

IN SEARCH OF THE TRANSACTION OR OCCURRENCE: COUNTERCLAIMS

I. INTRODUCTION

The “transaction or occurrence” is the cornerstone of joinder in the Federal Rules of Civil Procedure. A counterclaim arising out of the same transaction or occurrence as the claim is compulsory; a counterclaim not arising out of the same transaction or occurrence is permissive.¹ A cross-claim must arise out of the transaction or occurrence of the claim or a counterclaim.² A third-party defendant may assert a claim against the plaintiff that arises out of the transaction or occurrence of the claim; the plaintiff may return the favor.³ An amendment relates back when it arises out of the “conduct, transaction, or occurrence” of the original pleading.⁴ Permissive joinder of parties is allowed when the right to relief arises out of the same “transaction, occurrence, or series of transactions or occurrences.”⁵

The importance of the “transaction or occurrence” extends far beyond the joinder devices. It is close kin to pleading a claim.⁶ Preclusion doctrines today revolve around the “transaction.”⁷

¹FED. R. CIV. P. 13(a), (b).

²FED. R. CIV. P. 13(g).

³FED. R. CIV. P. 14(a).

⁴FED. R. CIV. P. 15(c). In slightly different fashion, FED. R. CIV. P. 15(d) allows a supplemental pleading to set forth “transactions or occurrences or events” that happened subsequent to the original pleading.

⁵FED. R. CIV. P. 20(a).

⁶FED. R. CIV. P. 8(a)(2). *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS ch. 3, topic 2, title D, intro. note (1982):

The term ‘claim,’ or the older cognate term ‘cause of action,’ appears in a variety of

The requirement of the “same case or controversy under Article III” for supplemental jurisdiction is the direct descendant—if not the clone—of the transaction or occurrence.⁸

Consequently, the transaction or occurrence is a key concept across civil procedure. Exploration of all of the above doctrines will help us understand it, yet together they provide far too much material for a single article. This article is about the one area of joinder that produces by far the most difficulty, judged by the volume of reported decisions: compulsory counterclaims. A second, forthcoming article will explore the commonality of transaction or occurrence across other joinder devices, pleading, preclusion, and supplemental jurisdiction.

Part II of this article identifies the historical antecedents for the choice of transaction or occurrence as the base of the counterclaim rule. This part shows how the test fits within the

contexts to refer to a unit of litigation, for example: in stating what a complaint should contain . . . [T]he ‘transactional’ meaning or scope ascribed in this Restatement to claim for purposes of res judicata is not singular to that subject; it is a meaning that is being progressively ascribed to claim in a number of the contexts in which it appears in a modern system of procedure.

See also id. § 24 cmt.a: “The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories The transaction is the basis of the litigative unit or entity which may not be split.” *See infra* notes 34-41 and accompanying text.

⁷RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982):

When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger and bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

⁸28 U.S.C. § 1367(a) (2000). The statute brought together the two common law doctrines pendent jurisdiction and ancillary jurisdiction. Pendent jurisdiction depended on a “common nucleus of operative facts,” as stated in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Ancillary jurisdiction turned on the same transaction or occurrence. *See* 13 CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, *FEDERAL PRACTICE & PROCEDURE: JURISDICTION* 2D § 3523 (1984 & Supp. 2006).

general policies of the Federal Rules of Civil Procedure, which in turn leads to the intended, and proper, meaning of the phrase.⁹

Part III explores the interpretation of transaction or occurrence in compulsory counterclaim cases by federal courts. The courts from the beginning develop four different, inconsistent glosses on the rule language.¹⁰ Over the years, some decisions properly reflect the intention and policies behind the transaction or occurrence.¹¹ Unfortunately, far more decisions run contrary to the intention and policies in a variety of ways.¹²

Part IV argues for proper interpretation of the transaction or occurrence in compulsory counterclaim cases. This goal is achieved when courts look to the facts of cases instead of to legal theories, extraneous policy, or superfluous rule glosses.¹³ Consequently, Part IV suggests that the “transaction or occurrence” might profitably be replaced with a test that clearly focuses the attention of courts onto those facts; this Part provides more than a dozen suitable alternatives.

⁹*See infra* part II.

¹⁰*See infra* part III.A.

¹¹*See infra* part III.B.

¹²*See infra* part III.C.

¹³*See infra* part IV.

II. IN SEARCH OF THE TRANSACTION OR OCCURRENCE

A court or commentator attempting to interpret a legal word or phrase often begins with a dictionary definition. That effort gains little in search of “transaction or occurrence.” Long before the phrase was baked into the federal joinder rules, the Supreme Court of the United States declared “‘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.”¹⁴ Even today, the law dictionary offers little.¹⁵ Indeed, many have inveighed against the attempt to find a precise definition.¹⁶ Accordingly, no precise definition is attempted here.

That does not mean a court should throw up its hands, murmur case-by-case basis, and attempt to do rough justice in deciding whether a counterclaim is compulsory or permissive. While “transaction or occurrence” may evade precise definition, we know precisely the intent and policies behind the phrase. We look to the intent and policies informing the Federal Rules of Civil Procedure generally, and specifically to the federal joinder rules.

¹⁴Moore v. New York Cotton Exch., 270 U.S. 593, 610 (1926).

¹⁵The transaction or occurrence test is defined as itself: “A test used to determine whether, under Fed. R. Civ. P. 13(a), a particular claim is a compulsory counterclaim.” BLACK’S LAW DICTIONARY 535 (8th ed. 2004). A transaction is defined as “The act or an instance of conducting business or other dealings, esp., the formation, performance, or discharge of a contract,” or alternatively, “Any activity involving two or more persons.” *Id.* An occurrence is defined as “Something that happens or takes place; specif., an accident, event, or continuing condition that results in personal injury or property damage that is neither expected nor intended from the standpoint of an insured party.” *Id.* at 1109.

¹⁶*E.g.*, Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1724 (1998); Charles A. Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 591 (1952).

The Federal Rules became effective in 1938, having been authorized by Congress and promulgated by the Supreme Court.¹⁷ The Federal Rules were drafted by a distinguished advisory committee appointed by the Court; the reporter for the committee was Professor, later Judge, Charles E. Clark.¹⁸ Clark was a procedure expert of long-standing, he held strong views about the subject, and he seized the opportunity to embed his procedural philosophy throughout the Federal Rules.¹⁹

The global procedural philosophy of Clark is summed up in the title of a speech he later published: procedure is the handmaid of justice.²⁰ Rules of procedure should be “continually restricted to their proper and subordinate role” to substantive law.²¹ Clark’s primary theme is

¹⁷Congress authorized the Supreme Court to promulgate rules of civil procedure by the Rules Enabling Act, Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as 28 U.S.C. § 2072 (2000)). The history of the period from passage of the Rules Enabling Act to the effective date of the rules in 1938 is recounted in Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1043-98 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943-75 (1987).

¹⁸The Supreme Court by order appointed a fourteen-member committee, and designated Professor Charles E. Clark of Yale the reporter. 295 U.S. 774-75 (1935).

¹⁹“With justification, Clark has been called the ‘prime instigator and architect of the rules of federal civil procedure.’” Subrin, *supra* note 17, at 961, *quoting* Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323, 1323 (1965). *See also* Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80-81 (1988) (“Charles Clark was perhaps the single most important figure in the drafting of the 1938 Federal Rules of Civil Procedure Although Clark’s views were not held by all members of the Advisory Committee, his influence was considerable.”); Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976) (Clark “was principally responsible for the drafting of the Federal Rules.”)

²⁰Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 298 (1938).

²¹*Id.* at 298. *See also* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING §

procedure should serve substantive law, or in other words, that procedural rules should promote decision on the merits of a case.²² By de-emphasizing procedural rulings, the primary peripheral benefit is saving time and resources for all.²³

More specifically, Clark's procedural philosophy is apparent in the joinder rules.²⁴ The primary point of all the joinder rules—including the counterclaim—is whenever feasible to settle all controversies between the litigants in one suit.²⁵ Settling all controversies in the same suit

12, at 60 (2d ed. 1947) (“[T]he lawsuit is to vindicate rules of substantive law, not rules of pleading, and the latter must always yield to the former.”).

²²“One theme pervades [Clark’s] works: procedural technicality stands in the way of reaching the merits, and of applying substantive law.” Subrin, *supra* note 17, at 962.

²³“Clark implicitly urged two of the cardinal virtues of this concept of procedure: cases would be decided on their merits rather than by procedural rulings, and this would occur with an economy of time and resources.” Smith, *supra* note 19, at 916.

²⁴Bone, *supra* note 19, at 81 (“Clark, with the help of his research assistant James William Moore, took major responsibility for drafting the party structure provisions of the Federal Rules.”)

²⁵The leading early commentator on the new rules, Professor Charles A. Wright, opined “the sound policy is to require the pleading of defendant’s claims whenever there is any possibility that it may be advantageous to have them tried with plaintiff’s claims.” Charles A. Wright, *Estoppel by Rule: The Compulsory Counterclaim under Modern Pleading*, 39 IOWA L. REV.255, 275 (1954). Writing of the MINN. R. CIV. P., which were patterned closely after the FED. R. CIV. P., Wright stated “The purpose, as has been indicated, is to make ‘one lawsuit grow where two grew before.’” Wright, *supra* note 16, at 580. Inveighing against restrictive interpretation of “transaction” in some code state opinions, Charles E. Clark wrote “Any attempt at such classifications gives rise to an ever-increasing number of categories with technical demarcations which, in their application, tend to obscure the true function of the counterclaim, which, presumably, is to enable litigants to settle in one suit as many controversies as feasible.” CLARK, *supra* note 21 § 102, at 657.

Like the compulsory counterclaim rule, the goal of the permissive joinder of parties rule—also centered on the “transaction or occurrence”— is to prevent multiple lawsuits. *See* 7 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1652 (2001).

incorporates two things. One, broad joinder promotes judicial economy and “end[s] the necessity for litigating the same issues over and over.”²⁶ Second, and more important for our purposes, it means joinder objections are not fine-tuned pleading questions but instead are matters for later exercise of broad trial court discretion over trial convenience.²⁷

In order to accomplish these policies and goals, the drafters of the Federal Rules—the advisory committee members and staff, under the firm direction of Clark—based the federal joinder rules on the “transaction,” a term that traces back into the codes and even through to the common law.²⁸ The advisory committee note to Federal Rule 13 states it is an “expanded version” of former Federal Equity Rule 30, which centered on the “transaction.”²⁹ The committee

²⁶Charles A. Wright, *Modern Pleading and the Alabama Rules*, 9 ALA. L. REV. 179, 197 (1957).

²⁷Clark believed that joinder questions primarily involved only “the orderly and efficient conduct of court business,” as contrasted with matters of substantive law, and so should be largely left to trial court discretion—to be exercised at the time of trial. *See* Bone, *supra* note 19, at 100. Bone for himself said “The federal rule drafters . . . defined party structure primarily in terms of trial convenience, not in terms of right, and relied to a large extent on trial judge discretion to shape optimal lawsuit structure for each dispute.” *Id.* at 80. This is summed up as follows:

The philosophy is that joinder is not properly a pleading problem, but rather is one of trial convenience, which can be judged best only at the time of trial.

* * *

I think my final advice to the bar can be put very simply: if there is any reason why bringing in another party or another claim might get matters settled faster, or cheaper, or more justly, then join them. Somewhere in the rules there is surely authority for the joinder.

Wright, *supra* note 16, at 580, 632.

²⁸CLARK, *supra* note 21 § 102, at 659.

²⁹FED. R. CIV. P. 13 advisory committee’s note:

Rule 13 is an expanded version of former Equity Rule 30 and much of the philosophy of the earlier provision has been preserved. Under Rule 13 the court has broad discretion to allow claims to be joined in order to expedite the resolution of all the controversies

note does not specify in what ways the new federal rule expands on the equity rule, but certainly one expansion is inflating the operative test from “transaction” to “transaction or occurrence.” In the same fashion, the operative test for party joinder is inflated from “transaction” to “transaction or occurrence.”³⁰ This quite apparently is done across the joinder rules to broaden the availability of joinder under a unified test, as well as to disapprove some grudging code decisions on the scope of a “transaction.”³¹

between the parties in one suit.

