

# Civil Procedure

Eric M. Fink  
Elon Law School

## Joinder

### 1 Basic Joinder

#### 1.1 Permissive Joinder of Claims

##### Rule 18

- Broad scope
  - Any claims, whether related or unrelated
    - But must satisfy subject-matter jurisdiction for each claim
      - Independent SMJ, or
      - Supplemental Jurisdiction, if claims are related
  - No distinction between “compulsory” and “permissive” claims
    - But claim preclusion will apply to claims arising out of the same t/o

#### 1.2 Permissive Joinder of Parties

##### Rule 20

- Permissive
  - Rule 20 defines when multiple plaintiffs and/or defendants *may be joined* in a single action
  - Optional, not mandatory
    - Rule 19 requires joinder in certain circumstances
- Plaintiffs
  - Multiple plaintiffs seek relief arising out of same (series of) transaction(s) or occurrence(s), and
  - Common question of law or fact
- Defendants
  - Relief sought against multiple defendants arising out of same (series of) transaction(s) or occurrence(s), and
  - Common question of law or fact
- Same Transaction or Occurrence
  - “Logical relationship” standard. *Moore v. NY Cotton Exchange* (US 1926) (interpreting pre-FRCPP compulsory counterclaim rule)

- “Absolute identity of all events is unnecessary”. *Mosley v. General Motors* (8th Cir. 1974)
- “... the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all issues be resolved in one lawsuit.” *Harris v. Steinem* (2d Cir. 1978) (interpreting Rule 13(a))
- Common Question of Law or Fact
  - Does not require identical injuries. *Mosley v. General Motors*.
- Remedy for Improper Joinder
  - Severance: Rule 21
  - See also Rule 42(b): Separate trials
    - Can be used where parties are properly joined under Rule 20, and cases are suitable for consolidated treatment pre-trial, but where there might be problems of prejudice or jury confusion if they are tried together.
  - Rule 42(a) permits consolidation for trial of separate but related suits

## Mosley v. General Motors Corp. (8th Cir. 1974)

- Facts & Procedural History
  - 10 plaintiffs sue GM & UAW for employment discrimination (Title VII & § 1981)
    - 8 sue GM Chevrolet Division; 2 sue GM Fisher Body division
  - All assert same legal theory and allege similar facts
  - District court severed on motion by GM
- Holding & Analysis
  - Joinder was proper, and trial court erred in severing actions, where plaintiffs asserted transactionally-related claims sharing common issues of law and fact
  - Logical relationship standard is satisfied where plaintiffs allege defendant(s) acted as part of a company-wide system or policy
  - Fact that plaintiffs worked in different corporate sub-divisions does not negate commonality
- Questions:
  - Note difference between “transaction & occurrence” requirement for claim v. party joinder
    - Rule 20(a): same t/o, or series thereof
    - Rule 13(a) & (g): same t/o (but not “series”)
      - But see *Moore v. NY Cotton Exchange* (US 1926) (“‘Transaction’ is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.”)
  - Practical lawyering issue
    - Why did plaintiffs want to join cases?
    - Why did GM want to sever cases?

## 1.3 Counterclaims

### 1.3.1 Compulsory Counterclaims

#### Rule 13(a)

- Standard

- Claim is ripe at time of service of opposing party's claim
- Arises from same transaction or occurrence
- Does not require joinder of additional party over whom court lacks jurisdiction
- Consequences
  - Preclusion
    - Defendant may not assert omitted compulsory counterclaim in a subsequent action
      - Not res judicata, because defendant who asserts no counterclaim is not a "claimant". But effect is the same.
  - Subject Matter Jurisdiction
    - Compulsory counterclaim will always satisfy supplemental jurisdiction
      - If same t/o, then CNOF
  - Relation back
    - Compulsory counterclaim may relate back to date of filing of opposing claim (because same t/o)

### 1.3.2 Permissive Counterclaims

#### Rule 13(b)

- Scope
  - All other claims by defendant against plaintiff
    - i.e. not arising from same t/o
  - Defendant does not need a compulsory (related) counterclaim to assert a permissive (unrelated) counterclaim
    - Cf. Crossclaims
- Subject Matter Jurisdiction
  - Permissive counterclaim needs independent basis for SMJ
  - No supplemental jurisdiction, because no CNOF

