

Civil Procedure

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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

(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—as well as a vessel, cargo, or other property subject to admiralty process in rem—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.*

1.2.1 Same Transaction or Occurrence

- “Logical relationship” standard
 - “... 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 similar “transaction or occurrence” provision for compulsory counterclaims under Rule 13(a))
 - “Absolute identity of all events is unnecessary”. *Mosley v. General Motors* (8th Cir. 1974)

1.2.2 Common Question of Law or Fact

- *At least one* common question of law or fact
 - This is almost always true where claims arise out of the same T/O
- Does not require identical injuries. *Mosley v. General Motors*.

1.2.3 Permissive

Rule 20 defines when multiple plaintiffs and/or defendants *may be joined* in a single action. But joinder under Rule 20 is not compulsory.

- Rule 19 *requires* joinder of additional parties in special circumstances:
 - Court cannot grant complete relief without the absent party,
 - Absent party’s interest may be impaired, or
 - Existing party would face multiple or inconsistent obligations without the absent party.
- Examples:
 - Parties to contract, where suit seeks to void the contract.
 - Joint owners of property in dispute.
 - Third-persons whose interest would be adversely affected by an injunction.

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

Facts & Procedural History

- 10 plaintiffs sue GM & UAW for employment discrimination (Title VII & § 1981).
 - 8 plaintiffs worked for GM’s Chevrolet Division.
 - 2 plaintiffs worked for GM’s Fisher Body division.
 - All plaintiffs asserted the same legal theory and alleged similar facts about the nature of the discrimination.
- 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 locations for different corporate sub-divisions does not negate commonality.
- Practical lawyering issue
 - Why did plaintiffs want to join cases?
 - Why did GM want to sever cases?

2 Counterclaims

2.1 Compulsory Counterclaims

Rule 13(a)

(i) *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.*

Note the difference between the T/O requirement for party joinder under Rule 20 and for compulsory counterclaims (and crossclaims) under Rule 13.

- Rule 20(a): same T/O, or series thereof
- Rule 13(a) & (g): same T/O (but not “series”)

In practice, courts generally give broad meaning to “transaction or occurrence” under the “logical relationship” approach:

‘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.

Moore v. NY Cotton Exchange (US 1926) (applying pre-FRCP compulsory counterclaim rule)

2.1.1 Subject Matter Jurisdiction Over Compulsory Counterclaims

- Compulsory counterclaim will *always* satisfy supplemental jurisdiction.
 - Courts treat “same T/O” under joinder rules as functionally equivalent to “same case or controversy”/CNOF requirement for supplemental jurisdiction.
 - Courts sometimes assess whether a counterclaim is compulsory by first assessing whether supplemental jurisdiction over that claim is proper.
 - Note that counterclaims (claims by a defendant against a plaintiff) are not among the “yellow flag” claims under § 1367(b).

2.1.2 Consequences of Omitting a Compulsory Counterclaim

- Preclusion

- If defendant fails to assert a compulsory counterclaim, they may not assert that claim later in a separate action.
 - Not *res judicata*, because defendant who asserts no counterclaim is not a “claimant”.
 - Purpose of compulsory counterclaim rule is to place defendant and plaintiff on even footing with regard to which claims they must assert in the same action.

2.2 Permissive Counterclaims

Rule 13(b)

A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

- All other claims by defendant against plaintiff
 - i.e. not arising from same T/O
- Similar to joinder of claims under Rule 18.
 - But defendant does not need a compulsory (related) counterclaim to assert a permissive (unrelated) counterclaim.
 - Cf. Crossclaims

2.2.1 Subject Matter Jurisdiction Over Permissive Counterclaims

- Permissive counterclaims need an independent basis for SMJ (federal question or diversity).
 - No supplemental jurisdiction, because if no common T/O, then no CNOF.

Pace v. Timmermann’s Ranch & Saddle Shop (7th Cir. 2015)

Facts & Procedural History

- Pace sued Timmermann’s (her former employer) and its employees for abuse of process, false arrest, intentional infliction of emotional distress, and related tort claims.
- Timmermann’s had previously sued Pace for conversion and other claims based on her alleged theft of merchandise and cash.
- District court dismissed all of Pace’s claims, concluding that she should have asserted them as compulsory counterclaims in the previous suit.
- Pace appealed the dismissal of her claims against the individual defendants and the dismissal of her abuse of process claim against Timmermann’s.
 - She conceded that her other claims against Timmermann’s were properly dismissed as unasserted compulsory counterclaims in the prior suit.

