

MEMORANDUM

To: Subcommittee on Amendment to Civil Rules of Procedure

From: N. William Delker, Chair

Date: October 4, 2016

Re: # 2016- 010. Super. Ct. R. 10. Recommendations regarding Permissive Counterclaims

The Supreme Court Advisory Committee on Rules has approved our recommendations and put out for public comment the changes we proposed earlier this year. There were still a few issues outstanding that we, as a subcommittee, needed to resolve. One of those issues involved permissive counterclaims. I agreed to take on the research of that issue. I had an intern summarize New Hampshire law and survey the approach of other jurisdiction on this issue. I have included his memo on the subject. Based on my review of the case law, I believe that permissive counterclaims are recognized by both New Hampshire statutes and case law. This should be reflected in the court rules. Therefore, I propose the following amendments to Superior Court Rule 10, which are adapted from existing Fed. R. Civ. P. 13(b) and 42(b) (new material is in **[bold and brackets]**; deleted material is in ~~format~~):

Rule 10. Counterclaims, Cross-claims and Third-Party Claims

(a) **[Compulsory Counterclaims.]** A pleading shall state as a counterclaim any claim which at the time of serving the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

[(b) Permissive Counterclaims. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory so long as a right of action existed thereon at the time of the filing of complaint.]¹

~~(b)~~**[(c)]** A pleading may state as a cross-claim any claim by one party against a co-party which arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim therein.

¹ Fed. R. Civ. P. 13(e) allows for a permissive counterclaim that matured after the complaint was originally filed. I believe that RSA 515:8 precludes this practice. As a result, I have included the language of that statute in my proposal.

~~(e)~~**[(d)]** Unless otherwise provided by law, whenever a third party may be liable to a defendant in any pending action for any of the plaintiff's claim against said defendant, or if said defendant may have a claim against a third party depending upon the determination of an issue or issues in said pending action, said defendant may bring an action against said third party and, unless otherwise ordered on motion of any party, such action will be consolidated for trial with the pending action or, if justice requires, said third party may be made a party to the pending action, for the purpose of being bound by the determination of any common issues. However, except for good cause shown to prevent injustice and upon such terms as the court may order, no such action will be consolidated with or said third party joined in said pending action, unless suit is brought against said third party within 30 days following filing of the defendant's Answer in said pending action.

~~(e)~~**[(e)]** A third party against whom an action is brought in accordance with this rule and a plaintiff against whom a counterclaim has been filed may, under the same circumstances prescribed by this rule, use the same procedure with respect to another person and the same time limitation shall apply, except that as to a plaintiff the 30 days will begin to run on the date the counterclaim is filed.

~~(e)~~**[(f)]** This rule shall not be construed to limit or abridge in any way the existing common law practice of joining parties in pending actions whenever justice and convenience require, or the giving of notice to third parties to come in and defend any pending action or be bound by the outcome thereof.

~~(f)~~**[(g)]** This rule does not apply to a defendant who contends that a third party is solely liable to the plaintiff or to a defendant in a tort action as to a possible joint tortfeasor against whom said defendant has no right to contribution or reimbursement.

[(h) 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.]

MEMORANDUM

TO: Judge Delker

FROM: Brandon Chase

DATE: May 23, 2016

RE: *Non-compulsory counterclaim survey and analysis*

ISSUE PRESENTED

Survey New Hampshire case law to determine the Court's view on non-compulsory counterclaims and analyze what other states have done on the issue to see whether there are any rules from other states that include language about the standard for when non-compulsory counterclaims are appropriate.

BRIEF ANSWER

In New Hampshire, if trial courts find the existence of special circumstances which in equity and justice require the allowance of any one of such counterclaims or there is no undue confusion or complexity of the issues which might prejudice the rights of one or both parties, non-compulsory counterclaims could be permitted in the original suit. New Hampshire is in the minority on this issue as most states have adopted simpler rulings as well as simpler definitions on non-compulsory counterclaims, which is similar to that of Federal Rule of Civil Procedure 13(b).

DISCUSSION

The term "counterclaim" encompasses any claim that the defendant has at the time of answering the plaintiff's complaint which could form the basis of a separate suit. 4-13 NH Civil Practice and Procedure § 13.02 (2015). The reasoning behind allowing counterclaims is to avoid

circuitry of action, multiplicity of suits, inconvenience, expense, unwarranted consumption of the court's time, and injustice by resolving all controversies and granting full relief in one proceeding. City of Concord v. 5,700 Square Feet of Land, 121 N.H. 170, 172 (1981). The trial court has discretion whether to allow a counterclaim. Id.

