Lect 26

Joinder – Counterclaims

Compulsory and permissive

*Rule 13. Counterclaim and Crossclaim  
  
(a) Compulsory Counterclaim.  
    (1) In General.  A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing  
party if the claim:  
        (A) arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim; and  
        (B) does not require adding another party over whom the court cannot acquire jurisdiction.  
    (2) Exceptions.  The pleader need not state the claim if:  
        (A) when the action was commenced, the claim was the subject of another pending action; or  
        (B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the  
        pleader on that claim, and the pleader does not assert any counterclaim under this rule.  
  
(b) Permissive Counterclaim.  A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.*

P, X and D get into a brawl. P sues D for battery.  
May D counterclaim against P for breach of an unrelated contract? Yes  
Must he? No  
May D bring a counterclaim against P for D's damages in the brawl? Yes  
Must he? Yes  
Must D join X to his counterclaim against P? No

Assume that D (Cal.) has contracted to buy a $45,000 car from P (NY). D has paid no deposit. D finds that the car is defective and refuses to pay. P sues D for the $45,000 in N.Y. state court. D brings a permissive counterclaim for breach of an unrelated contract for $45,000.

May P remove to federal court? NO – Ps can’t remove

May D remove to federal court?

* NO – removability is determined by looking to the P’s complaint
* Courts have held no aggregation of permissive CCs with P’s action to get above jurisdictional minimum

Could D remove if his permissive counterclaim were for $80,000? (once again – no – must look to P’s complaint)

what if D’s counterclaim were compulsory?

P sues D under jurisdictional minimum, D brings compulsory CC that, if aggregated with P’s claim against D, would take us above the jurisdictional minimum

May P remove to federal court? (No Ps can’t remove)

May D remove to federal court? courts have *still* held no

- notice manipulation possibilities

- X(NY) knows that he is likely to be sued by Y(CA) under negligence for $80,000. He feels that a state court would be more favorable to him than a federal court. How might X use the compulsory counterclaim rule (assuming it applies in state court) to ensure a state court forum for Y’s negligence action? Can bring an action in state court under the jurisdictional minimum to which the $80K action is a compulsory CC –Y will not be able to remove

13(a) and PJ

P (NY) sues D (Cal) in California state court concerning a battery that the two got into in NY. D counterclaims concerning the damages that D sustained from P in the brawl. P brings a motion to dismiss the counterclaim for lack of PJ. What result?

- could there be PJ if the CC were a freestanding lawsuit? (NO)

but cts have found that PJ need not be satisfied

it is constitutional under Pennoyer framework – Adams v Saenger

also a good idea, since the same witness will be at issue in P’s action and the compulsory counterclaim

* P (NY) sues D (Cal) in federal court in Cal concerning a battery that the two got into in NY. D counterclaims concerning breach of an unrelated contract that took place solely within NY. P brings a motion to dismiss the counterclaim for lack of PJ. What result?

is it constitutional to take PJ over P for the permissive CC – it is under Pennoyer framework

should the ct take PJ?

cts are less certain but most say Yes

- Green thinks no

- Assume that P sues D for battery in fed ct.   
- D answers, asserting the defense of lack of PJ and joins a counterclaim for his own damages in the brawl.   
- P argues that D has waived defense of PJ by counterclaiming. - -

Is this questions answered by FRCP 12(b): "No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion"?

No – we are now talking about a counterclaim, not a defense

- courts nevertheless hold no waiver

Same as above, except D joins a counterclaim for breach of an unrelated contract.

* Some cts say Yes there is waiver
* Others say no (it is now the trend)

NOTE: cts hold that the venue statute does not have to be satisfied for a compulsory CC

why?

- if there is venue for P’s action against D, there are strong convenience and efficiency arguments to not demand that venue be satisfied for the compulsory CC, since it is efficient to litigate the two together

- most hold that venue does not have to be satisfied for a permissive CC either

- here the argument is weaker

Counterclaims and statutes of limitations

P sues D for battery in state court within the statute of limitations

D answers, bringing a compulsory counterclaim for his damages from the same brawl

By the time of the answer, the counterclaim is outside of the statute of limitations

Is it barred?

I this answered by relation back?

*FRCP 15(c) Relation Back of Amendments.*

*(1) When an Amendment Relates Back.*

*An amendment to a pleading relates back to the date of the original pleading when:*

*(A) the law that provides the applicable statute of limitations allows relation back;*

*(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or*

...

NO – that is about P amending his complaint to add a new cause of action

This is about the D adding a counterclaim

Still – courts hold that the compulsory CC should not be barred

P sues D for battery in state court within the statute of limitations

D answers, bringing a compulsory counterclaim for defamation concerning statements P made during the brawl

The counterclaim was outside the statute of limitations for defamation (with is shorter than the statute of limitations for battery) even at the time that P serves his complaint upon D

P claims that D’s defamation action is barred by the applicable statute of limitations

Is it?

Here courts are more conflicted – some say that the P has waived the defense of statute of limitations by suing about the transaction

**Other joinder rules – joinder of claims and joinder of parties**

* Here is a way of characterizing the joinder rules (except for third party complaints and necessary parties)
* two questions –   
  1) are people already adversaries?  
  2) does the cause of action concern the same t/o of an action already being litigated?

