Civil Procedure Notes (October 19, 2017)

Relation Back

* Notice to the real defendant **either** within 4(m) time period or within the statute of limitations. Must be **actual notice.** The rightful defendant must know that the action would have been brought against it, but for the wrong name (“This should be against me!”).
* This usually happens in the context businesses litigation
* although you need actual notice, it is possible that there was actual notice to an employee but it never made it up the chain to the Corp. – in that case the question will be whether the employee or officer who received the notice sufficiently important

Joinder Rules

* Use the simple Green test of asking the two questions as a guide to most situations: (1) Already adversaries? (2) Same transaction or occurrence?
  + if answer yes to one question then joinder is permitted but not required
  + if answer yes to both then it is required
* examples where answer is yes to both: Claim preclusion: not a codified rule, but a common law doctrine and compulsory counterclaim rule 13(a)
* You have to bring all causes of action against an adversary related to the transaction or occurrence you and the adversary are litigating, or you will lose them.
* You can look at these rules as a consequence of expensive litigation. The more expensive, the less generous the system has become about duplicative litigation
* Exception to waiver of counterclaim: two claims going at the same time
  + the D in the second action will bring up CC rule to get the action dismissed without prejudice so it can be brought in the first action
  + if he doesn’t then he will be thought to have acquiesced in the duplicative litigation and so can’t bring up CC rule when one of them comes to a judgment

What about a jurisdiction with no compulsory counterclaim rule?

* Hypo where P sues first in MD court (where there is no compulsory **counterclaim rule). D sues second in federal court (where there obviously is). Is the second action dismissed? Why or why not? Under the full faith and credit statute, the federal court must give full faith and credit to the MD judgment by giving it the same preclusive effect that it has in MD ct – it would not bar D’s suit against P in Md ct so it does not in fed ct**
* **Reverse situation. State court should give fed judgment the same preclusive effect that it has in fed ct (probably due to the supremacy clause). the fed judgment would bar D’s suit against P in fed ct so it does in MD ct too**

What about situations where the counterclaims has no SMJ – doesn’t have to be brought?

* The counterclaim is not compulsory if the original court cannot entertain the claim.
* P sues D in California state court for breach of a contract to pay for securities  
    
  - D fails to join an action against P for violation of federal securities law in connection with the sale (because such an action has exclusive federal SMJ)  
    
  - California has a compulsory counterclaim rule  
    
  - subsequently D brings an action in federal court in California against P for violations of federal securities law  
    
  - P claims the action is barred under California's compulsory counterclaim rule  
    
  - what result? not barred
* However, if the court can entertain the claim, then the counterclaim is compulsory.

- Officer P sues arrestee D in California state court for battery in connections with P's arrest of D  
  
- California has a compulsory counterclaim rule  
  
- must D join in his answer his federal civil rights action against P concerning P's actions in the arrest?  
  
 - if D brings the counterclaim, may P remove?

* No. See § 1441 “defendant” (not “counter-defendant”) removes

- if D brings the counterclaim, may D remove?

* No. See *Mottley*.
* Counterclaims are not a basis for removal. Otherwise, it would be too easy to get into federal court by drumming up a counterclaim under federal law.
* Officer P knows that he is likely to be sued under federal civil rights law by D, someone he arrested  
    
  he feels that a state court would be more favorable to him than a federal court  
    
  how might P use the compulsory counterclaim rule (assuming it applies in state court) to ensure a state court forum for D’s federal civil rights action?
* The officer in the hypo can race the potential civil rights claimant to the courthouse and file his battery claim first in order to force the claimant to litigate in state court with the comp CC rule
* As long as the applicable frivolousness rule is satisfied, this is acceptable.

What about when the pre-answer motion disposes of the claim?

P sues D in federal court concerning negligence   
•    D makes pre-answer motion to dismiss for failure to state a claim   
•    D’s motion is granted  
•    subsequently D sues P in federal court concerning negligence in connection with the same accident  
•    P asserts defense that D is precluded from bringing action because it was a compulsory counterclaim in the earlier suit  
•    barred?

* Counterclaims are not precluded. See compulsory counterclaim rule (13(a)).
* A pre-answer motion is not a “pleading.”

When you answer the complaint, and the action is dismissed, make sure not to waive compulsory counterclaims. Make sure that the court dismisses the counter-claims **without** prejudice.

better yet use a preanswer motion and avoid answering entirely

- 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?

notice this is a permissive CC

* In the case of a **compulsory** counterclaim, there is personal jurisdiction over the plaintiff on the counterclaim. P filed in California, so there is personal jurisdiction over him for D’s CC for damages from the NY brawl.
* However, on **permissive** counterclaims, this is somewhat of an open question. Compulsory counterclaims are easy, but permissive ones are more complicated. Green inclined to say yes jurisdiction is constitutional, but should not be allowed as a practical matter. Consider hypo where defendant on ten-cent claim counterclaims for ten billion dollars.

Personal jurisdiction and counterclaims

- assume that P sues D for battery in federal court  
- 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 - result?

Remember the uber-special appearance. See 12(b), stating no defense waived by joining it with other ones. This is an open question because 12(b) does not mention counterclaims. Majority view: there is no waiver by virtue of bringing up a counterclaim.

However, what about when defendant mentions a permissive counterclaim? Open question whether this waives the objection to personal jurisdiction.

Impleaders (aka third party complaints)

* Rule 14

P, D, and X, each driving their own cars, are in an accident  
P sues D for negligence  
D wishes to join an action against X for negligence in connection with the same accident  
OK for D to implead X?