The vast majority of jurisdictions follow a similar rule on permissive counterclaims as Federal Rule 13(b), which states that a pleading may state as a counterclaim against an opposing party any claim that is not compulsory.¹ Fed. R. Civ. P. 13. Many jurisdictions have simplified the distinction between permissive, non-compulsory, and compulsory counterclaims by stating that any counterclaim, which is not a compulsory counterclaim, is a permissive counterclaim – eliminating “non-compulsory” counterclaims as a category of counterclaims. 6 Mass. Prac. Rules Practice § 13.25 (2d ed.); *See also*: N. Carolina Trial R. 13(B). Similarly, some jurisdictions have effected modernization by adopting the Federal Civil Rules terminology and converted the terms “recoupment”² and “set-off”³ to “compulsory counterclaim” and “permissive counterclaim” respectfully, also eliminating “non-compulsory” counterclaims and following the

¹ The majority of jurisdictions have adopted a similar rule on permissive counterclaims: a pleading 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. (Alabama, AL ST RCP Rule 13; Florida, Fla. R. Civ. P. 1.170; Puerto Rico, § 11.2 Permissive counterclaims, T. 32 Ap. III, § 11.2; South Carolina, SCRP 13; Indiana, Ind. R. Trial P. 13; Oklahoma, Okla. Stat. Ann. tit. 12, § 2013; North Carolina, N.C. Gen. Stat. Ann. 1A-1, 13; Utah, Utah R. Civ. P. 13; Delaware, De R JP CTS CIV Rule 13; Washington, Wash. Super. Ct. Civ. R. 13; Kentucky, Ky. R. Civ. P. 13.02; Vermont, Vt. R. Civ. P. 13; New Jersey, N.J. Ct. R. R. 4:7-1; Arizona, Ariz. R. Civ. P. 13(b); Wyoming, WY R RCP Rule 13; Hawaii, Haw. R. Civ. P. 13). Some states do not include the “...subject-matter of the opposing party's claim,” clause, thus making the rule a similar version to the following: a pleading may state as a counterclaim any claim against an opposing party. (Massachusetts, Mass. R. Civ. P. 13; Rhode Island, RI R RCP Rule 13; North Dakota, N.D. R. Civ. P. 13; Nevada, NV ST J CTS RCP Rule 13; Montana, M. R. Civ. P. 13). Tennessee has a broader version of this statute by allowing permissive counterclaims whether or not the claims are within the subject matter of the opposing party's claim. (Tenn. R. Civ. P. 13.02). Idaho's rule states that permissive counterclaims are allowed for any claim that is not compulsory – a mirror of the federal rule. (I. R. C. P. 13). Although not all states are listed, rules similar to the above stated are apparent across the United States, with New Hampshire as an exception.

² New Hampshire uses this term and defines “recoupment” as a claim arising from the same facts and circumstances as the plaintiff's claim, and diminishes it. Zurback Steel Corp. v. Edgcomb, 120 N.H. 42,45.

³ New Hampshire uses this term and defines “set-off” as a debt or demand arising from different facts and circumstances, but existing at the time the plaintiff's action is filed. RSA 515:7-8.

majority where counterclaims that are not compulsory are permissive. Romar Dev. Co., Inc. v. Gulf View Mgt. Corp., 644 So. 2d 462, 470 (Ala. 1994).

Compulsory counterclaims are claims that arise out of the transaction or occurrence that is the subject matter of the opposing party's claim; and does not require the addition of another party over whom the court cannot acquire jurisdiction. Id. The determination of whether a counterclaim is permissive is directly related to the application of the same "logical relationship" test identified for compulsory counterclaims. Specifically, if there is a logical relationship apparent, then the counterclaim arises out of the same transaction or occurrence and therefore, it is compulsory; if there is no logical relationship, the counterclaim is permissive. 4 Fla. Prac., Civil Procedure § 1.170:18. Whether a counterclaim arises out of the same transaction or occurrence under the logical relationship test depends on whether it arises out of "the same aggregate of operative facts" in the sense that such aggregate of facts "serves as the basis of both claims" and that "the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant." 4 Fla. Prac., Civil Procedure § 1.170:9. Courts have further stated that a trial court *must* permit compulsory counterclaims, but permitting permissive counterclaims is left to the discretion of the trial courts. Hilliard v. Jacobs, 927 N.E.2d 393, 401 (Ind. App. 2010). The court may order a separate trial of a permissive counterclaim in order to avoid confusion to the trier of fact or prejudice to either party. Ind. Trial R. 13(I) and 42(B); City of Concord, 121 N.H. at 172.