#### Pace v. Timmerman's Rance & Saddle Shop (7th Cir. 2015)

- Facts & Procedural History
  - Pace sued Timmerman's (her former employer) and its employees for false arrest, intentional infliction of emotional distress, and related tort claims
  - Timmerman's had previously sued Pace for conversion and other claims based on her alleged theft of merchandise and cash.
  - District court dismissed Pace's claims, concluding that they should have been asserted as compulsory counterclaims in the company's suit.
- Issue
  - Whether abuse of process claim against Timmerman's was a compulsory counterclaim that should have been asserted in the company's suit?
  - Whether claims against the individual employees were compulsory counterclaims that should have been asserted in the company's suit?
- Holding & Analysis
  - Pace's claim against Timmerman's for abuse of process was a compulsory counterclaim, because it arose from the same events and was ripe at the time Pace answered Timmerman's suit

- Pace's claims against the individual employees were not compulsory counterclaims, because Rule 13(a) does not apply to counterclaims that require joinder of additional parties.

### 1.3.3 Problems

#### Problem 1

Dana is employed by Crimson Permanent Assurance Co. as a sales agent. Under the terms of her employment contract, she earns a commission on all insurance policy sales she generates. The contract states that, in the event Dana's employment terminates, she is entitled to collect earned but unpaid commissions, unless she was fired for cause. The contract also contains a non-compete clause, providing that if Dana voluntarily quits her job, she may not go to work for any competing insurance company for one year. Having become dissatisfied with her job at Crimson, Dana quits and goes to work for Scarlet Everlasting Assurance Co., one of Crimson's competitors. Crimson sues Dana and Scarlet in federal court (assume diversity jurisdiction is satisfied), asserting the following claims:

- Breach of contract, against Dana, based on the non-compete clause.
- Tortious interference with contract, against Scarlet, for improperly inducing Dana to breach her employment contract with Crimson.

*May Crimson join Dana & Scarlet as co-defendants in the same action?*

- Yes. Joinder is proper under Rule 20(a)(2). Both claims arise out of the same T/O (Dana going to work for Scarlet), and there will be common questions of fact and law (the circumstances of Dana changing jobs; the terms and enforceability of Dana's non-compete agreement).

*Which of these counterclaims would be compulsory under Rule 13(a)?*

- A claim by Dana for breach of contract, alleging that Crimson failed to pay commissions, as provided under her employment contract, on sales she generated before she quit.
  - Probably not. Crimson's claim against Dana arises out of her quitting and going to work for Scarlet. Dana's counterclaim arises from work she performed while employed at Crimson. A court will most likely regard these as distinct transactions/occurrences.
    - Might argue that Crimson's non-compete claim against Dana and Dana's claim for unpaid commissions both arise from the same employment relation and contract. But even under a broad "logical relationship" view, that's probably a stretch.
- A claim by Dana for defamation, alleging that Crimson falsely told its customers that Dana was fired for embezzlement.
  - Possibly. The best argument would be that Crimson made the defamatory statements in retaliation for Dana's quitting and going to work for a competitor, and thus arises from the same occurrence as Crimson's non-compete claim.
- A claim by Scarlet for commercial disparagement, alleging that Crimson falsely told customers that Scarlet is really a Ponzi scheme.
  - Possibly. It might depend on the timing and circumstances of Crimson's disparaging statements—i.e. whether Crimson appears to have acted in response to Scarlet's hiring Dana, or whether the two events were unrelated.

## Problem 2

Debtor owes \$85,000 to Lender. When Debtor falls significantly behind in the loan payments, Lender assigns the debt to Collection Agency. After making unsuccessful attempts to induce Debtor to pay up, Collection Agency sues Debtor to collect the unpaid debt.

Debtor contends that Collection Agency's tactics violated the Fair Debt Collection Practices Act (FDCPA), a federal statute. The FDCPA permits a Debtor to sue in federal court and recover damages for a debt collector's unlawful practices. But a successful FDCPA claim does not absolve the debtor of liability for the underlying debt.

Is Debtor's FDCPA claim against Collection Agency a compulsory counterclaim?

- Collection Agency's argument: Both claims arise from the same underlying transaction, i.e. the debt.
- Debtor's argument: The two claims are not logically related. Collection Agency's claim arises out of the underlying debt, and depends on the validity of that debt. Debtor's FDCPA claim arises out of the defendant's collection efforts, and does not depend on the validity of the debt.
  - Most courts have accepted this view

## 1.4 Crossclaims

### Rule 13(g)

- Scope
  - Same transaction or occurrence as original claim, or
  - Related to any property that is the subject of original claim
  - Includes claims for contribution or indemnity among co-defendants
- Crossclaims are permissive
  - Claim preclusion won't apply if there is no crossclaim
  - But if party asserts a crossclaim, claim preclusion will apply to additional claims arising from the same t/o
- Unrelated claims between co-parties
  - Rule 13(g) + Rule 18
  - Must have a valid Rule 13(g) crossclaim (related) before using Rule 18 to assert additional (unrelated) claim(s)
    - › Cf. Counterclaims: Defendant may assert a permissive (unrelated) counterclaim, even without a compulsory (related) counterclaim.