The equity rule read in relevant part: “The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may . . . set out any set-off or counterclaim against the plaintiff . . .” The history of the proceedings in the advisory committee that resulted in patterning the counterclaim rule on the equity rule are traced in detail in Wright, *supra* note 25, at 281-83.

The history of counterclaims traces back through the common law and code procedures of set off and recoupment, the latter of which was dependent on the matter arising from the same transaction. *See, e.g.*, 6 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1401; CLARK, *supra* note 21, § 100.

³⁰FED. R. CIV. P. 20, while clearly kin, does not derive from the same equity rule as does FED. R. CIV. P. 13. The “transaction” of the party joinder rule, according to FED. R. CIV. P. 20 advisory committee’s note, descends from “provisions found in England, California, Illinois, New Jersey, and New York.” *E.g.*, N.Y. CIV. PRAC. ACT § 209 (1937) (“All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist . . .”)

The history of party joinder can be found in many sources, *e.g.* CLARK, *supra* note 21, §§ 56-61; 4 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 20App.100 (3d ed. 2005); WRIGHT, MILLER & KANE, *supra* note 25, § 1651.

³¹As to the former, *see* MOORE, *supra* note 30, at §§ 20.02[1][a], 20App.100 n. 7; Carl C. Wheaton, *A Study of the Statutes Which Contain the Term “Subject of the Action” and Which Relate to Joinder of Actions and Plaintiffs and to Counterclaims*, 18 CORNELL L.Q. 232, 242 (1933).

As to the latter, *see* Wright, *supra* note 25, at 283 n. 121 (“Thus it seems clear that the purpose of the Federal Advisory Committee in adding ‘occurrence’ to the joinder of parties rule was to prevent the New York construction from being put on the rule by adopting a phrase different from that which was critical in New York.”). At the time the committee drafted the Federal Rules, *Ader v. Blau*, 241 N.Y. 7, 148 N.E. 771 (1925), was a recent, much-criticized case. In that case, a boy was injured by an iron picket fence maintained by one defendant, and

If the expansion from “transaction” to “transaction or occurrence” does not make the policy of the federal joinder rules clear enough, then the inclusion of Federal Rule 21 seals the deal:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.³²

The language points out to judges that joinder problems are to be dealt with as trial convenience problems, not pleading problems.³³

Treating joinder as a trial convenience problem instead of a pleading problem is hand-in-glove with the federal rules’ de-emphasis on pleading in favor of deciding cases on the merits.³⁴

received negligent medical treatment from a second defendant. The court refused to allow the two defendants to be joined in a single action since the injury and the treatment were said to be not part of the same “transaction.”

³²FED. R. CIV. P. 21. With the hindsight of seven decades of joinder decisions, one can recognize that Clark and the advisory committee would have been more perspicacious to write the language of this rule into each joinder rule—as New York had done in its permissive joinder rule [N.Y. CIV. PRAC. ACT § 209 (1937)].

³³See CLARK, *supra* note 21, § 101, at 645; Bone, *supra* note 19, at 79-80; *supra* note 27. Unfortunately, with the direction to treat joinder issues as trial problems instead of pleading problems separated and isolated, the courts have largely ignored FED. R. CIV. P. 21, and consequently have made what was intended to be easy lifting into hard work. See *infra* part III.

³⁴See *supra* notes 25-26 and accompanying text. A decade prior to drafting the FED. R. CIV. P., Clark wrote “Our problems of joinder, of stating a cause, of amendment, should be decided with reference to the ease of developing the operative facts in our law trials, and our application of legal principles to such facts when developed may be expected to take care of itself.” Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 831 (1924). See also Kane, *supra* note 16, at 1723; Wright, *supra* note 26, at 180-81:

One of the principal hallmarks of modern procedural thinking is that it is wise to leave as much as possible to the discretion of the trial judge The other essential point is that the desired goal of just, speedy, and inexpensive determination of controversies is not served by decisions on technicalities of pleading, nor is it served if results turn on the

The federal rules simplify pleading by providing for notice pleading of facts sufficient to state a “claim for relief.”³⁵ The claim is a brand-new term coined in an attempt to eliminate much of the wasteful pre-trial litigation encountered in interpreting the code requirements of pleading “ultimate facts” constituting a “cause of action.”³⁶

The key to the claim for relief is that it is fact-based and fact-defined. Under the codes, some courts and scholars thought a cause of action was law-based, the intersection of a single right and duty, a single legal theory of recovery.³⁷ Clark believed strongly a cause of action was fact-based, a set of facts that a lay person would expect to be tried together without regard to legal rights or duties; one cause of action could contain several legal theories of recovery.³⁸ This

skills and diligence of counsel, rather than on the merits of the case. This philosophy finds its concrete expression in three great reforms:

1. A real and effective merger of the forms of action and of law and equity;
2. Simplified pleading, supplemented by a broad system of pre-trial devices for getting at the merits;
3. Unlimited joinder of claims and parties.

³⁵FED. R. CIV. P. 8(a)(2).

³⁶See CLARK, *supra* note 21, § 38 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1202, at 87 (2004); Douglas D. McFarland, *The Unconstitutional Stub of § 1441(c)*, 54 OHIO ST. L.J. 1054, 1061-67 (1993).

³⁷JOHN N. POMEROY, CODE REMEDIES § 347 (4th ed. 1904) (“[T]he primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as used in the codes of the several states.”); O.W. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 638 (1925) (cause of action “is that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right”).

³⁸Early in the debate, Clark wrote

The cause of action under the code should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons. The size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business.

Clark, *supra* note 34, at 837. Many years later, he reiterated a cause of action was “such a group

debate is of historical interest only. Clark won the debate—at least for federal courts and rules states—through drafting the Federal Rules. The claim for relief did not exist under the codes, and the cause of action does not exist under the rules.³⁹ In federal courts and rules states, the claim or relief is fact-based, bounded only by a lay conception of what facts properly and conveniently group together:

of facts . . . limited as a lay onlooker would to a single occurrence or affair, without particular reference to the resulting legal right or theories.” CLARK, *supra* note 21 § 38, at 130. Clark maintained that scholars such as Pomeroy and McCaskill [*see supra* note 37] were defining a right of action, not a cause of action. Clark, *supra* note 34, at 823-24.

³⁹The term “cause of action” appears nowhere in the FED. R. CIV. P. In its place, FED. R. CIV. P. 8(a)(2) requires pleading “a short and plain statement of the claim.” As an aside, Clark may have done better to write specific abolishment of the term cause of action into the Federal Rules, as he did with “demurrer” in FED. R. CIV. P. 7(c). The cause of action will not go away. *See* McFarland, *supra* note 36, at 1067.

This brings to mind the thought that Clark may have done better in drafting the joinder rules to coin a new phrase entirely instead of using a well-known term from the codes, the “transaction.” *See infra* part IV. Of course, the test is “transaction or occurrence,” which is a new test, yet the new test employs the old word. The Supreme Court had announced “Transaction is a word of flexible meaning” in *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926). Many courts had tried and failed to define the word, *e.g.*, *McArthur v. Moffitt*, 143 Wis. 564, 128 N.W. 445 (1910); *Stone v. Case*, 34 Okla. 5, 124 P. 960 (1912). Many courts had rendered unfortunate, narrow definitions of transaction, *e.g.*, *Ader v. Blau*, 241 N.Y. 7, 148 N.E. 771 (1925) (*see* note 31, *supra*); *McArthur, supra* (count to quiet title to land not same transaction as count for trespass to same land). One does not have to be prescient to foresee that courts attempting to interpret a new term will look to precedents interpreting the key word of the new test. As could also be predicted, these precedents start courts on the wrong path to decision. *See infra* parts III.A, C. Clark was not unaware of this problematical tendency of courts; he decried use of common law decisions in interpreting code counterclaim provisions:

[U]nder the older code provisions the development of a test of ‘convenience of trial’ has been unduly hampered by a tendency to adhere to former practice. This may be due in part to judicial inertia, and in part to the terms in which the counterclaim provisions were phrased. The same terms—‘transaction’ and ‘subject matter’—were familiar to the common law in an analogous and somewhat similar capacity. . . . [T]hey were frequently used in delimiting the use of the recoupment . . . and these restrictions have unfortunately been continued in many code decisions.

CLARK, *supra* note 21 § 102, at 659. *See infra* note 47.

The variable character of ‘cause of action’ has been pointed out. . . . Because of its illusive character, that concept has been entirely omitted from the new rules; but a similar idea is conveyed. . . . These rules make the extent of the claim involved depend not upon legal rights, but upon the facts, that is, upon a lay view of the past events which have given rise to the litigation. Such lay view of a transaction or occurrence, the subject matter of a claim is not a precise concept; its outer limits should depend to a considerable extent upon the purpose for which the concept is being immediately used.⁴⁰

One quickly recognizes the claim for relief sounds much like a “transaction or occurrence.”⁴¹ Thus we cycle back to the keystone of the joinder devices. The definitions of a code cause of action, a rules claim for relief, and a transaction or occurrence are all fact-based, not law-based. And all are part and parcel of Clark’s overall philosophy of subordinating procedure to substantive law, promoting trial on the merits, and saving time and resources.⁴²

⁴⁰CHARLES E. CLARK, *CASES ON PLEADING AND PROCEDURE* 658-59 (1940) (citations omitted).

⁴¹In his treatise on code pleading updated twenty years after promulgation of the Federal Rules, Clark maintains

Considering ‘cause of action’ as referring to that group of operative facts which give ground for judicial action, the ‘foundation of the plaintiff’s claim’ may well be defined as comprising the more material facts of that group of facts set forth in the complaint. The defendant’s cause of action, as set forth in the counterclaim, must ‘arise out of’ such ‘material facts’ . . . in the sense that some or all of such ‘material facts,’ as stated in the complaint, are also common to, and form a part of, the operative facts set forth in the answer as an independent cause of action—‘counterclaim.’ . . .

The choice of common operative facts, however, is expressly limited under the transaction clause to only those facts which comprise the ‘contract’ or ‘transaction’ set forth in the complaint. . . . The term ‘transaction’ would seem to offer great flexibility. . . . Conceivably, ‘transaction’ might include all those facts which a layman would naturally associate with, or consider as being a part of, the affair, altercation, or course of dealings between the parties.

CLARK, *supra* note 21 § 102, at 654-55.

⁴²*See supra* notes 20-23 and accompanying text. A fact-based definition of cause of action in code states—or claim in rules states—would “promote the ‘convenient, economical and efficient conduct of court business, the enforcing of rules of substantive law with as little obtrusion of procedural rules as possible . . . More shortly we may state it as “convenience of

A skeptic might well point out what Charles Clark intended may not be what the advisory committee intended, and what the advisory committee intended may not be what the Supreme Court intended, and what the Supreme Court intended may not be what the rule actually says. All true enough. Yet joinder decisions should reflect the procedural philosophy and policy of the Federal Rules, and the Federal Rules transparently reflect the procedural philosophy and policy of Charles Clark.⁴³

trial.”” Bone, *supra* note 19, at 85, quoting Clark, *supra* note 34, at 820.

Years later, from the bench, Clark warned against narrow definitions across the field of civil procedure. Plaintiff sued on two theories: patent infringement and unfair competition. The majority reasoned that different evidence would be required for each theory and denied pendent jurisdiction. In dissent, Judge Clark fumed

[T]he core of the plaintiff’s grievance is the same in each case. . . . Narrow views as to it may lead not only to peculiar and uneconomical results so far as federal jurisdiction is concerned, but also to kindred problems involving res judicata, amendment, finality of judgments, and all the other where the yardstick of the cause of action is applicable.

Musher Found. v. Alba Trading Co., 127 F.2d 9, 12 (2d Cir. 1942) (Clark, J., dissenting).