Parties may assert non-compulsory counterclaims in a separate and unrelated action, and failure to assert these claims will not result in a waiver of these claims if a party would like to bring them up at a later date. Berkemeier v. Rushville Nat. Bank, 459 N.E.2d 1194, 1199 (Ind. App. 1st Dist. 1984). Furthermore, claims that mature or are acquitted after the pleading has been

served are permissive rather than compulsory. Sampson v. Haywire Ventures, Inc., 278 Ga. App. 525, 526 (Ga. App. 2006).

New Hampshire is an exception as the New Hampshire court rules are silent on non-compulsory counterclaims. RSA 515:7 recognizes a form of permissive counterclaim. That statute provides: “If there are mutual debts or demands between the plaintiff and defendant at the time of the commencement of the plaintiff’s action, one debt or demand may be set off against the other.” See also RSA 515:11 (“The defendant may plead such setoff, or give notice thereof with the general issue, describing the debt or demand with the same certainty as is required in a declaration.”). Moreover, the New Hampshire Supreme Court has held that a trial court could permit a counterclaim, regardless of the type,⁴ in the original suit if it has either: (1) found that special circumstances exist, which in equity and justice require the counterclaim to be allowed; or (2) found that allowing the counterclaim would not produce undue complexity and confusion of issues which might prejudice the rights of one or both parties. Varney v. Gen. Enolam, Inc., 109 N.H. 514, 516 (1969); 4-13 Civil Practice and Procedure § 13.03 (2015); Van Miller v. Hutchins, 118 N.H. 204, 205 (1978). Trial courts have allowed non-compulsory counterclaims where special circumstances exist. These special circumstances have been identified as (1) where the plaintiff was a non-resident, which would make it difficult to enforce his claim, (2) insolvency of the plaintiff, and (3) plaintiff’s fraud. Varney, 109 N.H. at 516; Hutchins, 118 NH at 205. Noncompulsory counterclaims have most frequently been allowed where one of the parties is a nonresident. Hellberg v. Norris, 97 N.H. 222, 223 (1951). If undue complexity and confusion of issues is apparent, the trial court may require separate trials for the counterclaim. City of Concord, 121 N.H. at 172; Hutchins, 118 N.H. at 206. Although New

⁴ Whether the counterclaim is compulsory, a set off, a recoupment, or some other form of counterclaim.

Hampshire trial courts have discretion as to whether the non-compulsory claim should be permitted unless special circumstances exist, the exercise of that discretion will be scrutinized if the defendant's rights to assert the claim are permanently foreclosed by the trial court's order.

Id. However, New Hampshire law states in pertinent part that no demand shall be set off unless a right of action existed at the beginning of plaintiff's action. RSA 515:8. In other words, the Court has held that the defendant must be able to maintain a separate action on a counterclaim against the plaintiff at the time the plaintiff brought the suit in order to assert a set off in the pending case. Phinney v. Levine, 117 N.H. 968, 970-71 (1977).

CONCLUSION

In short, a majority of jurisdictions have replaced the terms "set-off" and "recoupment" with "permissive counterclaim" and "compulsory counterclaim" respectfully and simply state that claims can only be either permissive or compulsory. Most jurisdictions also have simplified the definition of permissive counterclaim as being when the defendant's claim does not arise out of the same transaction or occurrence as the original suit and the claim relates to similar subject matter as the original case and have also stated that there is no barring of claims if they arise after a claim has been brought. Trial courts have discretion as to determine whether to allow the permissive counterclaim in the original suit or to demand a separate trial if confusion and complexity would arise. Permissive (non-compulsory) counterclaims are treated as compulsory counterclaims within a trial and can be motioned for dismissal by the opposing party.

New Hampshire law mandates that [permissive counterclaims] shall not be made unless a right of action existed for it at the beginning of the plaintiff's action. New Hampshire, although not as clear on the matter, states that non-conclusory (set-off or recoupment) counterclaims are

left to the discretion of the trial courts as to whether they should be allowed in the original suit. However, when equity and justice requires a counterclaim because special circumstances exist or if no undue complexity and confusion of issues that might prejudice the rights of one or both parties is present, non-compulsory counterclaims could be allowed in the original suit. New Hampshire courts have further held that the discretion of the trial court will be scrutinized and revised when the trial court's ruling has permanently barred a defendant's right to assert the claim and it seems possible to permit the two claims in the original action.