## 1.5 Third-Party Claims (Impleader)

### Rule 14

- 14(a)(1): Third-Party Claims

- Third-party defendant is or may be liable to defendant for all or part of plaintiff's claim(s) against defendant
  - Must obtain leave of court if third-party complaint is to be served more than 10 days after original answer
- 14(a)(2): Claims & Defenses by Third-Party Defendant
  - Must assert
    - Any compulsory counterclaims under Rule 13(a)
  - May assert
    - Any permissive counterclaims under Rule 13(b)
    - Any crossclaims under Rule 13(g)
    - Claims against plaintiff
      - Only if arising out of same transaction or occurrence that is the subject matter of plaintiff's underlying claim against third-party plaintiff
      - Must plaintiff then assert compulsory counterclaims?
        - See §1367(b): limits on supplemental jurisdiction for claims by plaintiff against Rule 14 third-party defendant
- 14(a)(3): Plaintiff's Claims Against Third-Party Defendant
  - May assert any claim arising out of transaction or occurrence that is the subject matter of the plaintiff's underlying claim against the third-party plaintiff
    - Third-party defendant must then assert:
      - Any compulsory counterclaim under Rule 13(a)
    - Third-party defendant may assert:
      - Any permissive counterclaim against the plaintiff
      - Any crossclaim under Rule 13(g) (i.e. against co-defendant(s) on plaintiff's claim)

### Erkins v. Case Power & Equip. Co. (D.N.J. 1995)

- Facts & Procedural History
  - Erkins died while operating a backhoe
  - Estate sued manufacturer of backhoe (Case) in strict liability for failure to warn
  - Case claimed right of contribution from contractors responsible for the job (Fitzpatrick & ECRACOM), alleging accident resulted from their failure to conduct safety meetings
  - Plaintiff did not sue contractors
    - Why not?
      - Possibly because of workers compensation bar (Erkins worked for subcontractor of Fitzpatrick and ERACOM)
  - Case sought to implead them as 3rd Party defendants
- Issue
  - Whether Rule 14 allows defendant to implead joint tortfeasors,
    - Turns on whether NJ law provides a right of contribution among joint tortfeasors in this case
- Analysis
  - NJ law provides right of recovery against joint tortfeasors
    - Defines "joint tortfeasors" as "two or more persons jointly or severally liable in tort for the same injury to person or property"
    - Applies where
      - Parties act together in causing injury, or

- Parties act independently of one another, but their actions combine to cause a single injury
- Doesn't matter whether theory of liability is different (e.g. strict liability v. negligence)

## Lehman v. Revolution Portfolio LLC (1st Cir. 1999)

Illustrates interaction of Rules 14 & 18

- Facts & Procedural History
  - Trust borrows \$2.8 million from bank
  - Lehman & Roffman, co-beneficiaries of trust, each guarantee loan
  - Trust defaults
  - Bank forecloses on Lehman's property
  - Lehman sues Bank in state court to stop sale of his property
    - claimed Roffman had perpetrated a fraud, and Bank failed to exercise due diligence
  - Bank fails
    - FDIC, as receiver, substituted as defendant in place of Bank
      - Removes to federal court
      - Asserts counterclaim against Lehman for outstanding loan balance
      - Asserts third-party claims against Roffman
      - Seeks indemnification & contribution on Lehman's claims
      - Also seeks recovery of outstanding loan balance from Roffman as guarantor
  - Action stayed when Lehman files for bankruptcy
    - Court eventually allows FDIC to proceed with third-party claims against Roffman
    - FDIC moves to substitute Revolution as defendant
      - FDIC had assigned its interests to Revolution
- Issue
  - Was joinder of Roffman as third-party defendant proper
- Analysis
  - Third-party claim against Roffman for contribution & indemnification is proper
    - Roffman & Bank were allegedly joint tortfeasors on Lehman's claim arising from Roffman's fraud & Bank's negligence
    - Even though Lehman only sought to stop the sale of his property, and not money damages, he might have been awarded damages, so FDIC could implead against that possibility
    - Rule 18(a) then permitted FDIC to assert any other claim it had against Roffman (provided there is jurisdiction)

