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An Overview of Counterclaims in Class Actions

Can a class action defendant bring counterclaims against unnamed class members?

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A class action lawsuit is a convenient procedural device for multiple plaintiffs with similar claims to aggregate those claims, which would often be too small to bring individually, into a single action. Defendants, however, may sometimes wish to take advantage of this same convenience in regard to counterclaims.

For example, consider a case in which a plaintiff brings a claim in federal court against a defendant for alleged unfair debt collection practices. The case is styled as a class action on behalf of a class of plaintiffs who allegedly have been subject to the same practices. Many of the putative class members still owe debts to the defendant. Can the defendant, in its answer, assert counterclaims against these unnamed class members?

This question raises issues under Rule 13 of the Federal Rules of Civil Procedure as well as issues of federal court jurisdiction. Both of these issues are addressed below.

Absent Class Members as "Opposing Parties" under Rule 13

Under Rule 13 of the Federal Rules of Civil Procedure, both compulsory and permissive counterclaims can be asserted only against an "opposing party."

Fed. R. Civ. P. 13(a)(1), (b). Is an absent class member an "opposing party" for purposes of this rule? Courts are divided on this question.

Some courts have concluded that absent class members are not opposing parties under Rule 13, and these courts have dismissed counterclaims against absent class members on this basis. For example, the Eleventh Circuit has held that "absent class members are not opposing or litigating adversaries for purposes of Rule 13." *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1259 n.14 (11th Cir. 2003), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (quotation omitted). More recently, the Southern District of New York reviewed the case law on this topic and concluded: "This Court agrees with those that have held that non-party putative class members are not properly considered 'opposing parties' under Rule 13." *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 42 F. Supp. 3d 520, 527 (S.D.N.Y. 2014); *accord Donson Stores, Inc. v. Am. Bakeries Co.*, 58 F.R.D. 485, 489 (S.D.N.Y. 1973).

A number of courts, however, have come out the other way. For example, the Northern District of Illinois has held: "It is this court's determination that the better view is that absent members of an alleged class are opposing parties subject to counterclaim." *Bd. of Educ. of Twp. High Sch. v. Climatemp, Inc.*, 1981 WL 2033, at *6 (N.D. Ill. Feb. 20, 1981); *see also In re Fin. Partners Class Action Litig.*, 597 F. Supp. 686, 688 (N.D. Ill. 1984). The District of Delaware is in accord: "I think it undeniable, however, that members of the named plaintiffs' class are 'opposing parties' for purposes of Rule 13." *Wolfson v. Artisans Sav. Bank*, 83 F.R.D. 552, 554 (D. Del. 1979).

Furthermore, even courts that have held that unnamed class members are not "opposing parties" for purposes of Rule 13 have indicated that they would allow counterclaims if and when an absent class member made a claim in the case. In one such case, the Southern District of New York explained: "It is the intention of the Court to try the issue of defendants' liability to the named plaintiffs first. If liability is established, other issues, including damages and counterclaims, can be handled on a class member-

by-class member basis." *Donson Stores, Inc.* 58 F.R.D. at 489–90. In another case, the Eastern District of Pennsylvania held: "[C]ounterclaims may be brought against unnamed class members only if and when these class members intervene or file claims in this action." *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 349 (E.D. Pa. 1976); *accord Aamco Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440, 450 (E.D. Pa. 1975); *see also Serpa v. Jolly King Rests., Inc.*, 1974 WL 941 (S.D. Cal. 1974) ("Once liability is established and claims for damages filed, then and only then, may the defendants raise specific and detailed counterclaims to offset the damage claims.").

Thus, Rule 13 ultimately does not appear to be an obstacle to asserting counterclaims against unnamed class members. Even if counterclaims are not allowed at the pleadings stage, the court has discretion to allow them on a member-by-member basis at the damages phase. And there are good policy reasons for the court to allow such counterclaims:

> That a defendant will counterclaim is an entirely normal risk of bringing and prosecuting a lawsuit. The absent members of the instant class may not have brought this suit against [defendant], but they have decided to become a part of it in order to reap the benefits of any possible recovery. Depriving defendant of its right to assert otherwise viable counterclaims against such class members by affording them some special species of immunity is, in my view, too high a price for fostering all-inclusive plaintiff classes under Rule 23.

Herrmann v. Atl. Richfield Co., 72 F.R.D. 182, 186 (W.D. Pa. 1976).

Federal Court Jurisdiction over Counterclaims

Separate from the procedural questions under Rule 13, counterclaims in federal class actions may also raise jurisdictional questions.

If the counterclaim is one over which the court would have original jurisdiction, then there is no jurisdictional concern. For example, the court would have original jurisdiction over a counterclaim that arises under federal law.

Absent original jurisdiction, however, the court has jurisdiction—if at all—only under the supplemental jurisdiction statute, 28 U.S.C. § 1367. That statute gives the federal courts supplemental jurisdiction over claims "that form part of the same case or controversy under Article III of the United States Constitution" as the claim over which the court has original jurisdiction. 28 U.S.C. § 1367(a). So the question becomes whether the counterclaims are part of the same "case or controversy" as the plaintiffs' claims.

Historically, determining whether a federal court had supplemental (or, to use the older terminology, "ancillary") jurisdiction over a counterclaim depended on whether the counterclaim was compulsory or permissive. Compulsory counterclaims were within the court's jurisdiction. Permissive counterclaims were not. *See Painter v. Harvey*, 863 F.2d 329, 331 (4th Cir. 1988). This is still the approach used by some federal courts. *See O'Fay v. Sessoms & Rogers, P.A.*, 2010 WL 9478988, at *5 (E.D.N.C. Feb. 9, 2010) (collecting cases). In these courts, to maintain a counterclaim against unnamed class members, the defendant will have to show that the counterclaim arises out of the same "transaction or occurrence" as the plaintiffs' claim. Fed. R. Civ. P. 13(a)(1)(A).

Other courts, however, have held that when Congress in 1990 codified the federal courts' supplemental jurisdiction, that statutory grant of supplemental jurisdiction went beyond compulsory counterclaims and encompassed at least some permissive counterclaims. *See, e.g., Global NAPs, Inc. v. Verizon New England, Inc.*, 603 F.3d 71, 76, 87 (1st Cir. 2010); *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 213 (2d Cir. 2004). For example, one court has held that in light of the 1990 legislation, a "loose factual connection" between the plaintiffs' claims and the class-wide counterclaims

is all that is needed for the court to have supplemental jurisdiction over the counterclaims. *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379, 385 (7th Cir. 1996).

Note, however, that even if the court's jurisdiction does not hinge on whether the counterclaim is compulsory or permissive, that distinction still has relevance for statute of limitations purposes. Compulsory counterclaims relate back to the date of filing of the original complaint, whereas permissive counterclaims do not. *See* 6 *Federal Practice and Procedure*, Civil § 1425 (3d ed.).

Conclusion

There are still many unsettled issues surrounding counterclaims against unnamed class members. But as long as the counterclaims are at least somewhat connected to the plaintiffs' claims, defendants ought to be allowed to assert them at some point in the case and should consider raising them early in the litigation.

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