⁴³The ensuing years brought Charles Clark many opportunities to expound on the intended meaning of the FED. R. CIV. P.: he was a federal judge, a frequent public speaker, and a member of the advisory committee until his death in 1963. See Smith, *supra* note 19, at 915. Clark eschewed the desirability of telling everyone what he thought the rules meant: “[I]t is not appropriate for me to attempt to state the supposed effect of the various separate rules. Interpretation is now, of course, for the courts.” Clark, *supra* note 20, at 299. Despite that sentiment, Clark stated his thinking early and often, both in opinions and in speeches. For example, the very article in which he humbly declined to comment on the Federal Rules contains many comments. *Id. passim*. See Smith, *supra* note 19, at 921-50. Sometimes Clark even refused to follow precedents: “Since I am so publicly committed to advocacy of procedural rules both simple and uniform, it is distressing to me, as well as confusing to others who read, to have to announce and follow procedural views I oppose” *Id.* at 951, quoting MARVIN SCHICK, LEARNED HAND’S COURT 224 n. 8 (1970) (quoting letter to Judge Learned Hand (Feb. 2, 1944)).

Followers of the Clark philosophy of procedure might wish he had been more willing to express his views from the bench. A prime example is *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). Six years after the promulgation of the Federal Rules, the trial court granted a motion by an assistant United States Attorney to dismiss a complaint for “failure to state a cause of action.” The court of appeals, in an opinion written by Judge Clark, mildly reversed. Clark removed a caustic line from the opinion at the request of a fellow judge. Smith, *supra* note 19, at 924. Had Clark allowed the competitive juices to flow in the *Dioguardi* opinion, we might have

To repeat, that philosophy is when feasible to settle all controversies between the litigants in one suit, both to avoid litigating the same issues repeatedly and to promote judicial economy; joinder decisions should be convenience of trial decisions, not pleading questions.⁴⁴ The next section of this article evaluates how closely courts follow these policies in their decisions on compulsory counterclaims.

III. COURTS STRUGGLE WITH THE TRANSACTION OR OCCURRENCE

Courts deciding whether a counterclaim is compulsory or permissive, *i.e.*, whether the counterclaim arises out of the same transaction or occurrence as the claim, typically give lip service to the need to interpret the rule liberally or as broadly as possible.⁴⁵ Many then proceed apace to an illiberal, narrow interpretation.⁴⁶ In doing so, they lose sight of the policies of the counterclaim rule, the other joinder rules, and the Federal Rules as a whole. The “transaction or occurrence,” which is intended to broaden joinder, is employed in many decisions as a restrictive test to deny joinder. The counterclaim decisions do not return federal procedure to rigid formalism of pleadings, but they embark on that road.

A. Early Identification of Four Glosses for “Transaction or Occurrence”

From the beginning, courts labored to grasp the “transaction or occurrence” test. In their search for meaning in the new abstraction, judges quickly created no fewer than four competing

been spared many future opinions with their heads more in the codes than in the rules.

⁴⁴See *supra* notes 24-27 and accompanying text.

⁴⁵See WRIGHT, MILLER & KANE, *supra* note 29, § 1410 n. 1.

⁴⁶See *infra* parts III.A, C. Other courts are more generous. See *infra* part III.B.

glosses on the rule language, and worse looked for guidance in familiar code practice.⁴⁷

The four glosses were summarized in a law review article written only a decade after

⁴⁷In an earlier era, judges had retreated from the great reform of code practice by employing common law notions:

The cold, not to say inhuman, treatment which the infant Code received from the New York judges is matter of history. They had been bred under the common-law rules of pleading and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to import in to the Code rules and distinctions from the common-law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators.

McArthur v. Moffett, 143 Wis. 564, ___, 128 N.W. 445, 446 (1910). *See supra* note 39.

So too judges interpreted the new rules with familiar and comfortable—and narrow—code practices. For example, Judge Charles Clark could not even carry a majority and was forced to dissent in two cases narrowly interpreting the scope of plaintiff's claim for purposes of pendent jurisdiction. *Musher Found. v. Alba Trading Co.*, 127 F.2d 9 (2d Cir. 1942); *Lewis v. Vendome Bags, Inc.*, 108 F.2d 16 (2d Cir. 1939). He dissented strongly from the gloss the majority placed on the summary judgment rule in *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

promulgation of the Federal Rules,⁴⁸ and remain largely intact today:

Most courts, rather than attempting to define the key terms of Rule 13(a) precisely, have preferred to suggest standards by which the compulsory or permissive nature of specific counterclaims can be determined. Four tests have been suggested:

- 1) Are the issues of fact and law raised by the claim and counterclaim largely the same?
- 2) Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?
- 3) Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?
- 4) Is there any logical relation between the claim and the counterclaim?⁴⁹

These four "tests," or glosses on the rule language, will now be discussed in turn. Two tests (numbers one and three) are inappropriate, one test (number two) passes the buck, and one test (number four) is superfluous.

The first gloss, whether the issues of fact and law are largely the same, is doubly inappropriate. Both sub-tests violate the intent of the rule.

⁴⁸Wright, *supra* note 25, at 270-71.

⁴⁹WRIGHT, MILLER & KANE, *supra* note 29, § 1410, at 52-55. Other authorities agree with this summary. See BLACK'S, *supra* note 15, at 1535; MOORE, *supra* note 30, § 13.10[1][b].

The lesser error in the first gloss is the idea that the “issues of fact” need be “largely the same.” Certainly facts encompassed within the same transaction or occurrence may produce different and discrete fact issues for trial. A simple example is a contract between A and B. When A sues for breach of contract and seeks damages for failure to pay royalties, B counterclaims against A for breach of fiduciary duty in passing proprietary information to a third person. One contract, one transaction or occurrence, two dissimilar fact issues. Another simple example is a suit by C against former employer D Corp. for discrimination in firing her; D Corp. counterclaims for property damage inflicted by C immediately after the termination. One firing, one transaction or occurrence, two dissimilar fact issues. Upon first identifying this gloss, Professor Charles A. Wright called it “plainly unsound.”⁵⁰ Fifty years later, his leading treatise is only slightly less critical, deeming the test “of doubtful utility.”⁵¹

⁵⁰Wright, *supra* note 25, at 271.

⁵¹The reasons why the test is “plainly unsound” and “of doubtful utility” are these: It assumes . . . defendant will be both motivated and able to determine before answering whether his claim must be asserted as a compulsory counterclaim under Rule 13(a). Yet, given the permissive nature of pleading under the federal rules, no one can be certain what the issues are until after the pleadings are closed . . . Furthermore, a strict application of the identity of issues test would be inconsistent with many authoritative counterclaim decisions. Indeed, in the leading Supreme Court decision on compulsory counterclaims, *Moore v. New York Cotton Exchange*, which was decided under former Equity Rule 30, plaintiff’s claim centered around the question whether defendants were violating the antitrust laws by refusing to give plaintiff ticker tape service, while the counterclaim raised the issue whether plaintiff was purloining quotations from defendant’s exchange and using them for a ‘bucket shop’ operation. Clearly, neither the facts nor the issues involved in these two claims were identical, yet the Supreme Court held the counterclaim compulsory, stating: ‘To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant’s counterclaim.’ WRIGHT, MILLER & KANE, *supra* note 29, § 1410, at 58-59, *quoting* *Moore v. New York Cotton Exch.*, 270 U.S 593, 610 (1926).

The greater error in the first gloss is the notion that issues of law should be considered at all. The transaction or occurrence was and is fact-based; law is irrelevant.⁵² Perhaps because courts now realize the consideration of legal theories is a false test, recent cases largely abandon it. Some cases, however, still mention legal theories as part of other tests: one leading opinion declares “In short, there is no formalistic test to determine whether suits are logically related. A court should consider the totality of the claims, including the nature of the claims, the legal basis for recovery, the law involved, and the respective factual backgrounds.”⁵³ One can only respond no. No! No!! No!!! Well, got one at least.

The second gloss, whether res judicata would bar a second suit, merely passes the buck. The test may have come from a dissenting opinion: “[T]he following is the acid test in distinguishing the two: If a defendant fails to set up a ‘compulsory’ counterclaim, he cannot in a later suit assert it against the plaintiff, since it is barred by res judicata; but if it is ‘permissive’, then it is not thus barred.”⁵⁴ The statement advances the discussion not a whit. The court must

⁵²See *supra* notes 37-42 and accompanying text. Referring to the “transaction” still required in many code states, the primary author of the Federal Rules states

Many courts have stated restricted definitions, distinguishing as separate things claims resting merely upon different legal theories from those sued upon. The more desirable rules seems to be to consider these terms as referring to groupings of operative facts . . . CLARK, *supra* note 21, § 102, at 653.

⁵³*Burlington N. R.R. v. Strong*, 907 F.2d 707, 711 (7th Cir. 1990). See *infra* notes 60-63 and accompanying text for discussion of the logical relationship test. Some commentators even quote this language from *Burlington* with apparent approval. See MOORE, *supra* note 30 § 13.10[2][a], at 13-18; Michael D. Conway, Comment, *Narrowing the Scope of Rule 13(a)*, 60 U. CHI. L. REV.141, 151 (1993).

⁵⁴*Libbey-Owens-Ford Glass Co. v. Sylvania Indus. Corp.*, 154 F.2d 814 (2d Cir. 1946) (Frank, J., dissenting). Tellingly, Judge Jerome Frank is dissenting from a majority opinion by Judge Charles Clark holding a plaintiff’s multiple-theory complaint is only a single claim preventing interlocutory appeal under FED. R. CIV. P. 54(b).

next ask whether res judicata would bar the claim, and that completes the circle back around to whether it arises from the same transaction (or occurrence). Why take the circular trip?

Further, the statement is inaccurate. B's unpleaded claim against A is not precluded when judgment is reached on a claim by A against B—in the absence of a compulsory counterclaim rule. For this reason, Professor Wright first deemed this test not “apt” because it would mean the compulsory counterclaim rule merely states the law as it always was.⁵⁵ Fifty years later, his treatise points out the test is actually the opposite: absent a compulsory counterclaim rule, a party is not barred from suing on an unpleaded counterclaim.⁵⁶

A few cases mention the res judicata test, but do not really employ it in the analysis.⁵⁷ Like the first test, this second test has largely faded from counterclaim analysis.

The third gloss, whether substantially the same evidence will support or refute both claim and counterclaim, is plainly too narrow. It is a one-way test. When the same evidence will support or refute both claims, that is a strong indication both arise from the same set of facts.

⁵⁵See Wright, *supra* note 25, at 271.

⁵⁶WRIGHT, MILLER & KANE, *supra* note 29, § 1410, at 59. Also, the rule would make uniform federal application difficult because preclusion doctrines are state law. *Id.*

⁵⁷*E.g.*, *Iron Mountain Security Storage Corp. v. American Specialty Foods, Inc.*, 457 F. Supp. 1158, 1162 (E.D. Pa. 1978) states “Since . . . the counterclaim arises out of the same set of facts . . . it is ‘compulsory’ . . . and would be nonlitigable under res judicata principles if not asserted as part of this case.” That statement asserts only that an unpleaded compulsory counterclaim is later barred by res judicata; it does not use res judicata to identify whether the counterclaim is compulsory. *Agostine v. Sidcon Corp.*, 69 F.R.D. 437, 442 (E.D. Pa. 1975) states “*Res judicata* would not bar Domestic from asserting its counterclaims . . . in a later state court suit, because by this Court’s holding them to be permissive, the counterclaims cannot be barred.” In like fashion, that statement asserts only that an unpleaded permissive counterclaim is not later barred by res judicata; it does not use res judicata to identify whether the counterclaim is permissive.

The converse is not true: a claim and counterclaim can arise from the same set of facts—the same transaction or occurrence—and require discrete evidence to prove each. Professor Wright makes this point, with numerous examples, in both his early article and leading modern treatise.⁵⁸

Over the years, courts have employed this same-evidence test to reach some spectacularly bad results.⁵⁹ The better course is to abandon it altogether.

That leaves the fourth gloss, whether the claim and counterclaim are logically related, as the best of a bad lot. At its best, this test focuses on the facts of both the claim and counterclaim.⁶⁰ As such, it is a rather harmless gloss on transaction or occurrence.⁶¹ The

⁵⁸WRIGHT, MILLER & KANE, *supra* note 29, § 1410, at 60; Wright, *supra* note 25, at 271-72.

