. Given the countless postures in which modern day litigants find themselves, it is often impossible to determine on whose *side* any given litigant is. "As between the third-party plaintiffs and the third-party defendants, it is convenient to regard them as adversaries, at least for the purpose of counterclaims, even though, as a practical matter, it often happens that their primary objective is the common defense against plaintiff's claims." Capital Care Corp. v. Lifetime Corp., No. 88-2682 (E.D. Pa. Jan. 10, 1990) (LEXIS, Genfed library, Dist file). *Compare id.* ("In a sense, both the original defendants and the third-party defendants are similarly situated, in that each is being charged (by someone) with liability for the claims asserted by the plaintiffs.") *with* Hansen v. Shearson/American Express, Inc., 116 F.R.D. 246, 248 (E.D. Pa. 1987) ("To the extent that Manfredo and Guptill both stood to lose if Hansen prevailed they might be viewed as 'parties on the same side of the main litigation' and the conclusion might be reached that a claim by Guptill against Manfredo is a cross-claim."). Although explanatory notes to one state cross-claim rule suggest that "Rule 13(g) regulates claims between parties on the same side of the *versus*[,]" MASS. R. CIV. P 13(g) reporters' notes (emphasis in original), this is similarly unhelpful. Original defendants and third-party defendants both appear on the opposite side of the plaintiff/original defendant "versus," and before cross-claims are asserted between original defendants and third-party defendants, such parties have no legal relationship whatsoever other than that both parties happen to be involved in the same proceeding.

Second, aside from being adopted only in dicta by the *Stahl* court, defining "co-parties" as those parties on the same side of the main litigation would be unduly burdensome on the courts. Judges would have to decide, through a kind of balancing test, whether litigants are adverse or non-adverse towards one another. An example of this balancing approach is found in the case of *In re* Queeny/Corinthos, 503 F Supp. 361, 364 (E.D. Pa. 1980) (emphasis in original) (citation omitted):

> To be on the same side of the litigation these parties need not have an identity of interests, issues or positions with respect to each other, but need only stand in a similar posture in relation to claims of opposing parties brought against each of them, even though such claims are brought separately, by different parties, and on different legal theories. Certainly the Queeny interests, owners and operators of the Queeny, and the products defendants, builders of and manufacturers of equipment for the Queeny, are more easily identified as standing

definition of a counterclaim only allows such claims between those parties who are "opposing parties,"[115] some claims related to the subject matter of the original lawsuit will not be classifiable as either counterclaims or cross-claims with *Murray*'s non-dichotomous definition of "co-party," that is, "parties having like status."[116] For, as this Note illustrates, it is entirely possible for one party to have a claim against another party who is not an opposing party yet who is not a party of like status either.

> on the *same* side of this litigation than as on opposing sides. On the opposing side are parties such as the Corinthos interests and BP/Sohio which is also a plaintiff in the products liability action. This Court has already determined that the Queeny was at fault in the collision between it and the Corinthos. The Queeny interests allege that the products defendants, builders and suppliers of the Queeny, are liable for the collision under a products liability theory. The Corinthos interests, BP/Sohio, and other claimants on the opposing side of the litigation are the parties which were injured as a result of the actions of Queeny. Thus, on one side stands those parties actually or allegedly responsible for the collision, and on the other side stands those parties injured or damaged.

Thus, the *Stahl* definition of "co-party" demands a case-by-case analysis, which requires a considerable amount of time on the part of courts to administer. Instead of focusing on the configuration of the parties and their claims, a sounder approach lies in dividing all claims by parties to an action into two mutually exclusive categories—counterclaims and cross-claims.

Third, because the *Stahl* approach requires a balancing scheme, it—like all other interest-weighing approaches—will be subject to manipulation by courts. If a court finds a litigant's claim has merit, it could construe "co-party" broadly to allow that claim's assertion. Conversely, if a court finds a litigant's claim lacking in merit, it could construe "co-party" narrowly to prohibit that claim's assertion. Even if a court merely dismisses a claim without prejudice, such manipulation of the term "co-party" would violate the spirit of the Federal Rules, which require courts to decide cases on their merits rather than on procedural technicalities. *See supra* notes 102-03 and accompanying text. An extreme case of manipulation could occur if claims of the type discussed in this Note are allowed under Rule 13(h) instead of Rule 13(g). For, unlike the practice before Rule 13(h)'s amendment in 1966 of

> joining parties "as defendants," the parties are to be aligned according to their interests. Specifically, the Note states that "the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion." Once the parties are aligned according to their actual interest in the suit, then the court must determine whether federal jurisdiction will be affected by their addition. If the added party's real interest is with plaintiff and his citizenship is the same as defendant, then he cannot be joined for his presence will destroy the preexisting diversity, unless a compulsory counterclaim is involved. Of course, if the added party is correctly aligned as a defendant, then the jurisdictional principles applicable to counterclaims and cross-claims will govern.