* D happens to have a claim against X involving the same transaction or occurrence. Can he bring it? No. X has to be liable to D for all or part of what D is liable to P
  + Primary example is insurance company, which is liable to the original D for all or part that D is liable to P
  + Indemnification, such as in employer-employee relationship
  + Contribution, such as with joint tortfeasors
* Here Green’s rules don’t work – they are not adversaries but it is the same T/O so joinder should be permitted but not required – but it is forbidden

P, D, and X, each driving their own cars, are in an accident  
P sues D for negligence  
D believes that X is the one who was negligent and thus the one that is liable to P  
OK for D to implead X?

* NO X has to be responsible to D for all or part that D is liable to P in order to be brought in. It cannot be simply that X is directly liable to P.
* D can claim that X is responsible at trial, but he cannot actually bring in X as a party.
* Third-party defendants are subject to the waiver of defenses and waiver of counterclaims rules. – can also bring up D’s defenses

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?  
May Y implead its insurer I?  
If P sues Z, may Z implead X?

Employer (Y) can implead employee (Z) – when there is respondeat superior action the employer can implead the employee for indemnification. . Employer (Y) can implead insurance company (I) – indemnification under the insurance contract

Employee (Z) can implead X but only under theory that X is a joint tortfeasor – if so, Z can be liable to P for all P’s damages, but Z will have a contribution action against X

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?

* The insurance company can claim that the defendant was not negligent. And this question would have to be re-litigated because I was not a party in earlier suit
* that is why it is so important to join under R 14

- P sues D for negligence  
- D impleads X, his insurance company *-* D is found liable and it is determined that X must indemnify D under the insurance contract.  
- Subsequently X sues D for premiums that were past due at the time of D's impleader against X  
- May the suit proceed?

* This claim is probably precluded because it was compulsory CC

- X, employee of D, gets in car accident with P  
- P sues D under theory of respondeat superior  
- D impleads X for indemnification  
- May X bring an action against P for X’s damages in the car accident?

YES see R 14

14(a)(2)   
             third party defendant (D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff.  
    (3) Plaintiff’s Claims Against a Third-Party Defendant.  The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff.

- Must he? NO  
- If X does not bring an action against P concerning the car accident, may X bring an action against P for P’s breach of a contract to mow X’s lawn? NO – not same T/O as P’s action against D

Intersection between joinder and PJ and venue

causes of actions joined under 18(a) by plaintiffs against defendants  
each must satisfy venue statute and there must be PJ over the defendants for each

joinder of defendants under R 20  
there must be PJ over each defendant, the venue statute must be satisfied with respect to all defendants

compulsory counterclaims by defendants against plaintiffs  
PJ is considered satisfied (or waived)  
venue statute need not be satisfied

Permissive counterclaims by defendants against plaintiffs  
majority view is PJ is considered satisfied (or waived)  
 majority view is venue statute need not be satisfied

third party complaints brought by defendants  
there must be PJ over the third party defendant  
venue statute need not be satisfied

Necessary Parties

easy to think someone is a necessary party when he isn’t

P, D, and X are in an accident in which D runs into P’s and X’s car   
P sues D for negligence  
Is X a necessary party on the ground that a determination of D’s negligence in X’s absence will impair X’s ability to protect his interest?

* NO - Additional plaintiff is not a necessary party because he will not be bound by the finding in the first lawsuit. Additional plaintiff can have his own day in court. Cannot be bound if you were not a party.
* e.g. P, D, and X are in an accident in which D runs into P’s and X’s car   
  P sues D for negligence  
  D is determined to be not negligent  
  X then sues D for negligence  
  can D preclude X from relitigating the issue of D’s negligence? NO
* This might lead to inconsistent determinations of D’s negligence, but that’s just how it is.
* Inconsistency is fine as long as there are not inconsistent **obligations**.

COMPARE

P, D, and X are in an accident in which all three cars run into one another  
P sues D for negligence  
D is found not liable on the ground the P was contributorily negligent  
P then sues X for negligence  
Can X preclude P from relitigating the issue of P’s contributory negligence?

YES – P was a party in the earlier suit

* the plaintiff who was found to be contributorily negligent in a case against one party cannot re-litigate the case against another potential defendant (for negligence).

A, B and C are in a brawl  
A sues B for battery (but C really did it)  
Is C a necessary party because he is essential for B’s defense?

NO – can simply offer defense that C did it – don’t need to make him a party to do that

* It is more likely that there will be necessary parties in cases where injunctive relief is requested.
* So when is there a necessary party? (1) If court cannot provide complete relief.
* - you are suing a corporation to have certain dividends declared in your name, but the majority of a board of directors has to sign on for that to happen  
  - are the members of the board necessary parties?
* YES - Relief is not possible if other parties are not brought into the case.
* - water flows from D’s property down to P’s, flooding it  
  - P sues D to erect a dam to protect P’s property  
  - if the dam is erected X’s property, upstream from D’s will be flooded  
  - Is X a necessary party?

YES

19(a)(1)(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may:  
            (i) as a practical matter impair or impede the person’s ability to protect the interest; or  
            (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

* Often, the problem can be framed in terms of B(i) or B(ii). As a practical matter, you can look at the problem under either section.

could say that X will not be able to protect his interest because the injunction to build the dam will already have been litigated

or could say that if X is able to relitigate and win, then D could be subject to inconsistent obligations – build dam and tear it down

Glueck sues Company to have Company reissue shares currently held by Haas in Glueck and Haas’s name  
Haas (who thinks shares are all his) is a necessary party  
why?

* There can be a necessary party when ownership is disputed to avoid a party’s having to pay out twice on the same claim.
* assume Company loses to Glueck and gives him ½ of shares
* here if Haas is not made a party, he could sue Company and get all of the shares
* concerning ½ of shares Company will have paid out twice