⁵⁹Examples abound. In *Ginsberg v. Valhalla Anesthesia Associates*, 971 F. Supp. 144 (S.D.N.Y. 1997), when plaintiff became pregnant, she missed some work due to sickness, later went on maternity leave, and eventually was terminated. She claimed for discrimination. Defendant counterclaimed 1) for benefits paid her while on maternity leave and 2) for damages for poor performance while she was sick. The court ruled the same-evidence test made the “first counterclaim” compulsory but the “second counterclaim” permissive. The question the court should have asked itself is how many times was plaintiff pregnant? *See infra* notes 163-72 and accompanying text. Any lay person would expect all the facts of employment issues involved in a single pregnancy to be tried together, and a single trial would be efficient for both the court system and the parties. In *Anderson v. Central Point School Dist.*, 554 F. Supp. 600 (D. Ore. 1982), plaintiff sued on various theories when the school district relieved him of his coaching duties. Defendant district counterclaimed for abuse of process. The court ruled the counterclaim permissive on the same-evidence test. The question the court should have asked itself is what facts did the abuse of process counterclaim arise out of if not the facts of the claim? In *Williams v. Robinson*, 1 F.R.D. 211 (D.D.C. 1940), plaintiff wife sued for maintenance; defendant counterclaimed (“cross-complaint”) for divorce against plaintiff on the ground of adultery and added Williams as an additional party to the counterclaim. Williams later sued separately for defamation. The court ruled Williams’ claim was not compulsory on the same-evidence test. Again, the question the court should have asked itself is what facts the defamation claim arose from if not the pleaded adulterous relationship? *See infra* note 166. A lay person would certainly expect this sordid set of facts to be tried together, and efficiency considerations support that result.

⁶⁰*See* MOORE, *supra* note 30, § 13.10[1][a]: under the section heading “Logical

criticism sometimes raised against this approach is that it is too flexible, but that is really no criticism at all.⁶² At its worst, this test leads a court to seek the logical relationship in the legal theories instead of the facts. This would be as bad as the first three tests. Fortunately, the courts

Relationship Rests on Factual Identity of Claims,” Moore’s treatise states “The claims are logically related if the essential facts alleged by the plaintiff constitute, at least in part, the basis of the defendant’s counterclaim.”

⁶¹The gloss is obvious when one considers that the proper statement in Moore’s treatise should be that the claims arise out of the same *transaction or occurrence* “if the essential facts alleged by the plaintiff constitute, at least in part, the basis of the defendant’s counterclaim.” See *supra* note 60.

Even Charles Clark apparently was willing to accept the logical relationship test as not far from the transaction or occurrence test. Shortly after the promulgation of the Federal Rules, he wrote

A ‘compulsory counterclaim’ under Rule 13(a) is a claim, not the subject of a pending action, which the defendant has at the time of its filing if it ‘arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.’ This rule is a broadening of former Equity Rule 30 to include ‘occurrence,’ as well as ‘transaction,’ and to apply to all civil actions, not merely to suits in equity. But the equity rule had been given a liberal interpretation in the interest of avoiding multiplicity of suits in *Moore v. New York Cotton Exchange*, 270 U.S. 593 [1926], where it was said: “‘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.’

* * *

The compulsory counterclaim device is, of course, only a means of bringing all logically related claims into a single litigation.

Lesnik v. Public Indus. Corp., 144 F.2d 968, 975 (2d Cir. 1944). A decade later, he cited both *Lesnik* and Moore’s treatise in support of the statement “In practice this [transaction or occurrence] criterion has been broadly interpreted to require not an absolute identity of factual backgrounds for the two claims, but only a logical relationship between them.” *United Artists Corp. v. Masterpiece Productions, Inc.*, 221 F.2d 213, 216 (2d Cir. 1955).

⁶²“The looseness of the latter test has not been a detriment, however, since the courts make an effort to apply it in terms of the policies underlying Rule 13(a).” WRIGHT, MILLER & KANE, *supra* note 29, § 1410, at 65. Another treatise applauds “the policies of the compulsory counterclaim rule of achieving economy, fairness, and consistency by requiring both to be determined in a single suit.” MOORE, *supra* note 30, § 13.10[1][b]. “[T]he sound policy is to require the pleading of defendant’s claims whenever there is any possibility that it may be advantageous to have them tried with plaintiff’s claim.” Wright, *supra* note 25, at 275.

have by and large not used the logical relationship test in this manner.

After fumbling for decades with the four tests just discussed, courts now seem to be coalescing around the logical relationship gloss.⁶³ To a limited extent, this is a welcome development, but it cannot be greeted with unabashed enthusiasm. Gloss is gloss. Even one layer of gloss is not enough for some courts.⁶⁴ And gloss can yield mighty strange results.⁶⁵

The courts have made the compulsory counterclaim rule, turning on the transaction or occurrence, much harder work than was intended and should be. A return to both the language of

⁶³A recent opinion identifies five circuits—Second, Third, Fifth, Seventh, and District of Columbia—that adopt the logical relationship test. *Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 389-90 (3d Cir. 2002) (Alito, J.). A leading treatise counts eight circuits that use one form or another of the logical relationship test. MOORE, *supra* note 30, §13.10[1][b] counts the Second, Fourth, Seventh, Ninth, and Tenth Circuits as using the test with weight also given to the same-evidence test; it counts the First, Fifth, and Eleventh Circuits as using the test in searching for an “aggregate of operative facts.”

⁶⁴*See infra* notes 102-04 and accompanying text. One court complains the logical relationship test is too vague and proceeds to hold a counterclaim for defamation arising out of the complaint and a press release issued upon the filing of the complaint is only permissive! *Bose Corp. v. Consumers Union of U.S., Inc.*, 384 F. Supp. 600 (D. Mass. 1974). Another court cobbles together various glosses. *Meinrath v. The Singer Co.*, 87 F.R.D. 422, 432 (S.D.N.Y. 1980):

In determining whether the claim and counterclaim arise out of the same ‘transaction or occurrence,’ courts in this Circuit are required to assess whether there is a ‘logical relationship’ between the claim and the counterclaim. Although precise identity of issues and evidence between the two claims is not required, their ‘thrust’ must be similar, or the counterclaim will be deemed permissive. In applying this test, the Court may consider whether the two claims are “‘inextricably intertwined,’” so that a party’s success on one renders the other moot; whether separating them would result in ‘fragmentation of (the) litigation and multiplicity of suits’ and whether it is fair to preclude a defendant that failed to counterclaim from asserting its claim in a separate action in another form. [Footnotes omitted.]

⁶⁵Holding a counterclaim permissive, one court says “While the debt claim and the [Fair Debt Collection Practices Act] counterclaim raised here may, in a technical sense, arise from the same loan transaction, the two claims bear no logical relation to one another.” *Peterson v. United Accounts, Inc.*, 638 F.2d 1134, 1137 (8th Cir. 1981). *See also infra* part III.C.2.

the rule and the policies behind the rule will result in more sure-footed—and easier—decisions.⁶⁶

B. Some Courts Follow the Rule and Get It Right

Some early, much celebrated decisions follow the intent and policies of Federal Rule 13(a) and look to the facts of the cases. Plaintiff in *Great Lakes Rubber Corp. v. Herbert Cooper Co.*,⁶⁷ sued defendant in federal court for the state law tort of unfair competition. Defendant first counterclaimed for an antitrust violation, which included allegations of unjustified lawsuits against competitors. Defendant next moved to dismiss the original complaint for lack of subject matter jurisdiction. The court dismissed the complaint on a finding of no diversity, but retained the federal question counterclaim. The original plaintiff then asserted a counterclaim—virtually identical to the original complaint—as a compulsory counterclaim to what was the original counterclaim. The Third Circuit concluded the counterclaim was compulsory and thus under ancillary jurisdiction: the two claims were “offshoots of the same basic controversy,” and separate trials “would involve a substantial duplication of effort and time by the parties and the courts.”⁶⁸ The court properly paid no attention to the differing legal theories—one federal and one state. The second celebrated case is *Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*⁶⁹ The George A. Fuller Company (Fuller) signed two contracts as general contractor with the city of Scottsboro, Alabama, to construct a manufacturing plant; the plant was to be leased to Revere Copper & Brass Incorporated (Revere). Aetna Casualty & Ins. Co. (Aetna) issued a performance

⁶⁶*See infra* parts III.B, IV.

⁶⁷286 F.2d 631 (3d Cir. 1961).

⁶⁸*Id.* at 634.

⁶⁹426 F.2d 709 (5th Cir. 1970).

bond on Fuller. Plaintiff Revere sued Aetna on the performance bond in federal court. Aetna impleaded Fuller. Fuller “counterclaimed” directly against Revere under Federal Rule 14(a). Revere moved to dismiss the 14(a) claim for lack of diversity, but the Fifth Circuit upheld ancillary jurisdiction. Paying no attention to the multiple contracts, the confusing mass of parties, and the varying law, the court recognized all the facts arose from a single construction project: one transaction or occurrence.⁷⁰

These decisions were rendered closer to the time of Charles Clark and may have been informed by his influence. Today, with Clark gone from the scene for more than 40 years, courts have by and large moved away from his thinking; the farther removed they become, the more they struggle with counterclaim cases, and the more often they conclude a counterclaim is not compulsory.⁷¹

Some courts today continue to follow the language and intent of the compulsory counterclaim rule. These are the courts that look to the facts of the claim and counterclaim.⁷²

⁷⁰“The theory adopted in the new rules . . . has been that the “transaction” or “occurrence” is the subject matter of a claim, rather than the legal rights arising therefrom; additions to or subtractions from the central core of fact do not change this substantial identity . . .” *Id.* at 713, *quoting* Clark v. Taylor, 163 F.2d 940, 942 (2d Cir. (1947)). *See also* LASA Per L’Industria Del Marono Societa Per Azioni v. Alexander, 44 F.2d 413 (6th Cir. 1969) (despite a welter of counterclaims, cross-claims, and third-party claims, court recognized all arose from one construction project). *See infra* note 162.

⁷¹Early on, the leading commentator wrote “Courts have almost uniformly given compulsory rules a liberal construction. This trend should continue . . .” Wright, *supra* note 25, at 299. This optimistic prediction has not been proved out by later cases. *See infra* part III.C.

⁷²*Cf.* MOORE, *supra* note 30, § 13.10[1][b], at 13-16-13-17: “The First, Fifth, and Eleventh Circuits ask whether the claim and counterclaim share an ‘aggregate of operative facts’ . . .”

Even this approach is somewhat problematical, both because the term “operative facts” has been passed along from code practice, *see* CLARK, *supra* note 21, §§ 18, 102, and because the

phrase is itself a gloss. Later, the same treatise criticizes the test, saying it “could have the deleterious effect of undermining judicial economy if it allowed the trial in one action of claims so loosely related that they do not in fact constitute a convenient trial package.” *Id.*, § 13.10[3], at 13-26. Of course, the author has totally lost sight of the purposes of the joinder rules and FED. R. CIV. P. 21. *See supra* notes 27, 32-33 and accompanying text.

Many decisions, both older and recent, have focused tightly on the facts to a sound result.⁷³

⁷³A particularly strong decision is *Critical-Vac Filtration Corp. v. Minuteman Intern'l, Inc.*, 233 F.3d 697 (2d Cir. 2000), *cert. denied*, 532 U.S. 1019 (2001). The Second Circuit carefully distinguishes a much-criticized and unfortunate Supreme Court precedent [*Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944)] to hold that an antitrust counterclaim is compulsory to a patent infringement claim arising from the same facts. The court relies on the connection of the essential facts of both claims and the dictates of judicial economy and fairness. *Id.* at 699. *See also, e.g.*, *Kirkpatrick v. Lenoir County Bd. Of Educ.*, 266 F.3d 380 (4th Cir. 2000) (counterclaim compulsory because arises from same hearing and involves same child and school district); *Pochiro v. Prudential Ins. Co.*, 827 F.2d 1246 (9th Cir. 1987) (counterclaim “inextricably intertwined” with facts of the claim); *Nachtman v. Crucible Steel Co.*, 165 F.2d 997, 999 (3d Cir. 1948) (“claims of the litigants all stem from the basic fact that plaintiff, while

These courts almost invariably find the counterclaim is compulsory.⁷⁴

C. *Many Courts Indulge in Extraneous Considerations and Get It Wrong*

in defendant's employ, asserted the right of invention"); *D'Jamoos v. Griffith*, 368 F. Supp. 2d 200 (E.D.N.Y. 2005) (claim for legal malpractice and counterclaim for attorney fees are based on underlying identity of facts); *Harrison v. Grass*, 304 F. Supp. 2d 710 (D. Md. 2004) (both RICO claim and theft counterclaim arise from continuing business relationship); *Jupiter Aluminum Corp. v. The Home Ins. Co.*, 181 F.R.D. 605, 608 (N.D. Ill. 1998) (counterclaim arises from "same basic set of facts" and "judicial economy would be served").