No to 1 and 2  
forbidden  
  
Example:  
P sues D1 for breach of contract  
P joins an action against D2 for an unrelated battery

Yes to 1  
No to 2  
permitted, not required  
   
Example 13(b) :  
P sues D for battery  
D joins a counterclaim against P for breach of an unrelated contract

Yes to 1   
Yes to 2  
required  
  
13(a)  
claim preclusion

No to 1 (not already adversaries)  
Yes to 2 (overlap of t/o)  
permitted, not required

Example…  
  
**Rule 13. Counterclaim and Crossclaim**  
  
(g) Crossclaim Against a Coparty.  A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

Example:

P sues D1 and D2 for battery  
D1 joins an action against D2 for his damages in the brawl

1. Why are crossclaims permitted? Overlap of evidence
2. why merely permissive? Why not obligatory?

* don’t want to introduce fights among co-defendants or co-plaintiffs unless you have to

P sues D and D’s employer E for a battery committed by D in the course of D’s employment. May E cross-claim against D for indemnification?

yes – concerns same T/O as P’s suit against D

Must he?

No (will not be precluded if he brings it in diff suit)

If E chooses not to cross-claim for indemnification, may E nevertheless cross-claim against D for D’s pilfering office supplies?

No – not same T/O as original action against him

If E chooses to cross-claim against D for indemnification, may D join an action against E for E’s failure to pay back wages?

Yes – permissive CC

Rule 18. Joinder of Claims  
  
(a) In General.  A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

1) are people already adversaries? YES  
2) does the cause of action concern the same t/o of an action already being litigated? NO   
  
permitted, not required  
   
Example 18(a) :  
P sues D for battery  
P joins an action against D for breach of an unrelated contract

P sues D1 and D2 for damages in a battery. May D1 cross-claim against D2 for breach of an unrelated contract? NO  
  
 Assume that D1 cross-claims against D2 for his damages in the battery. May D1 now join an action against D2 for breach of an unrelated contract? YES under 18(a)

Notice that there must be PJ, SMJ and venue for each cause of action joined under 18(a)

P (NY) sues D (Conn.) in federal court in D. Wyo. for a battery that occurred in Wyo.   
D answers.  
P amends to join an action against D for another battery that occurred in Texas.  
  
PJ and V for the Texas battery? NO

JOINING PARTIES

*Rule 20. Permissive Joinder of Parties*

*(a) Persons Who May Join or Be Joined.*

*(1) Plaintiffs. Persons may join in one action as plaintiffs if:*

*(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and*

*(B) any question of law or fact common to all plaintiffs will arise in the action.*

*(2) Defendants. Persons . . . may be joined in one action as defendants if:*

*(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and*

*(B) any question of law or fact common to all defendants will arise in the action.*

1) are people already adversaries? NO  
2) does the cause of action concern the same t/o of an action already being litigated? YES  
  
permitted, not required  
   
Example 20(a):  
P sues D1 for battery  
P joins a battery action against D2 concerning the same brawl

- jointly, severally, or in the alternative…

joint liab. is where one defendant may be sued for the entire damages that the defendants caused

several is where each D may be used for the damages he caused

alternative is where the P is saying one defendant or the other did it (but not both)

* A, B and C, each driving separate cars, get into a car accident
* May both B and C sue A?
  + Yes
* Must they?
  + No
* May A sue both B and C?
  + Yes
* Must he?
  + No

permissive joinder of counterclaim or cross-claim plaintiffs or defendants

13(h)

may bring in as under 19 and 20

Rule 13. Counterclaim and Crossclaim

. . .

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

* P sues D1 and D2 for a 4-car pileup in Vermont
* May D1 cross-claim against D2 for damages D2’s car did to D1’s car?
  + Yes
* May D1 join X to that cross-claim?
  + Yes
* Must D1 join X to that cross-claim?
  + NO
* P sues D for battery concerning P’s damages from a barroom brawl
* May D counterclaim against P for his damages from a different brawl between P, D, and X?
  + Yes
* May D join X to this counterclaim?
  + Yes

**IMPLEADERS**

Rule 14. Third-Party Practice  
  
(a) When a Defending Party May Bring in a Third Party.  
    (1) Timing of the Summons and Complaint.  A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court’s leave if it files the third-party complaint more than 14 days after serving its original answer.  
    (2) Third-Party Defendant’s Claims and Defenses.  The person served with the summons and third-party complaint — the “third-party defendant”:  
        (A) must assert any defense against the third party plaintiff’s claim under Rule 12;  
        (B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);  
        (C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff’s claim; and…

**This does NOT satisfy the two-question rule**

Assume P D and X are in a brawl

P sues D for his damages

Can D bring a third party complaint against X concerning the damages that X caused D

**NO – not allowed under 14(a) even though it is the same T/O as P’s action against D**

* P, Z, and X are in a barroom brawl
* P sues Y, Z’s employer on the ground that Z’s battery was committed in the course of employment
* May Y implead Z?
  + YES - employee’s duty to indemnify employer, if employer is liable under respondiat superior
* May Y implead its insurer I?
  + Yes indemnification under insurance contract
* If P sues Z, may Z implead X?
  + ONLY IF arguing contribution between joint tortfeasors

Why allow impleaders

* some overlap of evidence
* good to have the third party defendant bound

P sues D for negligence in federal court  
D fails to implead his insurance company I  
D loses  
D then brings an action against I for indemnification under the insurance contract  
What defenses can I bring up?

* I can force D to relitigate D’s liability to P – I cannot be bound by that liability since I was not a party
* This is why it is good to implead
* NOTE: in most insurance contracts you don’t have to implead the insurance company – under the insurance contract you will be obligated to inform the company of the suit against you and allow it to undertake your defense
* BUT if the insurance company claims that the suit against you is not covered by the policy, it is good to implead them so that they can be bound by any determination that you are liable
  + Note that the third party defendant can bring up the defendant’s defenses to the plaintiff