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FEDERAL PROCEDURE - COUNTERCLAIM TO A COUNTERCLAIM UNDER THE FEDERAL RULES

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COMMENTS

FEDERAL PROCEDURE — COUNTERCLAIM TO A COUNTERCLAIM UNDER THE FEDERAL RULES—With one exception the cases decided in the federal courts under the Federal Rules of Civil Procedure have held that the plaintiff is free to plead a counterclaim in the reply, although in every instance the counterclaim in the reply under consideration was one related to the subject matter of the counterclaim

pleaded in the defendant's answer.[1] The court in one of the earlier cases, *Warren v. Indian Refining Co.*, stated:

> "If the language used in this rule means what it says, a counterclaim wholly unrelated to the subject matter of a suit may be set up. The question arises, who may counterclaim? Defendant says, only the defendant. Plaintiff says, either plaintiff or defendant. That is, it is plaintiff's contention that a plaintiff may file a counterclaim to a counterclaim. This seems to be exactly what Rule 13(b) permits. It is worthy of note and would seem to be quite significant that Rule 13 does not use the term 'plaintiff' or 'defendant,' or 'complaint' or 'answer,' but speaks of 'pleading,' 'a pleader' and 'any opposing party'. . . .
>
> "It would seem that the permissive counterclaim paragraph of Rule 13 would apply as well to a counterclaim filed by plaintiff . . . as to the allowance of the wholly unrelated counterclaim permitted by the defendant."[2]

In *Hartford-Empire Co. v. Obear-Nester Glass Co.*,[3] the plaintiff filed a reply containing a counterclaim and, although the plaintiff's counterclaim related to the subject matter of the counterclaim pleaded in the answer, the defendant felt a further pleading to be desirable and filed an amended counterclaim. The plaintiff moved to strike out parts of the second amended and supplemental counterclaim. The motion was overruled, the court holding:

> "Federal Rules of Civil Procedure, rule 7 . . . is plainly to the effect that an answer to a counterclaim is the last permitted pleading. When the plaintiff filed its reply to defendant's original counterclaim defendant found itself in a quandary as to how to meet the fifth and sixth defenses set up in the counterclaim in view of Rule 7. We do not think defendant is subject to criticism for filing an amended counterclaim, informing the court and the plaintiff of its position on the 'fifth' and 'sixth' defense rather than hazard the chance that the court would permit introduction of evidence to meet the issue without a pleading. . . ."[4]

[1] The cases decided include: Downey v. Palmer, (D.C. N.Y. 1939) 31 F. Supp. 83; Warren v. Indian Refining Co., (D.C. Ind. 1939) 30 F. Supp. 281; Kuenzel v. Universal Carloading & Distributing Co., (D.C. Pa. 1939) 29 F. Supp. 407; Bethlehem Fabricators, Inc. v. John Bowen Co., (D.C. Mass. 1940) 1 F.R.D. 274; Hartford-Empire Co. v. Obear-Nester Glass Co., (D.C. Mo. 1947) 7 F.R.D. 564; Cornell v. Chase Brass & Copper Co., (D.C. N.Y. 1943) 48 F. Supp. 979; Maison de Marchands Industrielle Ltee-Industrial Merchants, Ltd. v. New York Silicate Book Slate Co., (D.C. N.Y. 1952) 13 F.R.D. 15.

[2] (D.C. Ind. 1939) 30 F. Supp. 281 at 282.

[3] (D.C. Mo. 1947) 7 F.R.D. 564.

[4] Id. at 565, 566.

In an oblique way, this district court did take cognizance of the fact that under some circumstances, at least, the defendant would wish to reply to the counterclaim contained in the plaintiff's reply. In the other cases, however, the main emphasis has been on the need for settling all matters possible within the confines of a single action. The courts have ignored the procedural chaos which could develop if "all matters that you start litigating"[5] were included in one action without suitable provision for an ascertainment of the precise nature of these issues. Claims and counterclaims and cross-claims could be hurled at opposing parties, with the court's sole control lying in its ability to order separate trials.[6]

In the decade and a half since the adoption of the Federal Rules of Civil Procedure, a number of states have taken over their provisions, either in whole or in part. Arizona, Colorado, Delaware, Minnesota, Missouri, Nevada, New Jersey, New Mexico, and Utah[7] have rules or statutes with substantially the same provisions as federal rules 7(a), 13(a) and (b), and 18(a). These states present the similar situation which allows free joinder of claims and counterclaims while limiting the number of pleadings, thus preventing in some cases a precise delimitation of the issues.