6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1434, at 266-67 (footnotes omitted) (quoting FED. R. CIV P 13 advisory committee's note). As one can observe, if parties are allowed to assert the type of claims discussed in this Note under Rule 13(h), a court's manipulation of the term "co-party" could easily prevent an entire controversy from being decided in one forum because a court could refuse to hear part of a claim on jurisdictional grounds. Under Rule 13(g), on the other hand, courts would always have ancillary jurisdiction over cross-claims between such parties, and the balancing of parties' interests in a given piece of litigation would be unnecessary. *See supra* note 70.

115. FED. R. CIV P 13(a)-(b).

116. Murray v. Haverford Hosp. Corp., 278 F Supp. 5, 6 (E.D. Pa. 1968).

As a result, under both the *Stahl* and *Murray* approaches, some defendants' claims will never be classifiable under the Federal Rules. Parties will be forced forever to file separate complaints and, subsequently, motions for consolidation under Rule 42(a). Only by allowing counterclaims against *opposing* parties and cross-claims against *non-opposing* parties was the court in *Georgia Ports Authority* able to evade the definitional quagmire surrounding the term "co-party."[117]

V. PROPOSAL

In light of the conflict among authorities over the meaning of the term "co-party," the Federal Rules should be amended to clear up the confusion. First, Rule 13(g) should define "co-party" explicitly. A clear definitional clause added to that Rule would make it unnecessary for courts to examine the intent of the framers of the Federal Rules and relevant policy considerations. If the Advisory Committee on Civil Rules[118] wished to allow cross-claims between original defendants and third-party defendants, it could say so explicitly; if the Advisory Committee on Civil Rules wanted to prohibit such cross-claims, it could articulate that, too.[119]

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117. *Georgia Ports Auth.*, 119 F.R.D. at 695.

118. The Advisory Committee on Civil Rules is the body that first considers proposed rule changes. *See* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES XXI-XXII (West 1990) for a list of the members of the Advisory Committee on Civil Rules as constituted March 1, 1990. This body was appointed pursuant to an act passed by Congress July 11, 1958 (28 U.S.C. § 331 (1988)) authorizing the Judicial Conference of the United States to make a continuous study of the Federal Rules. *See also* 28 U.S.C.A. § 2073(a)(2) (West Supp. 1990) ("The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under section 2072 of this title."). According to 28 U.S.C.A. § 2073(a)(1), "[t]he Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules[.]"

119. Under the current statutory scheme, the U.S. Supreme Court has the power "to prescribe general rules of practice and procedure" for federal district courts. 28 U.S.C.A. § 2072 (West Supp. 1990). "The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule." 28 U.S.C.A. § 2074(a) (West Supp. 1990). If Congress does nothing within the seven-month period provided for by the statute, the new rule goes into effect. *Id.* ("Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.").

However, the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence ("Standing Committee") and the Advisory Committee on Civil Rules are the two bodies that continuously study the operations of the Federal Rules. FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, *supra* note 118, at X. The Standing Committee coordinates the work of the Advisory Committee on Civil Rules, makes suggestions of proposals to be studied by them, considers proposals recommended by the Advisory Committee and transmits such proposals with its recommendation to the Judicial Conference. *Id.* at XII. If the Judicial Conference approves of a proposal, it formally forwards its report and recommendations to the U.S. Supreme Court. 28 U.S.C.A. § 331 (West Supp. 1990). For a complete discussion of the rule-amending process, see 28 U.S.C.A. § 331; 28 U.S.C.A. §§ 2072-2074; and FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, *supra* note 118, at X-XIII.

For the reasons discussed in this Note, however, the term "co-party" should be defined as "any party that is not an opposing party."[120] This definition would divide and logically categorize all possible claims a defendant may assert against parties to a lawsuit into two all-inclusive groups. Every claim between defendants and third-party defendants would have to be, by definition, either a counterclaim or a cross-claim. Furthermore, defining "co-party" as "any party that is not an opposing party" would evade the line-drawing problems caused by (or resulting from) attempts to fit counterclaims and cross-claims into non-mutually exclusive pigeonholes.

In addition to amending Rule 13(g), Rule 14(a) should be amended to allow "cross-claims against other co-parties, as provided in Rule 13." The definition given "co-party" in Rule 13(g) also should be incorporated by reference into Rule 14(a). This would eliminate any ambiguity about the availability of cross-claims between original defendants and third-party defendants and make the Federal Rules internally consistent.[121]

CONCLUSION

The definition of "co-party" under Rule 13(g) has broad implications for the litigation process. Americans have filed more than 200,000 civil cases

120. Oklahoma has enacted a rule which provides that "[a] pleading may state as a cross-claim any claim by one party against any party who is not an opposing party[.]" OKLA. STAT. ANN. tit. 12, § 2013(G) (West Supp. 1991). However, the committee comment to § 2013 states that subsection G applies only to "a claim asserted by a party against another party on the same side of the action, such as a defendant against a co-defendant or a plaintiff against a co-plaintiff. It does not apply to a claim asserted by a defendant against a plaintiff or against a third-party defendant." *Id.* committee comment. Although this comment undoubtedly was intended merely to distinguish cross-claims from counterclaims and third-party claims brought under § 2013(A)-(B) and § 2014(A) (Oklahoma's respective counterparts to Federal Rules 13(a)-(b) and 14(a)), the Oklahoma statute suggests that any definition of "co-party" under the Federal Rules should state explicitly that "co-party" encompasses the relationship between original defendants and third-party defendants when Rules 13(a)-(b) or 14(a) are inapplicable.