Issue

- Whether the abuse of process claim against Timmermann’s was a compulsory counterclaim that should have been asserted in the company’s suit?
- Whether claims against the individual defendants were compulsory counterclaims that should have been asserted in the company’s suit?

Holding & Analysis

- Pace’s abuse of process claim against Timmerman’s was a compulsory counterclaim,

- It arose from the same events as the prior suit by Timmermann's against Pace.
- The court rejected Pace's argument that this claim did not come into existence until she was criminally charged with theft, which didn't happen until after Timmermann's brought its prior suit against her.
 - Under the applicable law, an indictment was not a necessary element of the abuse of process claim.
 - All the facts necessary to establish the elements of that claim occurred (and were known to Pace) before Timmermann's commenced its prior suit.
- Pace's claims against the individual defendants were not compulsory counterclaims, because they were not parties to the prior suit.
 - Neither Rule 13(a) nor Rule 20 requires joinder of additional parties.

2.3 Counterclaim Problems

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).
2. Same facts. Which of these counterclaims would be compulsory under Rule 13(a)?
 - 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.
 - Even under the broad "logical relationship" standard, the fact that Crimson's non-compete claim and Dana's breach of contract claim both arise from the same employment relation and contract is probably not enough to satisfy the same T/O requirement.
 - b) A claim by Dana for defamation, alleging that Crimson falsely told its customers that Dana was fired for embezzlement.

- Possibly. If Dana alleges that Crimson made the defamatory statements in retaliation for Dana's quitting and going to work for a competitor, a court might agree that the claims are logically related.
- c) A claim by Scarlet for commercial disparagement, alleging that Crimson falsely told customers that Scarlet is really a Ponzi scheme.
 - Possibly. Again, if Scarlet alleges that Crimson acted in response to Dana's quitting and going to work for Scarlet, a court might agree that the claims are logically related.
- 3. 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?

- *Argument in favor*: Both claims arise from the same underlying transaction, i.e. the debt.
- *Argument against*: The two claims are logically independent and do not arise from the same T/O:
 - 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 the second view in this scenario.

3 Crossclaims

Rule 13(g)

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.

3.0.1 Contrast with Counterclaims

- Crossclaims must arise from the same transaction/occurrence as the underlying plaintiff's claims.
 - Cf. Counterclaims, which may be related (compulsory) or unrelated (permissive) to the underlying plaintiff's claims.
- Crossclaims are permissive (i.e. they may be asserted in the same action or in a separate action).
 - Cf. Compulsory counterclaims.
 - But if a party brings any crossclaim against a co-party, they must then bring all related claims against that party (because claim preclusion will then apply).

3.0.2 Indemnification and Contribution

The last clause of Rule 13(g) (“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”) describes claims for *contribution* and *indemnification*.

Contribution

Allows a joint tortfeasor who pays damages beyond their proportionate share of fault (e.g. under joint and several liability) to seek reimbursement from other joint tortfeasors for their proportionate shares.

The right of contribution is governed by state law (statute or common law).

Indemnification

Allows a defendant to recover the full amount of a judgment (and sometimes defense costs) from another person.

- The common law right of indemnification applies where a defendant was not actually at fault, but is liable to the plaintiff based on the other person’s conduct.
 - Example: At common law, if an employer was held vicariously liable for an employee’s negligence, the employer had a right to sue the employee for indemnification.
 - In some states this particular right has been abrogated by judicial opinion or statute.
- Statutory indemnification may codify the common law right or impose a duty to indemnify where it would not apply under common law.
 - Example: In some states, an employer has a statutory duty to indemnify an employee for any civil liability (including the cost of defense) arising from the employee’s negligence in the course of employment. See, e.g., Cal. Labor Code § 2802(a) .
- Contractual indemnification agreements allow parties to shift ultimate responsibility for judgments, without regard to which one is at fault.
 - Example: University places students in internships with businesses and other organizations. The University may agree to indemnify the organizations for any civil liability the organizations incur as a result of the student’s conduct.
 - Liability insurance is a common type of contractual indemnification agreement.

FRCP Rule 13(g) permits co-defendants to assert claims for contributions as crossclaims, in which case their claims are contingent on the outcome of the underlying plaintiff’s claim. The court may opt to defer adjudication of such a crossclaim until the underlying plaintiff’s claim has been decided. If the defendant asserting a contribution/indemnification crossclaim is not found liable, then the crossclaim is dismissed.