⁷⁴Research has found only one decision that may stretch transaction or occurrence too far, although the result is to a large extent explained by the fact the appellate court is affirming a trial court decision disposing of the entire controversy between the parties. *See United States ex rel. D'Agostino Excavators, Inc. v. Heyward-Robinson Co.*, 430 F.2d 1077 (2d Cir. 1970). The prime contractor and the subcontractor entered two contracts for two separate construction jobs. The subcontractor sued for nonpayment on one job (which qualified for federal jurisdiction); the contractor counterclaimed for overpayments on that job and also the other job (which did not qualify for federal jurisdiction). The court approved the counterclaim covering both jobs as compulsory (and thus subject to ancillary jurisdiction) on considerations such as "same type of work," "substantially the same period," "progress payments . . . not allocated," and "single insurance policy covered both jobs." *Id.* at 1081-82. The problem is there were two separate jobs.

Review of the federal counterclaim cases shows that, more often than not, courts look in wrong directions—instead of to the fact-based transaction or occurrence—for guidance in decision. These extraneous considerations often lead courts astray into decisions that a counterclaim is not compulsory.

Why more courts seem to get compulsory counterclaim decisions wrong than those that get them right is a matter of speculation, but two ideas come to mind. The first is “Judges, like other mortals, make mistakes—and they do so in matters of procedure more often than elsewhere.”⁷⁵ They often make these mistakes because they do not value procedure as highly as substantive law.⁷⁶ They make these mistakes because of “procedural particularism,” *i.e.*, they employ procedural decisions to do justice in the case.⁷⁷

This last thought leads into the second idea. Many judges apparently do not like the compulsory counterclaim rule much, so they interpret it narrowly to avoid the results it commands. Enforcement of the rule leads to results judges might deem unfair: an unpleaded compulsory counterclaim is lost,⁷⁸ a compulsory counterclaim forces the court to admit a state

⁷⁵Wright, *supra* note 25, at 273.

⁷⁶“A real difficulty with our subject is that it is thought beneath the notice of those whose gaze is fixed on justice alone, but who nevertheless may stumble without ever seeing the lowly obstruction at their feet.” CLARK, *supra* note 21, at 71.

⁷⁷“This phenomenon is a result of what may be called ‘procedural particularism’: ‘. . . the resort to a rule of procedure, often subconsciously created or inflated for the occasion, as a short cut to doing justice in a particular case.’” Wright, *supra* note 25, at 273 n. 91, *quoting* CLARK, *supra* note 21, at 71.

⁷⁸*See Burlington N. R.R. v. Strong*, 907 F.2d 707 (7th Cir. 1990) (counterclaim to recover insurance benefits paid to employee injured in two incidents not compulsory to employee’s Federal Employers Liability Act claim for damages for injuries in same incidents).

law claim into federal jurisdiction,⁷⁹ a compulsory counterclaim complicates and makes more work in the instant case,⁸⁰ and a compulsory counterclaim may conflict with other federal policies that are perceived more important.⁸¹

This negative attitude among judges toward the compulsory counterclaim rule is unfortunate because the rule itself is neutral, and generous application will produce as many benefits as detriments to the courts. An unpleaded compulsory counterclaim is lost, both reducing future caseload and providing a strong incentive to avoid piecemeal litigation.⁸² A

⁷⁹*See Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 209 (2d Cir. 2004) (counterclaim to collect debts owed under contracts not compulsory to federal Equal Credit Opportunity Act claim for racially discriminatory markups on same contracts since “related to those purchase contracts, but not to any particular clause or rate”); *Birmingham Fire Ins. Co. v. Winegardner & Hammons, Inc.*, 714 F.2d 548 (5th Cir. 1983) (A hotel with two insurance carriers was damaged in a hurricane. When one carrier sued for a declaratory judgment of non-liability, the hotel “cross-complained” and sought to add the second carrier as an additional defending party. The court said its decision denying the compulsory nature of the counterclaim “in no way encourages piecemeal *federal* litigation,” opined a hurricane “can hardly be called an ‘operative fact,’” and volunteered that the hotel “should sue both insurers in state court.” *Id.* at 552, 554. *See infra* note 164.

⁸⁰*See Gilldorn Savings Ass’n v. Commerce Savings Ass’n*, 804 F.2d 390 (7th Cir. 1986) (counterclaim concerning exchange of stock for debentures pursuant to terms of stock purchase agreement executed a year earlier not compulsory to claim concerning the stock purchase agreement; counterclaim “significantly more complex” and “would have unduly and unnecessarily complicated the litigation.” *Id.* at 397.) [*see infra* notes 96-97 and accompanying text]; *Xerox Corp. v. SCM Corp.*, 576 F.2d 1057 (3d Cir. 1978) (counterclaim for patent infringement not compulsory to claim for antitrust violations; considerations of “enormous burden” on defendant and delay).

⁸¹*See infra* part III.C.2.

⁸²*See Wright, supra* note 25, at 299:

Compulsory counterclaim rules may at first blush appear harsh. On their face they are opposed to the dominant trend in procedure today which is to get away from penalizing a party’s procedural errors Yet such rules are an important part of the movement to end a multiplicity of litigation, and thus are in the interest of both litigants and the public.

broad interpretation of the transaction or occurrence allows a broader scope of the salutary doctrine *res judicata*.⁸³ A compulsory counterclaim relates back and is saved from loss due to expiration of the statute of limitations.⁸⁴ A compulsory counterclaim qualifies for supplemental jurisdiction that allows a court to resolve an entire dispute between parties in one lawsuit.⁸⁵ A compulsory counterclaim allows a defendant to sue the United States despite the doctrine of sovereign immunity.⁸⁶

1. Courts err in compulsory counterclaim cases

So many grudging compulsory counterclaim decisions provide so many targets to shoot at that one hardly knows whether to use a rifle to start picking off the faulty analyses or to fire a shotgun to take out the whole and be done with it. This section identifies five ways in which the courts employ faulty analyses in deciding compulsory counterclaim cases.

⁸³Res judicata, or claim preclusion, is based on a broad definition of transaction. RESTATEMENT, *supra* note 6, § 24. *See supra* note 7.

⁸⁴*See Kirkpatrick v. Lenoir County Bd. Of Educ.*, 266 F.3d 380 (4th Cir. 2000) (counterclaim for school district's payment for educational evaluations of student compulsory to claim by parents of child for reimbursement of private school tuition). *See infra* note 167.

⁸⁵28 U.S.C. § 1367 (2000). *See supra* note 8 and accompanying text.

⁸⁶WRIGHT, MILLER & KANE, *supra* note 29, § 1414.

a. Using gloss on the rule language

An earlier section of this article discussed the four common glosses on “transaction or occurrence” that were created soon after adoption of the Federal Rules and remain current today.⁸⁷ As there discussed, the first three are worse than mere gloss: they misdirect the court.⁸⁸ Only the fourth—whether a logical relationship exists between the claim and the counterclaim—assists the analysis at all.⁸⁹ The logical relationship test finds better use elsewhere; it may be positively helpful in permissive joinder cases,⁹⁰ but in compulsory counterclaim cases

⁸⁷*See supra* part III.A.

⁸⁸*See supra* notes 50-59 and accompanying text.

⁸⁹*See supra* notes 60-63 and accompanying text.

⁹⁰The counterclaim rule, FED. R. CIV. P. 13(a),(b), the cross-claim rule, FED. R. CIV. P. 13(g), and the third-party practice rule, FED. R. CIV. P. 14(a), refer only to “transaction or occurrence.” The relation back of amendment rule, FED. R. CIV. P. 15(c), employs “conduct, transaction, or occurrence.” Only the permissive joinder of parties rule, FED. R. CIV.P. 20(a), has a broader test: “same transaction, occurrence, or series of transactions or occurrences.” While the logical relationship test is an unnecessary, unhelpful gloss on “transaction or occurrence” [*see supra* notes 64-65], it can be quite helpful to a court stitching together a “series of transactions or occurrences.” This analysis will be developed in a forthcoming companion article by the author.

it is mere gloss.

b. Using the wrong test

Some courts and commentators stray further from the rule language than mere gloss to outright error. One leading commentator fastens on the logical relationship test, and then proceeds to recognize a “streamlined construction of the logical relationship test” that is used by several courts; this test, the commentary says

gives weight to the ‘same evidence’ and ‘claim preclusion’ factors. It asks the court to inspect the totality of the two claims, including the nature of the claims, their legal basis for recovery, their respective factual backgrounds, and the underlying substantive law, in order to delimit the basic transactional unit encompassing claim and counterclaim.⁹¹

That is just plain wrong in three of its four prongs, as they tell the court to look at the legal theories instead of the facts of the case.⁹² This disturbing triple error likely traces to a decision of the Seventh Circuit.⁹³

c. Misapplication of facts to the test

Other opinions have less trouble with the test than with applying the facts of the individual case to it. The Seventh Circuit has contributed two of these decisions also. In one, the parties entered into companion contracts to sell insurance and to guarantee a loan to finance the operation; the question was whether a suit to enforce the guarantee contract was a compulsory

⁹¹MOORE, *supra* note 30, § 13.10[2][a], at 13-17-13-18.

⁹²*See supra* notes 52-53 and accompanying text.

⁹³*See Burlington N. R.R. v. Strong*, 907 F.2d 707, 711 (7th Cir. 1990). *See supra* note 53. Acceptance of this erroneous statement by a leading treatise will almost certainly result in its unfortunate spread. The treatise cites an additional six other decisions of five circuits in support of its synthesis, but those opinions offer no support. *See* MOORE, *supra* note 30, § 13.10[2][a], at 13-17-13-18.

counterclaim in a suit to enforce the sale contract.⁹⁴ The court recognizes the key consideration is whether the claims present a “core of operative facts,” and continues to the remarkable conclusion “Though as a linguistic matter the claims might arguably have been said to come out of the same ‘transaction’–the loan agreement’–the relationship between the claims lacked the necessary ‘logical relationship’ to make the counterclaim compulsory.”⁹⁵ In the other case, one savings association sold a mortgage operation to another savings association, and a year later agreed to exchange a subordinated debenture against the selfsame, now failing, mortgage operation into preferred stock.⁹⁶ The basic question is whether the sale and the exchange are part of the same transaction or occurrence for compulsory counterclaim purposes. After mentioning that the “transaction or occurrence” should be liberally interpreted, the court proceeds to conclude “The exchange of stock for debentures was totally unrelated to the Stock Purchase Agreement originally entered into,” and adds “The claims do not spring from a continuous course of dealings between the parties”⁹⁷ Perhaps the second assertion is more accurate than the first since this

⁹⁴Colonial Penn Life Ins. Co. v. Hallmark Ins. Administrators, Inc., 31 F.3d 445 (7th Cir. 1994).

⁹⁵*Id.* at 447, 448.

⁹⁶Gilldorn Savings Ass’n v. Commerce Savings Ass’n, 804 F.2d 390 (7th Cir. 1986).

⁹⁷*Id.* at 396, 397.

was not a continuous course of dealings; in fact, it is a single business deal.