Two other states, Kentucky and Texas, while influenced by the federal rules, have apparently attempted to solve the problem posed by the above-mentioned federal provisions. Texas rule 51(a) parallels federal rule 18(a) in allowing the plaintiff to plead a counterclaim in the reply, which may be either permissive or compulsory,[8] but there is no limit on the number of pleadings which may be filed by either the plaintiff or the defendant.[9] The rules allow the filing of such supplementary petitions and answers "as may be necessary in the course of pleading by the parties to the suit." Thus under the Texas

[5] Bethlehem Fabricators, Inc. v. John Bowen Co., (D.C. Mass. 1940) 1 F.R.D. 274 at 275, quoting PROCEEDINGS OF THE A.B.A. INSTITUTE ON THE FEDERAL RULES 247 (1938).

[6] Rule 42(b), Federal Rules of Civil Procedure, 28 U.S.C. (1946).

[7] Ariz. Code (1939) §§21-401, 21-437, 21-438, 21-507; Colo. Stat. Ann. (1935, 1941 Cum. Supp.), Rules of Civil Procedure, rules 7(a), 13(a) and (b), 18(a); Del. Code Ann. (1953), Superior Court Rules, rules 7(a), 13(a) and (b), 18(a), Chancery Court Rules, rules 7(a), 13(a) and (b), 18(a); Minn. Rules of Civil Procedure, rules 7.01, 13.01, 13.02, 18.01 (1952); Mo. Rev. Stat. (1949) §§509.010, 509.420, 509.060, Supreme Court Rules, rule 3:16; Nev. Rules of Civil Procedure, rules 7(a), 13(a) and (b), 18(a) (1953); N.J. Rules, rules 4:7-1, 4:13-1, 4:31-1 (1953); N.M. Stat. (1941), Rules of Civil Procedure, rules 7(a), 13(a) and (b), 18(a); Utah Code Ann. (1953), Rules of Civil Procedure, rules 7(a), (13(a) and (b), 18(a).

[8] Tex. Rules of Civil Procedure, rule 97(a) and (b) (1943).

[9] Id., rules 78, 83.

procedure, while there may be free joinder of outstanding issues, pleadings may be continued until the parties have clearly defined the areas in controversy.

The drafters of the Kentucky rules, which became effective on July 1, 1953, noted that the federal rules allowed a counterclaim to be included in the reply and apparently were reluctant to adopt it in full for the Kentucky courts. Kentucky rule 7.01 permits the usual number of pleadings, including the reply. Rule 13.01 deals with the compulsory counterclaim, using the same phrasing as federal rule 13(a). Kentucky rule 13.02, dealing with permissive counterclaim, states:

> "A pleading, other than a reply, may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."[10]

In rule 18.01 it is provided that the plaintiff in his complaint and the defendant in his answer "setting forth a counterclaim may join either as independent or as alternative claims as many claims either legal or equitable or both as he may have against an opposing party."[11] The reply is thus excluded from the class of pleadings in which claims may be joined.

But under these Kentucky rules, is there any reason why the plaintiff could not plead a single compulsory counterclaim in his reply and actually might be considered as required to do so? It is not forbidden in the section covering compulsory counterclaims. Moreover, rule 8.04 states: "Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading. . . ."[12] Rule 12.08 states: "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply. . . ."[13]

It is clear that the drafters of the Kentucky rules provided against the injection into the action of unrelated counterclaims pleaded in the reply. A related counterclaim, however, may still be included in the reply, a pleading to which no responsive pleading is permitted, and where the defendant's only protection lies in the power of amend-

[10] Ky. Prac. (Baldwin, 1953), Rules of Civil Procedure, rule 13.02.
[11] Id., rule 18.01.
[12] Id., rule 8.04.
[13] Id., rule 12.08.

ment[14] and the provision for implied denial of the averments in the reply.[15] Essentially, the Kentucky Rules of Civil Procedure fail to provide for a precise formulation of the areas in controversy between the opposing parties over related counterclaims, although they do prevent the inclusion in the reply of those counterclaims not arising from the subject matter of the defendant's counterclaim and prohibit the joining in the reply of related counterclaims.