- Rule 14 (see below) also permits a party to join an additional “third-party” defendant to assert a claim for contribution or indemnification.
- Because crossclaims and third-party claims are not compulsory, a party with a potential contribution or indemnification claim (whether against a co-party or potential third-party) may opt to wait until the outcome of the suit and then bring the contribution/indemnification claim in a subsequent action.

3.0.3 Unrelated claims between co-parties

Once a party asserts a valid crossclaim against a co-party, Rule 18 then allows them to assert any other claims (related or not) against the same co-party.

- Cf. Counterclaims: Defendant may assert a permissive (unrelated) counterclaim, even without a compulsory (related) counterclaim.
- But, as with permissive counterclaims, unrelated Rule 18 claim(s) require an independent basis for SMJ.
 - No supplemental jurisdiction, because different T/O = no CNOF

3.0.4 Crossclaim Examples

- P₁ (driver) and P₂ (passenger in P₁'s car) sue D for negligence arising out of car accident.
 - P₂ may also assert a crossclaim against P₁ alleging that P₁'s negligence caused P₂'s injuries.
- P sues D₁ and D₂ for breach of contract arising out of a transaction among P, D₁, & D₂
 - D₁ may assert a crossclaim against D₂ for breach of contract arising out of the same transaction.
 - D₁ may assert a crossclaim against D₂ asserting that D₂ has a duty to indemnify D₁ in the event D₁ is found liable to P.
 - D₂'s duty to indemnify may be based on (the same or separate) contract, or may be imposed by law.
- P alleges that a painting in D₁'s possession really belongs to P and that D₁ acquired the painting from D₂, who stole it from P. P files a suit, joining D₁ and D₂ as co-defendant under Rule 20.
 - P seeks an order compelling D₁ to return the painting to P or, in the alternative, damages against D₂ for the value of the painting.
 - D₂ denies stealing the painting and instead contends it was a gift from P. D₂ also alleges they did not sell or give the painting to D₁ but merely left it with D₁ for cleaning and reframing.
 - D₂ may assert a crossclaim against D₁ for return of the painting.

4 Third-Party Claims (Impleader)

Rule 14(a)(1): Requirements for Impleader

(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.*

- Impleader under Rule 14 is limited to claims for contribution or indemnification.
 - In cases where the plaintiff has sued some, but not all, potential joint tortfeasors, Rule 14 allows the named defendant(s) to bring in the other potential joint tortfeasors for the purpose of asserting a right of contribution.
 - In cases where a defendant claims a (common law, statutory, or contractual) right to indemnification from a third-party (who may or may not also be directly liable to the plaintiff), Rule 14 allows the defendant to bring in the third-party for that purpose.

- Under FRCP Rule 14, a defendant may not implead a third-party to assert a claim for the third-party's liability to the defendant.
- But once a defendant properly impleads a third-party under Rule 14, Rule 18 then allows the defendant to assert any other claims it has against the third-party defendant.
- Some state rules permit joinder of a third-party defendant to assert a claim for the third-party defendant's liability to the defendant/third-party plaintiff, even without a claim for contribution/indemnification.

Rule 14(a)(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*
- (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.*

The limitation on supplemental jurisdiction under § 1367(b) *does not apply* to claims by third-party defendants joined under Rule 14. Supplemental jurisdiction is allowed over such claims, even if the third-party defendant and the party against whom the third-party defendant asserts a claim are citizens of the same state.

Rule 14(a)(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. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

4.0.1 Third-Party Claims & Subject Matter Jurisdiction

Supplemental jurisdiction is always permitted over these claims:

- Claims by a defendant against a third-party defendant
- Compulsory counterclaims by a third-party defendant against the defendant/third-party plaintiff under Rule 14(a)(2)(B),
- Claims by a third-party defendant against a plaintiff under Rule 14(a)(2)(D), and
- Compulsory counterclaims by a third-party defendant against a plaintiff under Rule 14(a)(3).

Since these claims arise out of the same transaction/occurrence as the underlying plaintiff's claims, they satisfy the CNOF requirement under § 1367(a) - The limitation on supplemental jurisdiction under § 1367(b) *does not apply* to these claims.

But supplemental jurisdiction is not always allowed over *claims by a plaintiff against a third-party defendant* under Rule 14(a)(3)

- These claims must arise from the same transaction/occurrence as the underlying plaintiff's claims.
- But the limitation on supplemental jurisdiction under § 1367(b) *does apply* to these claims.
 - If diversity is the sole underlying basis for subject matter jurisdiction, supplemental jurisdiction is not allowed if the plaintiff and third-party defendant are citizens of the same state.