Other courts have made similar decisions. Plaintiffs in one recent case sued an auto finance company for racial discrimination in its loan mark up policies, and the finance company counterclaimed for the amounts due on the same loans.⁹⁸ The court finds no logical relationship between the facts of the counterclaims and the claims since the counterclaims “related to those purchase contracts, but not to any particular clause or rate.”⁹⁹ Another court can perceive no “aggregate of operative facts” between a claim and cross-claim involving two insurance policies covering one hotel damaged in one hurricane.¹⁰⁰ A third with little reasoning asserts that the facts of a claim for breach of a noncompetition agreement and interference with contract after leaving a job “would do nothing to vitiate” the facts of a previously-unpleaded counterclaim asserting age discrimination and various torts prior to the end of the employment.¹⁰¹

d. Using all the “tests”

For some courts, using a single gloss on the rule language is not enough. They work their way through all four glosses, or “tests,” in deciding whether a counterclaim arises from the same transaction or occurrence. Every one of these cases reaches a narrow, grudging conclusion that the counterclaim is not compulsory.¹⁰² Some decisions are doubtless defective.¹⁰³

⁹⁸Jones v. Ford Motor Credit Co., 358 F.3d 205 (2d Cir. 2004).

⁹⁹*Id.* at 209.

¹⁰⁰Birmingham Fire Ins. Co. v. Winegardner & Hammons, Inc., 714 F.2d 548 (5th Cir. 1983). *See infra* note 164.

¹⁰¹Kopf v. Chloride Power Electronics, Inc., 882 F. Supp. 1183, 1188 (D.N.H. 1995). *See infra* note 169.

¹⁰²Federal Deposit Ins. Corp. v. Continental Ill. Nat’l Bank & Trust Co., 22 F.3d 1472

(10th Cir. 1994) (counterclaim involving same debtor-creditor relationship permissive); *Federman v. Empire Fire & Marine Ins. Co.*, 597 F.2d 798 (2d Cir. 1979) (counterclaim for injurious injury and fraud permissive as it presents different legal theories from claim for securities fraud); *Stewart v. Lamar Advertising of Penn LLC*, No. Civ. A. 03-2914, 2004 WL 90078 (E.D. Pa. Jan. 14, 2004) (counterclaim for fraud and breach of fiduciary duty during employment not compulsory to claim for employment discrimination); *Kirkcaldy v. Richmond County Bd. of Educ.*, 212 F.R.D. 289 (M.D.N.C. 2002) (former employee sued former school principal and board of education for sexual harassment; cross-claim by principal against board for termination

due to harassment allegations not same transaction or occurrence); *Goldman Marcus, Inc. v. Goldman*, No. 99-CIV. 11130 KMW, 2000 WL 297169 (S.D.N.Y. March 21, 2000) (counterclaim against former employer for mismanagement and failure to pay salary not compulsory to claim by former employer for copyright infringement and appropriation of trade secrets); *Adamson v. Dataco Derex, Inc.*, 178 F.R.D. 562 (D. Kan. 1998) (counterclaim for misappropriation of trade secrets on job not compulsory to Title VII claim for discrimination on job); *Majik Market v. Best*, 684 F. Supp. 1089 (N.D. Ga. 1987) (defendants' counterclaims for interference with contract relations and defamation arising from plaintiff's RICO claim not compulsory to that claim); *Agostine v. Sidcon Corp.*, 69 F.R.D. 437 (E.D. Pa. 1975) (counterclaim for debt owed not compulsory to claim for Truth in Lending Act violation arising from same debt instrument [*see infra* part III.C.2]); *Bose Corp. v. Consumers Union of U.S., Inc.*, 384 F. Supp. 600 (D. Mass. 1974) (counterclaim for defamation based on complaint and accompanying press release not compulsory); *Industrial Equip. & Marine Serv., Inc. v. M/V Mr. Gus*, 333 F. Supp. 578 (S.D. Tex. 1971) (counterclaim for breach of warranties in sale not compulsory to claim to enforce mortgage on sale of ship).

One opinion does not merely work its way through all four tests. It employs all four considerations as a sort of balancing test.¹⁰⁴

e. Using inappropriate considerations

¹⁰³*Federman*, 597 F.2d 798; *Kirkcaldy*, 212 F.R.D. 289; *Adamson*, 178 F.R.D. 562; *Majik Market*, 684 F. Supp. 1089; *Bose Corp.*, 384 F. Supp. 600; *Industrial Equip.*, 333 F. Supp. 578.

¹⁰⁴*Painter v. Harvey*, 863 F.2d 329, 331 (4th Cir. 1988): “A court need not answer all these questions in the affirmative for the counterclaim to be compulsory.” In doing so, the court makes hard work of a simple case. Plaintiff sued defendant arresting officer for use of excessive force, and defendant counterclaimed for defamation by plaintiff in the filing of the complaint and alerting the news media. The court holds the counterclaim compulsory after working through and balancing all four tests. The sharper analysis would be either to ask what facts the defamation counterclaim arose from if not the facts of the complaint, or to consider how many times plaintiff was arrested. *See infra* note 164.

Courts that fail to focus on the facts and add additions into the analysis seldom successfully shape a transaction or occurrence. Most often these courts inappropriately consider the legal theories presented by the claims.¹⁰⁵ Sometimes opinions deny that a counterclaim arises out of the same transaction or occurrence based at least in part on other extraneous considerations. These include that the counterclaim would require a different appellate path,¹⁰⁶ it would place a burden on the defending party,¹⁰⁷ or it would violate another federal policy.¹⁰⁸ The most inappropriate of all is that addition of the counterclaim might cause confusion of the jury.¹⁰⁹

¹⁰⁵*E.g.*, Burlington N. R.R. v. Strong, 907 F.2d 707 (7th Cir. 1990) (counterclaim for recovery of disability benefits paid by employer to employee not compulsory to claim by injured employee under Federal Employees' Liability Act for same injury in part because different law governs); Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798 (2d Cir. 1979) (counterclaim for injurious involvement and fraud permissive as it presents different legal theories from claim for securities fraud); Sparrow v. Mazda Am. Credit, 385 F. Supp. 1063, 1068 (E.D. Cal. 2005) (state law counterclaim for underlying debt not compulsory to federal law claim for violation of Fair Debt Collection Practices Act because "the legal issues and evidence relating to the claims are considered sufficiently distinct," and "The claim and counterclaim are, of course, 'offshoots' of the same transaction, but they do not represent the same basic controversy between the parties."); Kirkcaldy v. Richmond County Bd. of Educ., 212 F.R.D. 289, 296 (M.D.N.C. 2002) (former employee sued former school principal and board of education for sexual harassment; cross-claim by principal against board for termination due to harassment allegations not same transaction or occurrence as "legal questions presented . . . would overlap very little."); Shamblin v. City of Colchester, 793 F. Supp. 831, 834 (C.D. Ill. 1992) (counterclaim for breach of fiduciary duty on job not compulsory to claim for additional wages under minimum wage laws because "governed by different bodies of law."); United States v. Taylor, 342 F. Supp. 715 (D. Kan. 1972) (counterclaim for wrongful acts of lender in collecting note not compulsory to claim for note because claim on a guaranty and counterclaim in tort).

¹⁰⁶*See* Hydranautics v. Filmtec Corp., 70 F.3d 533 (9th Cir. 1995) (antitrust claim goes to court of appeals; patent infringement counterclaim goes to Federal Circuit).

¹⁰⁷Xerox Corp. v. SCM Corp., 576 F.2d 1057 (3d Cir. 1978) (burden and delay to require defendant to plead patent infringement counterclaim to antitrust claim).

¹⁰⁸*See infra* part III.C.2.

¹⁰⁹*See* Conway, *supra* note 53, at 161, *citing* Roberts Metals Inc. v. Florida Properties

The response to each and every one of these extraneous, inappropriate considerations is the same: the counterclaim rule was drafted specifically to make joinder issues trial questions, not pleading questions; the solution of the Federal Rules is later to sever the claims for trial, not to deny joinder at the pleading stage.¹¹⁰

2. Compulsory counterclaims in Truth in Lending Act cases

One question that has produced a circuit conflict is whether a state-law counterclaim for the debt is compulsory to a federal claim for violation of the Truth in Lending Act [TILA].¹¹¹ In the typical case, plaintiff borrower sues the lender in federal court on a claim that the loan documents fail to make the disclosures required by the TILA (a federal question); the defendant lender counterclaims on the debt (state contract law). The federal court can hear the counterclaim through supplemental jurisdiction only if the counterclaim is compulsory.¹¹² Is a debt counterclaim to a TILA claim compulsory? Several federal courts are in conflict.¹¹³

One line of authority holds the counterclaim is compulsory. Both the TILA claim and the debt counterclaim indisputably arise from the same contract, or debt instrument. A clearer example of the same transaction or occurrence can hardly be found.¹¹⁴ The opposing line of

Mktg. Group, Inc., 138 F.R.D. 89, 91 (N.D. Ohio 1991); *Agliam v. Ohio Savings Ass'n*, 99 F.R.D. 145, 148 (N.D. Ohio 1983).

¹¹⁰*See supra* notes 24-27 and accompanying text.

¹¹¹15 U.S.C. §§ 1601 et seq. (2000).

¹¹²28 U.S.C. § 1367 (2000). *See supra* note 8.

¹¹³*See* WRIGHT, MILLER & KANE, *supra* note 29, § 1410, at 76-78 nn. 64-67 (collecting cases).

¹¹⁴*See infra* notes 126-30 and accompanying text.

authority holds the counterclaim is permissive. These courts agree the transaction or occurrence encompasses the counterclaim but conclude the federal policy supporting private enforcement of the TILA is more compelling.¹¹⁵

The two competing lines of authority will be developed by analysis of three leading court of appeals decisions, all rendered within a year of each other: *Whigham v. Beneficial Finance Co.*,¹¹⁶ *Plant v. Blazer Financial Serv., Inc.*,¹¹⁷ and *Valencia v. Anderson Bros. Ford.*¹¹⁸ *Whigham* finds the counterclaim permissive; *Plant* finds the counterclaim compulsory; *Valencia* considers both positions and agrees with *Whigham*.

The one-page Fourth Circuit *Whigham* opinion holds the counterclaim permissive for several reasons: 1) the “issues of fact and law [are] significantly different,” 2) “the evidence needed to support each claim differs,” 3) the two claims “are not logically related,” and 4) the counterclaim “would impede expeditious enforcement of the federal penalty and involve the district court in debt collection matters having no federal significance.”¹¹⁹ Consider these four

¹¹⁵See *infra* note 119 and accompanying text.

¹¹⁶599 F.2d 1322 (4th Cir. 1979). This case also collects earlier precedents. *Id.* at 1324.

¹¹⁷598 F.2d 1357 (5th Cir. 1979).

¹¹⁸617 F.2d 1278 (7th Cir. 1980).

¹¹⁹599 F.2d at 1324.

arguments seriatim.

First, says the court, the issues of fact and law are different. The primary problem with this assertion is the questions of fact in the claim and counterclaim arise from the identical debt instrument. Absolute identity of all facts between any two claims is of course impossible and not what is required.¹²⁰ Indeed, the *Whigham* court is really not concerned with issues of fact; instead, it is concerned with issues of law: “The lender’s counterclaim, on the other hand, required the court to determine the contractual rights of the parties in accordance with state law.”¹²¹ The response to that statement is the transaction or occurrence is about facts; law is irrelevant.¹²²

Second, says the court, the evidence to support the claim and counterclaim differs. That too is an extraneous consideration. The transaction or occurrence is about facts, not evidence.¹²³

Third, says the court, the two claims are not logically related. This may arguably be a proper consideration, but the conclusion in *Whigham* is a bald assertion, supported only by the illogical statement “The borrower’s federal claim involves the same loan, but it does not arise

¹²⁰*See supra* notes 50-51 and accompanying text.

¹²¹599 F.2d at 1324.

¹²²*See supra* notes 52-53 and accompanying text.

¹²³*See supra* notes 58-59 and accompanying text.

from the obligations created by the contractual transaction.”¹²⁴ If not from the loan document, from where then does the TILA claim arise? From federal law, says the court. And so the court is back to the irrelevant consideration of law.

¹²⁴599 F.2d at 1324.