For a more detailed description of the rationale underlying Oklahoma's cross-claim provision, see Fraser, *Counterclaims, Cross-Claims, and Third-Party Claims Under the Oklahoma Pleading Code,* 39 OKLA. L. REV 1, 12-14 (1986). Professor Fraser's article, which was written before Oklahoma's cross-claim provision was amended in 1988, argued that "co-party" within § 2013(G) "should be liberally construed so that all claims against parties to an action that arise out of a transaction or occurrence can be joined." *Id.* at 13. He continued: "The Oklahoma Supreme Court should interpret section 2013(G) as permitting a party to an action to assert any claim that arises out of a transaction or occurrence that is already subject to the jurisdiction of the court against a person who is already a party to the action." *Id.* at 14. Accepting Professor Fraser's suggestion that, "to avoid the possibility that this section will be construed technically, section 2013(G) should be amended," the Oklahoma Legislature in 1988 adopted language consistent with Fraser's proposal. *Compare id. with* OKLA. STAT. ANN. tit. 12, § 2013(G). Today, a comment to the 1988 amendment of § 2013 contained in the *Oklahoma Statutes Annotated* by Professor Fraser states that the amendment "makes it unnecessary for the courts to determine who is a co-party." OKLA. STAT. ANN. tit. 12, § 2013 comment.

121. To make the Federal Rules completely consistent, the Advisory Committee on Civil Rules should follow the lead of Montana and add the words "or co-party" to the end of Federal Rule 18(a). *See* MONT. R. CIV. P 18(a) advisory committee's note to Sept. 29, 1967 amendment ("[T]he words 'or co-party' are added to the Montana amendment for consistency with the provisions of this amendment for cross-claims and Rule 13(g).").

in United States district courts each year since 1982,[122] and defendants and third-party defendants frequently must assert claims against one another. Whichever definition of "co-parties" is accepted—either those parties on the same side of the main litigation, those parties having like status or those parties that are not opposing parties—it is clear that each of these definitions will have significant consequences for litigants. Whether a court allows cross-claims between original defendants and third-party defendants or compels these parties to file separate complaints against one another, the definition of "co-party" matters because it has the potential to create extra filings and procedural difficulties thereby costing parties and courts time and money.

Until the Federal Rules are amended, "co-party" should be defined according to the policies that lie behind the Federal Rules. There is no persuasive authority showing that the framers of the Rules intended otherwise. Rule 1's mandate that the Federal Rules "be construed to secure the just, speedy, and inexpensive determination of every action" should be given broad effect.[123] Because the Rules presume that as many related claims as possible be resolved in a single proceeding,[124] the only legitimate way to define "co-party" is to examine the purpose of the Federal Rules. Given the absence of any policy reasons disfavoring cross-claims between original defendants and third-party defendants, the Federal Rules should permit such cross-claims.

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122. According to the latest available figures, 233,529 total civil cases were commenced in U.S. district courts during the twelve month period ending June 30, 1989. 1989 ADMIN. OFF. OF THE U.S. CTS. ANN. REP. 8-9 (Table 4). Total civil cases commenced for other years ending June 30 were as follows: 1982, 206,193; 1983, 241,842; 1984, 261,485; 1985, 273,670; 1986, 254,828; 1987, 239,185; 1988, 239,634. *Id.*

123. *See also* Bauer, Schiavone: *An Un-*Fortune*-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure,* 63 NOTRE DAME L. REV 720, 730 (1988) ("Although [Rule 1] obviously does not provide an answer to any specific question of the interpretation of any of the Federal Rules, it defines a context or, if you will, a predisposition against unnecessarily rigid or grudging interpretations of the Rules."); Dobie, *supra* note 17, at 262 n.3 (citations omitted) (the author was a member of the Advisory Committee appointed to draft the Federal Rules) ("The committee meant every word of [the Rule 1] sentence, and it is sincerely hoped that federal judges will interpret and apply the rules in this spirit.").

124. As three scholars have stated, "In keeping with this policy [of avoiding multiple suits] the courts generally have construed [Rule 13(g)] liberally in order to settle as many related claims as possible in a single action." 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 1431, at 229-30 (footnote omitted); *see also* LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143, 146 (6th Cir. 1969); Providential Dev. Co. v. United States Steel Co., 236 F.2d 277, 281 (10th Cir. 1956); Blair v. Cleveland Twist Drill Co., 197 F.2d 842, 845 (7th Cir. 1952); Old Homestead Bread Co. v. Continental Baking Co., 47 F.R.D. 560, 563-64 n.7 (D. Colo. 1969).