Note the lack of symmetry here:

- § 1367(b) doesn't apply to claims by a third-party defendant against a plaintiff (or against anyone else), but does apply to claims by a plaintiff against a third-party defendant.
- The rationale is that § 1367(b) is intended to prevent plaintiffs from evading the complete diversity requirement through creative joinder.
 - But claims by defendants and third-party defendants don't raise this same concern, and requiring them to bring their claims in separate actions would be unfair (since they didn't choose the forum initially) and inefficient.

Rule 14(b): Impleader by a Plaintiff

When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

Again, the limitation on supplemental jurisdiction under § 1367(b) applies to claims by a plaintiff against a third-party defendant joined under Rule 14.

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 sought to implead the contractors responsible for the job (Fitzpatrick & ECRACOM), alleging accident resulted from their failure to conduct safety meetings.
 - Why didn't Erkins sue the contractors in the first place? - Possibly because of workers compensation bar (Erkins worked for subcontractor of Fitzpatrick and ERACOM).

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". - 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 for each tortfeasor (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)

4.1 Misjoinder, Separate Trials, & Other Case-Management Measures**Rule 20**

(b) Protective Measures. The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

Rule 21

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

Rule 42

(a) *Consolidation. If actions before the court involve a common question of law or fact, the court may:*

- (1) *join for hearing or trial any or all matters at issue in the actions;*
- (2) *consolidate the actions; or*
- (3) *issue any other orders to avoid unnecessary cost or delay.*

(b) *Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.*

These rules give courts broad discretion in case management to promote goals of efficiency & consistency (consolidation) or to avoid confusion & prejudice (severance & separate trials).

5 Supplemental Jurisdiction Revisited

§ 1367(b)

Limitation on supplemental jurisdiction to prevent parties from evading the complete diversity requirement under § 1332 through clever joinder.

Application

- Applies only if diversity jurisdiction is the sole basis for the court's original jurisdiction, *and*
- Applies only to claims by/against parties joined under certain rules ("yellow flag" claims):
 - Claims *by a plaintiff* (i.e. someone who was initially named as a plaintiff in the original complaint) *against persons joined* under Rule 14, 19, 20, or 24
 - Claims *by persons joined as plaintiffs* (i.e. after the original complaint) under Rule 19 or intervening as plaintiffs under Rule 24

Consequence

- Court may not exercise Supplemental jurisdiction over such claims if doing so "would be inconsistent with the jurisdictional requirements of section 1332"

What does this mean?

- It certainly means no supplemental jurisdiction over "yellow flag" claims if it would destroy complete diversity between plaintiffs and defendants (which would have the effect of depriving the court's diversity jurisdiction over the underlying "anchor" claim).
- But where complete diversity is unaffected, it's unclear whether the claims identified in § 1367(b) must also satisfy the amount in controversy requirement.

- This wouldn't make sense, because if these claims independently satisfy both the complete diversity and amount in controversy requirements, they court would have diversity jurisdiction over them and there would be no need for supplemental jurisdiction at all.
- But the final clause implies that supplemental jurisdiction over such claims is allowed, as long as it isn't inconsistent with § 1332.
- The seeming paradox is resolved if § 1367(b) is understood to mean that a court may not exercise supplemental jurisdiction over "yellow flag" claims if doing so would be inconsistent *with the court's underlying diversity jurisdiction over the "anchoring" claim* under § 1367(a).
- The Supreme Court hasn't addressed this, and the Courts of Appeal don't appear to have addressed it either.

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) and National Can removed to federal court on basis of diversity.
- After removal, National Can 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.
 - Rule 14 itself allows such joinder.
 - But the court must have SMJ over the third-party claim.
 - Guaranteed & HydroVac are both citizens of NC, so no diversity jurisdiction.
 - Guaranteed relies on §1367
 - Indemnification & contribution claim against 3rd-party defendant satisfies §1367(a)

Holding & Analysis

- § 1367(b) precludes the exercise of supplemental jurisdiction over a claim by a plaintiff against 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: “claims by a plaintiff” means “a party who was named as a plaintiff in the initial complaint”.
 - For purposes of §1367(b), a party’s initial designation as a “plaintiff” doesn’t change just because another party asserts a counterclaim or crossclaim against them.
 - By the same reasoning, a party’s initial designation as a “defendant” doesn’t change just because they assert a counterclaim or crossclaim against another party.

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)?