Fourth, says the court, to allow the counterclaim would impede “enforcement of the federal penalty and involve the district courts in debt collection matters having no federal significance.”¹²⁵ The distaste for having to rule on state law is apparent, yet that is part of the work of a federal court under supplemental—at that time ancillary—jurisdiction. The key consideration of *Whigham* appears to be that federal policy will suffer from allowing the counterclaim. That too is an irrelevant consideration. The proper response of a court to that concern should be severance for trial.¹²⁶

In contrast to *Whigham*, the Fifth Circuit in *Plant* holds the debt counterclaim is compulsory because “the obvious interrelationship of the claims and rights of the parties, coupled with the common factual bases of the claims, demonstrates a logical relationship.”¹²⁷ The court recognizes the policy argument that allowing the counterclaim might undermine the enforcement scheme of the federal TILA,¹²⁸ but counters that with a more directly relevant policy: the policy of the compulsory counterclaim rule to provide complete relief to a defendant brought involuntarily into court.¹²⁹

¹²⁵*Id.* [emphasis added].

¹²⁶*See supra* notes 27, 32-33 and accompanying text; *infra* notes 137-45 and accompanying text.

¹²⁷598 F.2d at 1364.

¹²⁸*Id.* at 1361. The court also mentions other policy arguments that have been raised against a finding the debt counterclaim is compulsory. A flood of debt counterclaims may result; TILA class actions might be destroyed by vast numbers of individual questions; the debt claim has a jury trial right while TILA does not; and federal courts would infringe state court authority over state law. *Id.* at 1362. *Plant* does not respond to these arguments directly, perhaps considering them mostly make-weight.

¹²⁹*Id.* at 1364. The court also raises another competing policy. It points to the concurrent

This reasoning is difficult to criticize. One could quibble with the court's reference to the "claims and rights" of the parties and to the logical relationship test, instead of strict focus on the facts and the transaction or occurrence standard, but that would not change the result. A critic can complain the court's reading of the rule is "literal" or "wooden,"¹³⁰ but that is the rule. Any real objection must come from the position that the rule should yield to superior federal policy. Again, that is an extraneous consideration.¹³¹

The third case in this little trilogy is *Valencia*. The Seventh Circuit examines both *Whigham* and *Plant*, and comes down on the side of *Whigham* that the debt counterclaim is permissive.¹³² In doing so, the opinion essentially repeats the arguments of *Whigham*, so the responses here will be by interlineation into the analysis section of the *Valencia* opinion:

The TILA claim and debt counterclaim raise different legal and factual issues governed by different bodies of law. [*As stated previously, considerations of differing law are irrelevant.*]¹³³ A TILA suit for inadequate disclosure, such as the instant case, can often

jurisdiction in federal and state courts created by Congress for TILA enforcement actions. From this, it says that to allow the debtor to pursue the TILA claim in federal court without being subject to the debt claim would upset the "evenhanded treatment afforded both parties under the Act," and the the TILA "reflects a purpose that the debt claim and the truth-in-lending claims be handled together." *Id.*

¹³⁰One commentator recognizes a "literal application of Rule 13" presents "little difficulty" since the same credit transaction is a single transaction or occurrence, yet asserts that the proper reading of the rule should not be "wooden." F. Gifford Landen, Comment, *Truth in Lending Act—Defendant's Debt Counterclaim—Compulsory or Permissive?*, 28 CASE W.R.L. REV. 434, 438, 449 (1978). This commentator argues courts should not be "confused or diverted by the transaction or occurrence language," and should find the counterclaim permissive so as not to undermine the enforcement scheme of the TILA. *Id.* at 443.

¹³¹*See supra* notes 27, 32-33, 126 and accompanying text; *infra* notes 137-45 and accompanying text.

¹³²617 F.2d 1278 (7th Cir. 1980).

¹³³*See supra* notes 52-53 and accompanying text.

be resolved by an examination of the face of the loan document. A debt counterclaim, on the other hand, can raise the full range of state law contract issues. *[Distaste for state law rulings is irrelevant. The policy of federal joinder is economy and efficiency for the court system, not for one court in one case.]*¹³⁴ The two claims do not, as the Fifth Circuit held, spring from the same ‘aggregate of operative facts.’ Plant, supra, 598 F.2d at 1361. *[Why not?]* The rights and obligations of the parties with respect to the two claims hinge on different facts *[Again, why? The same contract gives rise to both.]* and different legal principles. *[Again, irrelevant.]* We concur in the Fourth Circuit’s characterization of the relationship between the claims:

... The borrower’s federal claim involves the same loan, but it does not arise from the obligations created by the contractual transaction. (citation omitted) *[The court seems to be saying the debt arises from the loan document and the TILA claim arises from the federal statute, but where does the statutory violation arise except from the loan document?]*

* * *

Similarly, we concur in the Fourth Circuit’s observation that permitting a creditor to ‘use the federal proceedings as an opportunity to pursue private claims against the borrower would impede expeditious enforcement of the federal policy . . .’¹³⁵ *[Finally, what appears to be the real nub of the decision, yet competing policy is extraneous.]*¹³⁶

Because the policy argument is paramount, this article now examines it. All agree the transaction or occurrence standard of Federal Rule 13(a) results in the conclusion that the debt counterclaim is compulsory. On the other hand, some courts find the rule language outweighed by a strong federal policy favoring private enforcement of the TILA; they further find this policy will be undermined by subjecting the TILA plaintiff to the debt counterclaim in federal court, especially because the debt counterclaim may exceed the claim for the TILA penalty.¹³⁷

This policy argument is an excellent example of “procedural particularism,” *i.e.*, “the resort

¹³⁴See supra notes 23-26 and accompanying text.

¹³⁵617 F.2d at 1291-92.

¹³⁶See infra notes 137-45 and accompanying text.

¹³⁷*E.g.*, Valencia, 617 F.2d 1278; Whigham, 599 F.2d 1322. Additional cases are collected in WRIGHT, MILLER & KANE, supra note 29, § 1410, at 76 n. 64.

to a rule of procedure, often subconsciously created or inflated for the occasion, as a short cut to doing justice in a particular case.”¹³⁸ Some federal judges seem to believe a TILA plaintiff should be able to pursue the statutory penalty unimpeded, and seize on a narrow interpretation of transaction or occurrence as the means to reach their favored result.

The primary reason this is misguided procedural particularism is that the TILA itself undercuts the policy argument. Congress did not provide for exclusive federal jurisdiction and enforcement. Congress provided concurrent jurisdiction with the states.¹³⁹ A plaintiff who sues in state court is without question subject to the debt counterclaim in every state—even those that provide only for permissive counterclaims. Congress obviously did not believe its enforcement scheme would be undermined in state court enforcement actions. So why would Congress have believed its enforcement scheme would be undermined in federal courts by allowing a debt counterclaim? Even more anomalous would be a TILA case brought in state court and removed to federal court. The result that follows is upon removal, and not before, the federal enforcement scheme is undermined by allowing the debt counterclaim.

¹³⁸CLARK, *supra* note 21, § 12, at 71. *See supra* notes 77-81 and accompanying text.

¹³⁹15 U.S.C. § 1640(e) (2000). Additionally, contrary to the assertion that private enforcement is vital, the TILA actually makes private enforcement an adjunct to enforcement by the Federal Trade Commission and other agencies. 15 U.S.C. § 1607 (2000). *Plant*, 598 F.2d at 1364, asserts the TILA “reflects a purpose that the debt claim and the truth-in-lending claim be handled together.”

The secondary reason is that the policy argument is far more generic, and therefore much more make-weight, than has been recognized. If federal enforcement policy of the TILA is undermined by allowing a compulsory counterclaim for the debt, then a federal court should decline to find a counterclaim compulsory in a host of other situations that come quickly to mind. A private Title VII discrimination action should not be undermined by any state law counterclaim arising from the same employment. A patent infringement claim should not be undermined by any state law counterclaim arising from the same business relationship. A Miller Act claim for payment on a federal construction project should not be undermined by any state law counterclaim arising from a transactionally-related construction project.¹⁴⁰ A claim under the Fair Debt Collection Practices Act should not be undermined by any state law counterclaim to collect the debt.¹⁴¹ A federal antitrust claim should not be undermined by any state law counterclaim arising

¹⁴⁰The court ruled the counterclaim compulsory in *United States ex rel. D'Agostino Excavators, Inc. v. Heyward-Robinson Co.*, 430 F.2d 1077 (2d Cir. 1970).

¹⁴¹15 U.S.C. §§ 1692 *et seq.* (2000). *Cf.* *Sparrow v. Mazda Am. Credit*, 385 F. Supp. 1063 (E.D. Cal. 2005). The court holds the counterclaim permissive (not based on policy reasons), and then concludes it still can assert supplemental jurisdiction! *See supra* note 105. *See also Jones v. Ford Motor Credit Co.*, 358 F.3d 205 (2d Cir. 2004) (Equal Credit Opportunity Act claim). *See supra* note 79.

The reverse situation has also occurred. In *Peterson v. United Accountants, Inc.*, 638 F.2d 1134 (8th Cir. 1981), the creditor sued in state court to collect the debt, and the debtor did not counterclaim. Later, the debtor sued in federal court under the Fair Debt Collection Practices Act. The court finds the claim is not barred because “the goals of Rule 13 and the purpose of the FDCPA can best be effectuated by holding the counterclaim involved in this case permissive . . .” *Id.* at 1137. In footnote, the court identifies the purpose of Rule 13(a) to be “to prevent a multiplicity of actions and a duplication of judicial efforts.” *Id.* at 1137 n. 8. How the court can conclude that preventing multiplicity and duplication will be served by holding a counterclaim arising out of the same loan permissive so two actions will do the work of one is unfathomable. One can only again mutter “procedural particularism.”

from the same business relationship.¹⁴² The list could go on through scores of federal policies that depend, at least in part, on private enforcement.¹⁴³ Perhaps it could continue through vast other areas of law.¹⁴⁴

The policy argument in TILA cases, just as it would also be in all of these other areas, is misplaced:

All such decisions as these add to the confusion of the lawyer in understanding an essentially simple rule. And they would not be necessary if the courts would remember that the counterclaim rule affects only the pleadings; whatever advantages there may be in independent actions can be retained through the power of the courts to order separate trials, and, if need be, to enter a final judgment on the plaintiff's claim before proceeding to consider the counterclaim.¹⁴⁵

IV. TWO PROPOSALS FOR IDENTIFICATION OF COMPULSORY COUNTERCLAIMS

We might wish the Federal Rules had completely abandoned the “transaction” of the codes, as they did with the replacement of “cause of action” by “claim.”¹⁴⁶ Perhaps even today the effort might be made. If the effort is to be made, the question is what should be the replacement?

¹⁴²The court ruled the counterclaim compulsory in *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631 (3d Cir. 1961). *See supra* notes 67-68 and accompanying text.

¹⁴³Fifty years ago, a leading commentator identified decisions that had “prohibited counterclaims in replevin actions, or in actions under the Informers’ Act, or in forcible detainer actions [footnotes omitted].” Wright, *supra* note 25, at 276. The commentator also pointed out the error of this approach. *See infra* note 145 and accompanying text.

¹⁴⁴A legal malpractice claim, for example, enforces the public interest in attorney competence, conduct, and ethics. When a client sues for malpractice, the court will not rule a counterclaim for unpaid legal fees does not arise out of the same transaction or occurrence because it would undermine enforcement of the public interest in competence and ethical behavior by attorneys. *Cf. D’Jamoos v. Griffith*, 368 F. Supp. 2d 200 (E.D.N.Y. 2005).

¹⁴⁵Wright, *supra* note 25, at 276-77.

¹⁴⁶*See supra* notes 35-36 and accompanying text.

The replacement must follow the policies of the Federal Rules. The replacement should exemplify the intended simplicity of the Federal Rules. The replacement should promote predictable application. Most importantly, the replacement must direct the court's attention to the facts of the case and away from legal theories and other considerations.

The following is a list of possible replacements for "transaction or occurrence." Every one meets the required criteria. All are largely synonymous. Here is the list, in only a partially organized fashion:

- "groupings of operative facts,"¹⁴⁷
- "operative facts," or "identity of operative facts,"¹⁴⁸
- "the aggregate of operative facts," or "the central core of fact,"¹⁴⁹
- "fundamental core" of facts, or "the core of the plaintiff's grievance,"¹⁵⁰
- "common nucleus of operative facts,"¹⁵¹
- "essential facts,"¹⁵²
- "same basic set of facts,"¹⁵³

¹⁴⁷See CLARK, *supra* note 21, § 102, at 653.

