

quirement that service be made on the United States in an action that asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States also require that the time to answer be extended to 60 days. Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.

An action against a former officer or employee of the United States is covered by subparagraph (3)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

*GAP Report.* No changes are recommended for Rule 12 as published.

#### COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 12 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 12(a)(4)(A) referred to an order that postpones disposition of a motion “until the trial on the merits.” Rule 12(a)(4) now refers to postponing disposition “until trial.” The new expression avoids the ambiguity that inheres in “trial on the merits,” which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

*Changes Made After Publication and Comment.* See Note to Rule 1, *supra*.

#### COMMITTEE NOTES ON RULES—2009 AMENDMENT

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

### Rule 13. Counterclaim and Crossclaim

#### (a) COMPULSORY COUNTERCLAIM.

(1) *In General.* A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) *Exceptions.* The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) *PERMISSIVE COUNTERCLAIM.* A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) *RELIEF SOUGHT IN A COUNTERCLAIM.* A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) *COUNTERCLAIM AGAINST THE UNITED STATES.* These rules do not expand the right to

assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.

(e) *COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING.* The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) [ABROGATED.]

(g) *CROSSCLAIM AGAINST A COPARTY.* A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) *JOINING ADDITIONAL PARTIES.* Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) *SEPARATE TRIALS; SEPARATE JUDGMENTS.* If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party’s claims have been dismissed or otherwise resolved.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

#### NOTES OF ADVISORY COMMITTEE ON RULES—1937

1. This is substantially [former] Equity Rule 30 (Answer—Contents—Counterclaim), broadened to include legal as well as equitable counterclaims.

2. Compare the English practice, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r.r. 2 and 3, and O. 21, r.r. 10—17; *Beddall v. Maitland*, L.R. 17 Ch.Div. 174, 181, 182 (1881).

3. Certain States have also adopted almost unrestricted provisions concerning both the subject matter of and the parties to a counterclaim. This seems to be the modern tendency. Ark.Civ.Code (Crawford, 1934) §§117 (as amended) and 118; N.J.Comp.Stat. (2 Cum.Supp. 1911–1924), N.Y.C.P.A. (1937) §§262, 266, 267 (all as amended, Laws of 1936, ch. 324), 268, 269, and 271; Wis.Stat. (1935) §263.14 (1)(c).

4. Most codes do not expressly provide for a counterclaim in the reply. Clark, *Code Pleading* (1928), p. 486. Ky.Codes (Carroll, 1932) Civ.Pract. §98 does provide, however, for such counterclaim.

5. The provisions of this rule respecting counterclaims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For a discussion of Federal jurisdiction and venue in regard to counterclaims and cross-claims, see Shulman and Jaegerman, *Some Jurisdictional Limitations in Federal Procedure* (1936), 45 Yale L.J. 393, 410 et seq.

6. This rule does not affect such statutes of the United States as U.S.C., Title 28, §41(1) [now 1332, 1345, 1359] (United States as plaintiff; civil suits at common law and in equity), relating to assigned claims in actions based on diversity of citizenship.

7. If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred. See *American Mills Co. v. American Surety Co.*, 260 U.S. 360 (1922); *Marconi Wireless Telegraph Co. v. National Electric Signalling Co.*, 206 Fed. 295 (E.D.N.Y., 1913); Hopkins, *Federal Equity Rules* (8th ed., 1933), p. 213; Simkins, *Federal Practice* (1934), p. 663.

8. For allowance of credits against the United States see U.S.C., Title 26, §§1672–1673 [see 7442] (Suits for re-

funds of internal revenue taxes—limitations); U.S.C., Title 28, §§774 [now 2406] (Suits by United States against individuals; credits), [former] 775 (Suits under postal laws; credits); U.S.C., Title 31, §227 [now 3728] (Offsets against judgments and claims against United States).

NOTES OF ADVISORY COMMITTEE ON RULES—1946  
AMENDMENT

*Subdivision (a).* The use of the word “filing” was inadvertent. The word “serving” conforms with subdivision (e) and with usage generally throughout the rules.

The removal of the phrase “not the subject of a pending action” and the addition of the new clause at the end of the subdivision is designed to eliminate the ambiguity noted in *Prudential Insurance Co. of America v. Saxe* (App.D.C. 1943) 134 F.(2d) 16, 33-34, cert. den. (1943) 319 U.S. 745. The rewording of the subdivision in this respect insures against an undesirable possibility presented under the original rule whereby a party having a claim which would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action.

*Subdivision (g).* The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of Rule 13(g).

*Subdivision (h).* The change clarifies the interdependence of Rules 13(i) and 54(b).

NOTES OF ADVISORY COMMITTEE ON RULES—1963  
AMENDMENT

When a defendant, if he desires to defend his interest in property, is obliged to come in and litigate in a court to whose jurisdiction he could not ordinarily be subjected, fairness suggests that he should not be required to assert counterclaims, but should rather be permitted to do so at his election. If, however, he does elect to assert a counterclaim, it seems fair to require him to assert any other which is compulsory within the meaning of Rule 13(a). Clause (2), added by amendment to Rule 13(a), carries out this idea. It will apply to various cases described in Rule 4(e), as amended, where service is effected through attachment or other process by which the court does not acquire jurisdiction to render a personal judgment against the defendant. Clause (2) will also apply to actions commenced in State courts jurisdictionally grounded on attachment or the like, and removed to the Federal courts.

NOTES OF ADVISORY COMMITTEE ON RULES—1966  
AMENDMENT

Rule 13(h), dealing with the joinder of additional parties to a counterclaim or cross-claim, has partaken of some of the textual difficulties of Rule 19 on necessary joinder of parties. See Advisory Committee's Note to Rule 19, as amended; cf. 3 *Moore's Federal Practice*, Par. 13.39 (2d ed. 1963), and Supp. thereto; 1A *Barron & Holtzoff, Federal Practice and Procedure* §399 (Wright ed. 1960). Rule 13(h) has also been inadequate in failing to call attention to the fact that a party pleading a counterclaim or cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied.

The amendment of Rule 13(h) supplies the latter omission by expressly referring to Rule 20, as amended, and also incorporates by direct reference the revised criteria and procedures of Rule 19, as amended. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plain-

tiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion. See also Rules 13(a) (compulsory counterclaims) and 22 (interpleader).

The amendment of Rule 13(h), like the amendment of Rule 19, does not attempt to regulate Federal jurisdiction or venue. See Rule 82. It should be noted, however, that in some situations the decisional law has recognized “ancillary” Federal jurisdiction over counterclaims and cross-claims and “ancillary” venue as to parties to these claims.

NOTES OF ADVISORY COMMITTEE ON RULES—1987  
AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 13 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The meaning of former Rule 13(b) is better expressed by deleting “not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.” Both as a matter of intended meaning and current practice, a party may state as a permissive counterclaim a claim that does grow out of the same transaction or occurrence as an opposing party's claim even though one of the exceptions in Rule 13(a) means the claim is not a compulsory counterclaim.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered—as they should be—according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). See 6 *C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d*, §1430 (1990). Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

## Rule 14. Third-Party Practice

(a) WHEN A DEFENDING PARTY MAY BRING IN A THIRD PARTY.

(1) *Timing of the Summons and Complaint.* A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

(2) *Third-Party Defendant's Claims and Defenses.* The person served with the summons and third-party complaint—the “third-party defendant”:

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);