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
  + Side note: what law determines this? You are not responsible for this – for your purposes we can say that CA law does, because under the full faith and credit statute the federal court must give the CA judgment the same effect in federal court that it would have in CA ct
    - So the federal securities law action can be brought in federal court because CA would make an exception to its compulsory counterclaim rule when the counterclaim cannot be brought due to subject matter jurisdiction problems
* However, if the court can entertain the federal action, 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?

- yes federal civil rights action have concurrent SMJ – they can be brought in state court  
  
 - 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 state court in order to force the claimant to litigate the federal civil rights action there – provided it is in a state 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?

* No - See compulsory counterclaim rule (13(a)).
* A pre-answer motion is not a “pleading.” No obligation to assert compulsory counterclaims

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 there is PJ as a constitutional matter, but it should not be asserted. Consider hypo where defendant on ten-cent claim counterclaims for ten billion dollars.
* But the majority view is that the plaintiff cannot challenge the permissive CC on PJ grounds

- 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 12(b), stating no defense waived by joining it with other defenses. This is an open question because 12(b) does not mention counterclaims. But it has been accepted that there is no waiver of the defense of PJ by virtue of bringing up a compulsory counterclaim.

However, what about when defendant introduces a permissive counterclaim? Open question whether this waives the defense of personal jurisdiction to the plaintiff’s claim

* Majority view appears to be he does – Green thinks no
* Impleaders
  + **Big thing to remember: they *don’t* do what you think they should** 
    - **which is to allow you to bring any action against new party concerning same transaction/occurrence for which you’re being sued**
  + What you have to say instead
    - Third party defendant is liable to you for all or some of what you are liable to the person suing you
    - Aka “derivative liability”
      * e.g. if I am liable, I and the third party D are joint tortfeasors , therefore, 3rd Party D is liable to me for all or part of what I am liable to P
      * or - employer brings indemnification against employee when employer is sued under respondeat superior
  + This is what Rule 14 is about
* 14(a)(2)
  + (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 cross claim 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…

3rd party D can assert the defenses of the defendant who impleaded him

Thus makes sense

Eg the insured may do a bad job defending because he knows that if he loses he will be covered by insurance

So the insurance company can bring up his defenses

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.

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) – action 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

- 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