¹⁴⁸Lewis v. Vendome Bags, Inc., 108 F.2d 16, 19 (2d Cir. 1940) (Clark, J., dissenting).

¹⁴⁹Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 713, 713 (5th Cir. 1970). The replacements suggested in notes 147-49 might be somewhat objectionable because "operative facts" harks back to code pleading and may invite restrictive interpretations.

¹⁵⁰Musher Found., Inc. v. Alba Trading Co., 127 F.2d 9, 12 (2d Cir. 1942) (Clark, J., concurring).

¹⁵¹United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

¹⁵²Kopf v. Chloride Power Electronics, Inc., 882 F. Supp. 1183, 1188 (D.N.H. 1995).

- “fact transaction,”¹⁵⁴
- “factual nexus,”¹⁵⁵
- “single occurrence or affair,”¹⁵⁶
- “single network,” or “unit of judicial action,” or “one affair,”¹⁵⁷
- “offshoots of the same basic controversy,”¹⁵⁸ or
- “part of the same case or controversy under Article III of the United States Constitution.”¹⁵⁹

Other formulations are certainly possible.¹⁶⁰

The problem with each of these phrases will be the same as with the transaction or

¹⁵³Jupiter Aluminum Corp. v. The Home Ins. Co., 181 F.R.D. 605, 608 (N.D. Ill. 1998).

¹⁵⁴CLARK, *supra* note 21, § 102, at 658. This test retains much of current law, and adds “fact” to direct decision.

¹⁵⁵Grattan v. Burnett, 710 F.2d 160, 163 (4th Cir. 1983); Farb v. Federal Kemper Life Assur. Co., 213 F.R.D. 264, 267 (D. Md. 2003) (decisions on relation back of amendments under FED. R. CIV. P. 15(c)).

¹⁵⁶CLARK, *supra* note 21, § 38, at 130. While the following language is too long for a rule, it shows clearly the intended meaning: “all those facts which a layman would naturally associate with, or consider as being a part of, the affair, altercation, or course of dealings between the parties.” *Id.* § 102, at 655.

¹⁵⁷Bone, *supra* note 19 at 37, 103 n. 349. The latter two phrases are taken from CLARK, *supra* note 21, § 19, at 143; Clark, *supra* note 20, at 312.

¹⁵⁸Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961).

¹⁵⁹28 U.S.C. § 1367(a) (2000). This definition has the advantage of tying the joinder rules tightly to supplemental jurisdiction, but might misdirect the court’s consideration to law in addition to facts.

¹⁶⁰A few that come to mind are bundle of facts, fact bunch, fact grouping, single life-situation, one set of facts, one aggregate of facts, and facts that a lay person would expect to try

occurrence. A court not buying into the generous joinder philosophy of the Federal Rules, seeking to avoid dealing with unfavored claims, or wishing to narrow federal supplemental jurisdiction will interpret through and around them. At least the intent of the rule will be clearer and should lead to better applications.

together.

So long as the transaction or occurrence remains the joinder gold standard, courts will find steady guidance in looking to the number of life events presented by the facts of the claim and counterclaim. Instead of searching for small, discrete packages of fact, courts should recognize the overarching life events that bind the facts together into a single whole. Courts reach sound decisions furthering the policy goals of the joinder devices when they recognize a single transaction or occurrence in one contract agreement,¹⁶¹ one construction project,¹⁶² one debt,¹⁶³ one injury/accident/incident,¹⁶⁴ one death,¹⁶⁵ one marriage,¹⁶⁶ one student,¹⁶⁷ and one property.¹⁶⁸

¹⁶¹Claims arising from the same contract are perhaps the clearest of all the examples of one transaction or occurrence. Causes of action arising from the same contract were specifically tied together under code practice. *See* CLARK, *supra* note 21, § 103.

Even two contracts signed together often fit as one accord. *See* Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc., 292 F.3d 384 (3d Cir. 2002); Adam v. Jacobs, 950 F.2d 89 (2d Cir. 1991); Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970).

¹⁶²*See* Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620 (D.C. Cir. 1975); United States ex rel. D'Agostino Excavators, Inc. v. Heyward-Robinson Co., 430 F.2d 1077 (2d Cir. 1970); LASA Per L'Industria Del Marono Societa Per Azioni v. Alexander, 44 F.2d 413 (6th Cir. 1969).

¹⁶³*See* United States v. Aquavella, 615 F.2d 12 (2d Cir. 1980); Plant v. Blazer Fin. Serv., Inc., 598 F.2d 1357 (5th Cir. 1979) [*see supra* notes 127-31 and accompanying text]; Scott v. Fairbanks Capital Corp, 284 F. Supp. 2d 880 (S.D. Ohio 2003) (relation back of amendment case); Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971).

Courts that lose sight of the one debt tying the facts together err. *See supra* part III.C.2 (discussing decisions under the Truth in Lending Act).

¹⁶⁴*See* Painter v. Harvey, 863 F.2d 329 (4th Cir. 1988); Ruta v. Delta Airlines, Inc., 322 F. Supp. 2d 391 (S.D.N.Y. 2004) (relation back of amendment case); Jupiter Aluminum Corp. v. The Home Ins. Co., 181 F.R.D. 605 (N.D. Ill. 1998); American Samec Corp. v. Florian, 9 F.R.D. 718 (D. Conn. 1949); Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 823 (1989) (with permissive joinder of parties three passengers injured in one taxicab accident can sue together against both the driver and the owner); Wright, *supra* note 16, at 601 (permissive joinder of two persons injured in same collision "clearly proper").

Courts that lose sight of the one injury/accident/incident tying the facts together reach

Continuing relationships that can often be handled together for judicial economy and disposition of all aspects of a dispute between the parties include one employment relationship/job¹⁶⁹ and one

poor decisions. *See* Birmingham Fire Ins. Co. v. Winegardner & Hammons, Inc., 714 F.2d 548 (5th Cir. 1983) (hotel damaged in one hurricane) [*see supra* note 101]; Burlington N. R.R. v. Strong, 907 F.2d 707 (7th Cir. 1990) (recovery of benefits paid for same injuries) [*see supra* notes 92-94 and accompanying text].

¹⁶⁵*See* Tiller v. Atlantic Coast Line R.R., 323 U.S. 574 (1945); Charles E. Clark, *The New York Court of Appeals and Pleading*, 35 YALE L.J. 85, 89 (1925) (“the death of the child . . . is the *ground* or occasion of the suit”).

The code case Ader v. Blau, 241 N.Y. 7, 148 N.E. 771 (1925), holding two defendants could not be joined in a suit arising out of the death of a child, was harshly criticized; the federal joinder rules were written specifically to avoid such a result. *See* CLARK, *supra* note 21, §61, at 390-92; Clark, *supra*, at 86.

¹⁶⁶*But cf.* Williams v. Robinson, 1 F.R.D. 211 (D.D.C. 1940). In this early decision, plaintiff sued for separate maintenance, defendant “cross-complained” for divorce on the grounds of adultery between plaintiff and an additional defending party to the counterclaim, and the additional defending party later sued separately for defamation from the adultery allegation. The court held the defamation claim not compulsory. *See supra* note 59. Surely such a result would not be reached today.

¹⁶⁷*See* Kirkpatrick v. Lenoir County Bd. Of Ed., 266 F.3d 380 (4th Cir. 2000).

¹⁶⁸*See* Cantrell v. City of Caruthersville, 359 Mo. 282, 221 S.W.2d 471 (1949). *But cf.* Industrial Equip. & Marine Serv., Inc. v. M/V Mr. Gus, 333 F. Supp. 578 (S.D. Tex. 1971) (holding counterclaim involving same ship not compulsory).

¹⁶⁹*See* Pochiro v. Prudential Ins. Co., 827 F.2d 1246 (9th Cir. 1987); Wright, *supra* note 16, at 602 (for permissive joinder of parties, “employment in one plant by successive owners is surely a ‘series of transactions or occurrences’ if, indeed, it is not a single transaction”). *Cf.* Stewart v. Lamar Advertising of Penn LLC, No. Civ. A. 03-2914, 2004 WL 90078 (E.D. Pa. Jan. 14, 2004) [competing versions of the reasons for termination appear to be exactly the type of case that economy dictates should be presented to a single jury].

Cases that attempt to divide one job into separate fact bunches struggle. *See* Iglesias v. Mutual Life Ins. Co., 156 F.3d 237 (1st Cir.), *cert. denied*, 528 U.S. 812 (1998); Kirkcaldy v. Richmond County Bd. Of Educ., 212 F.R.D. 289 (M.D.N.C. 2002) (cross-claim); Ginsberg v. Valhalla Anesthesia Associates, 971 F. Supp. 144 (S.D.N.Y. 1997); Adamson v. Dataco Derex, Inc., 178 F.R.D. 562 (D. Kan. 1998); Kopf v. Chloride Power Electronics, Inc., 882 F. Supp. 1183 (D.N.H. 1995); Shamblin v. City of Colchester, 793 F. Supp. 831 (C.D. Ill. 1992).

business relationship.¹⁷⁰

A helpful rule of thumb is to ask how many _____ did the parties have between them?

The answer one identifies a single transaction or occurrence.

V. CONCLUSION

¹⁷⁰See *Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384 (3d Cir. 2002); *Critical-Vac Filtration Corp. v. Minuteman Intern'l, Inc.*, 233 F.3d 697 (2d Cir. 2000), *cert. denied*, 532 U.S. 1019 (2001); *United States v. Aquavella*, 615 F.2d 12 (2d Cir. 1980); *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631 (3d Cir. 1961); *Nachtman v. Crucible Steel Co.*, 165 F.2d 997 (3d Cir. 1948); *D'Jamoos v. Griffith*, 368 F. Supp. 2d 200 (E.D.N.Y. 2005); *Harrison v. Grass*, 304 F. Supp. 2d 710 (D. Md. 2004).

The joinder rules of the Federal Rules of Civil Procedure use the “transaction or occurrence” as the primary grouping device.¹⁷¹ The rules are written to broaden joinder through allowing factually-connected claims and parties to be brought together into a single lawsuit.¹⁷² Counterclaims, as well as other joinder devices, are intended to present problems of trial management, not problems of pleading.¹⁷³ The policies favoring broad joinder were and are procedure should serve substantive law, procedural rules should promote trial on the merits, joinder rules should permit as many controversies as possible to be settled in a single lawsuit, and joinder rules should promote judicial economy and efficiency.¹⁷⁴ In order to accomplish all these policies, the transaction or occurrence must be defined by the facts of the case.¹⁷⁵

Unfortunately, courts from the beginning place glosses on the language, and inject extraneous, often irrelevant, considerations into their analyses.¹⁷⁶ They lose sight of the basic idea that the transaction or occurrence is a set of facts that a layperson would expect to be tried together.¹⁷⁷

¹⁷¹*See supra* part I.

¹⁷²*See supra* parts I-II. This article analyzes the transaction or occurrence as it is used in FED. R. CIV. P. 13(a), (b), which encompass counterclaims. Cross-claim decisions under FED. R. CIV. P. 13(g) are included, but few are reported. A forthcoming companion article will analyze the “transaction or occurrence” in other joinder rules and the sibling “transaction” employed in additional legal doctrines. *See supra* notes 3-8 and accompanying text.

¹⁷³*See supra* notes 27, 32-33, 126 and accompanying text.

¹⁷⁴*See supra* notes 21-27 and accompanying text.

¹⁷⁵*See supra* notes 42, 52 and accompanying text.

¹⁷⁶*See supra* part III.

¹⁷⁷*See supra* part II.

Perhaps the rules should be amended to replace the transaction or occurrence with a phrase that unmistakably points analysis toward the facts.¹⁷⁸ Until that occurs, the courts should cast aside gloss and extraneous considerations in compulsory counterclaim cases and look solely to the facts of the case. That is where they will find the transaction or occurrence.

¹⁷⁸*See supra* part IV.