Pennsylvania, a state outside the group adopting the federal rules in whole or in part, has a recent provision in its rules of civil procedure which seems to provide for the settling in one action of all outstanding controversies between opposing parties and at the same time to permit a precise delimitation of the areas in controversy. In the list of allowable pleadings appears the complaint, to be followed "by an answer thereto, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply to a counterclaim contains new matter. . . ."[16] Under this practice the plaintiff has an opportunity to answer the defendant's counterclaim but the defendant may file a fourth pleading, termed here a "counter-reply" in which the new issues raised in the reply may be answered.

Thus the court rules of two states specifically permit the use of a fourth pleading.[17] In two recent state cases, one in Montana and one in New York, the defendant attempted to use a fourth pleading. The Montana court refused to permit the use of a "sur-reply" under the code pleading procedure prevailing in that state,[18] but the New York court recognized it as a valid pleading.[19]

In reaching its decision the New York court considered that section 274 of the Civil Practice Act, which states, "Where an answer contains new matter constituting a defense by way of avoidance, the court, in its discretion, on the defendant's application, may direct the plaintiff to reply to the new matter . . . "[20] should be construed to include within the term "answer" a "reply alleging a defense by way of avoidance to a cause of action asserted in a counterclaim."[21] The court concluded that a fourth pleading properly could be ordered by

[14] Id., rule 15.01.
[15] Id., rule 8.01.
[16] Pa. Stat. Ann. (Purdon, 1951) tit. 12, appx., Rules of Civil Procedure, rule 1017.
[17] It must be recalled that at common law the pleading practice permitted a fourth pleading. Alabama, for example, still employs the sur-rejoinder.
[18] Sherburne Mercantile Co. v. Bonds, 115 Mont. 464, 145 P. (2d) 827 (1944).
[19] Rosner v. Globe Valve Corp., 276 App. Div. 462, 95 N.Y.S. (2d) 531 (1950).
[20] N.Y. Civ. Prac. Act (Cahill-Parsons, 1946) §274.
[21] Rosner v. Globe Valve Corp., 276 App. Div. 462 at 463, 95 N.Y.S. (2d) 531 (1950).

the court in spite of section 243 of the Civil Practice Act, which provides: "An allegation of . . . new matter in a reply is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires."[22] With this decision, New York became the third state to recognize the propriety of a fourth pleading, excluding of course those states following the common law procedure.

Serious consideration might be directed toward the merits of permitting a wider use of the fourth pleading. Historically, the common law did not limit the number of pleadings employed to determine the issues in controversy, although its joinder rules were highly restrictive. If a "counter-reply" should be added to the list of permitted pleadings, it might properly be limited to the answering of matter pleaded in the reply, excluding counterclaims of every kind.

An objection to permitting a fourth pleading might be based on the possibility of an increased number of pleadings with a resulting burden on the courts and the parties. If the defendant were permitted to file such a pleading, he would undoubtedly do so in many instances, but it seems questionable if this would place a greater real burden on the courts and parties than exists at present, when amendments to existing pleadings are the only way of replying to new issues which may be interpolated into the action in the third pleading. If the parties are to be given full notice of the issues involved, as well as of matters to be brought out at the trial, a fourth pleading is a more efficient device than the round-about method of amending existing pleadings or relying on an automatic denial or avoidance.

By amending the Federal Rules of Civil Procedure to permit a fourth pleading, the full gains of flexibility of joinder and notice pleading could be retained and at the same time the parties would have an opportunity to clarify the issues in controversy through a direct and predictable method of procedure.

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[22] N.Y. Civ. Prac. Act (Cahill-Parsons, 1946) §243.

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