## 2 Supplemental Jurisdiction

### 2.1 Pendant & Ancillary Jurisdiction

#### United Mine Workers v. Gibbs (US 1966)

- Standard for exercise of pendant jurisdiction:
  - Claims for part of same Constitutional case

- “Common nucleus of operative fact”
- Exercise of pendant jurisdiction is within court’s discretion
  - “[C]onsiderations of judicial economy, convenience, and fairness to litigants”
  - Factors favoring dismissal of pendant claims:
    - Federal claims, though not insubstantial, are dismissed before trial
    - State-law issues predominate
      - Conversely, where state-law issues are closely tied to questions of federal policy, that will favor exercise of pendant jurisdiction
    - Likelihood of jury confusion
  - List of factors is not exclusive
- Dismissal is normally without prejudice, allowing claim(s) to be refiled in state court

## 2.2 Supplemental Jurisdiction Under § 1367

### 2.2.1 Requirements

#### §1367(a)

- Codifies the Gibbs test (“same case or controversy”)
- Addresses the problem identified in Aldinger and Finley:
  - Permits exercise of supplemental jurisdiction, as long as there is some independent basis for original jurisdiction over the case
- Treats “pendant” and “ancillary” jurisdiction the same
  - Permits supplemental jurisdiction over claims involving joinder of additional parties

### 2.2.2 Limitations

#### §1367(b)

- Triggered where diversity is sole basis for court’s original jurisdiction
- Precludes exercise of supplemental jurisdiction in certain scenarios, where it would be inconsistent with diversity jurisdiction:
  - Claims by plaintiff against persons joined under Rule 13, 19, 20, 24
  - Claims by persons joined as plaintiffs under Rule 19 or intervening as plaintiffs under Rule 24
- Preserves the outcome in Owen Equipment
  - Would not allow claim by plaintiff (Kroger) against non-diverse third-party defendant (Owen Equip.) joined under Rule 14



### 2.2.3 Discretion

#### §1367(c)

- Codifies factors identified in Gibbs

#### Guaranteed Systems, Inc. v. American Nat. Can Co. (MDNC 1994)

- Procedural history:
  - Guaranteed (NC) sued National Can (DE) in NC state court for breach of contract (failure to pay for construction work)
  - National Can removed to federal court on basis of diversity
  - National Can then asserted counterclaim against Guaranteed for negligence in performance of construction job
  - Guaranteed sought to implead its sub-contractor, HydroVac. Svcs. (NC), under Rule 14(b)
- Issue
  - Whether plaintiff may join a non-diverse third-party defendant in response to defendant's counterclaim
    - Turns on subject-matter jurisdiction
      - No diversity between Guaranteed & HydroVac, so no jurisdiction under §1332
      - Guaranteed relies on §1367
        - Indemnification & contribution claim against 3rd-party defendant satisfies §1367(a)
- Holding & Analysis
  - §1367(b) precludes the plaintiff from joining a non-diverse third-party defendant in response to defendant's counterclaim
  - Restriction under §1367(b) explicitly applies to "claims by plaintiffs against persons made parties under Rule 14"
  - Court explains that it might be reasonable to treat Guaranteed as a "defendant" with respect to the counterclaim, for purposes of supplemental jurisdiction
    - Allowing plaintiff to do so in this posture would not run afoul of the policy concern behind §1367 (i.e. that plaintiffs might use supplemental jurisdiction to assert claims against non-diverse defendants, evading the complete diversity requirement under §1332).
      - Guaranteed sued in state court, and the case got to federal court on removal.
      - Guaranteed had no reason to assert any claim against HydroVac until National Can asserted its counterclaim
    - Disallowing joinder leaves Guaranteed in an unfair position, and is counter to efficiency and judicial economy
    - Court cites *Owen Equip. v. Kroger* (US 1978) in support of that analysis
  - But "plain terms of the statute" preclude that outcome.
- Questions
  - Is the court right in construing § 1367 to preclude joinder of the third-party defendant here?
  - It's merely fortuitous that Guaranteed brought its claim first; had National Can sued first, there's no question that Guaranteed could have impleaded HydroVac. Should this accident of timing really matter under § 1367(b)?
  - Does it matter that the counterclaim here is compulsory, rather than permissive?

- › i.e. if the counterclaim were merely permissive, might the court be on firmer ground in treating the original plaintiff as a “defendant” for purposes of § 1367(b)

## 2.3 Pendant Parties

### 2.3.1 Pre-§1367 cases

#### Aldinger v. Howard (US 1976)

- Facts
  - Aldinger was fired from her job in the Spokane County treasurer’s office.
  - She sued Howard, her supervisor, under 42 USC §1983, contending that she was fired in violation of her federal constitutional rights.
  - She also asserted a claim against the County alleging vicarious liability for Howard’s tortious conduct. She relied on state statute waiving county’s sovereign immunity.
    - › N.B. Prior to Aldinger’s suit, the Supreme Court had held that local government agencies could not be sued under §1983. After Aldinger, the Court reversed that interpretation.
- Holding & Analysis:
  - Supreme Court held that federal court lacked authority to exercise “pendant party” jurisdiction in this case
    - › A federal court must have some statutory basis for jurisdiction over claims against each party to a suit
    - › Because §1983 (as then interpreted) did not permit suit against County, that could not provide basis for jurisdiction
    - › No diversity jurisdiction between Aldinger (Washington State citizen) and County (unit of Washington State).
- §1367 changes the outcome
  - §1367(a) permits exercise of supplemental jurisdiction over claims against additional parties, if part of the same case or controversy
    - › Claim against County arises from same facts as claim against Howard
  - §1367(b) restricts supplemental jurisdiction only where diversity is the sole basis for original jurisdiction
    - › Here, the court had federal question jurisdiction over the §1983 claim against Howard

#### Owen Equipment & Erection Co. v. Kroger (1978)

- Facts:
  - Kroger (Iowa) sued Omaha Public Power District (Nebraska) for wrongful death of her husband
  - Power District impleaded Owen Equipment (Iowa) for indemnification
  - Kroger then asserted a wrongful death claim against Owen
- Holding & Analysis:
  - No supplemental jurisdiction over state-law claim against non-diverse defendant, where sole basis of federal SMJ was diversity
    - › Permitting supplemental jurisdiction in this situation would undermine the complete diversity requirement

- Result is the same under §1367
  - §1367(b) applies to claims by a plaintiff against a Rule 14 third-party defendant
  - Where plaintiff's claim against the third-party defendant would destroy complete diversity, §1367(b) prohibits supplemental jurisdiction

### Finley v. U.S. (US 1989)

- Facts:
  - Finley sued the Federal Aviation Admin., the City of San Diego, and San Diego Gas & Electric Co. for the wrongful death of her husband
  - Claim against FAA was based on the Federal Tort Claims Act
  - Claims against City and G&E Co. were based on state law.
    - No diversity jurisdiction, because all were citizens of California
- Holding & Analysis:
  - No supplemental jurisdiction over state-law claims against non-diverse defendants, where FTCA only granted jurisdiction over suits against the US
- §1367 changes the outcome
  - Same analysis as Aldinger

### 2.3.2 Post-§1367 case

#### Ortega v. Star-Kist Foods, Inc. (Exxon Mobil Corp. v. Allapattah Svcs.) (US 2005)

- Facts & Procedural History
  - Beatriz Blanco-Ortega suffered a severe injury when she cut her finger on a can of Star-Kist tuna
  - Her parents, in their capacity as her guardians, brought a suit against Star-Kist for her injuries
    - Sought damages exceeding \$75,000
  - The parents also asserted their own claims for emotional distress
    - Sought damages less than \$75,000
- Issue
  - Whether the court could exercise supplemental jurisdiction over the parent's claims, where there was complete diversity between the plaintiffs (Puerto Rico) and the defendants (not Puerto Rico), but where parents' claims did not independently satisfy the statutory amount in controversy requirement?
- Holding & Analysis
  - §1367 permits exercise of supplemental jurisdiction over claims by additional plaintiffs joined under Rule 20, without regard to the amount in controversy requirement under §1332
  - Supplemental jurisdiction under §1367(a) requires some independent basis for original jurisdiction over at least one claim, as a prerequisite for exercise of supplemental jurisdiction over additional factually-related claims
    - In a diversity suit, where at least one plaintiff meets the amount in controversy requirement for diversity jurisdiction, the court has original jurisdiction over the case
      - Where joinder of additional plaintiff under Rule 20 destroys complete diversity, that deprives the court of original jurisdiction under §1332

- › Lack of complete diversity “contaminates” every claim by every party.
- ▶ But, where joinder of additional plaintiff(s) does not destroy complete diversity, failure of additional plaintiff(s) to meet the amount in controversy does not deprive the court of original jurisdiction
  - › Doesn’t “contaminate” claim of primary plaintiff
- §1367(b) does not apply to claims by plaintiffs joined under Rule 20
  - ▶ But note that §1367(b) does apply to claims by a plaintiff against defendants joined under Rule 20.